UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARING AND APPEALS
INTERIOR BOARD OF LAND APPEALS

NATIONAL PARKS CONSERVATION
ASSOCIATION, COALITION TO PROTECT
AMERICA’S NATIONAL PARKS,
DEFENDERS OF WILDLIFE, and SIERRA
CLUB,

Appellants,

v.

BUREAU OF LAND MANAGEMENT,

Respondent.

IBLA No. 2018-193

APPELLANTS’ REPLY BRIEF
INTRODUCTION

In their answers, both Respondent Bureau of Land Management (“BLM”) and Intervenor-Respondent Eagle Crest Energy Company (“Eagle Crest”) mischaracterize and limit BLM’s duty under the National Environmental Policy Act (“NEPA”). As a result, BLM winnows its scope of review so narrowly that it ignores hard science, meaningful developments, and simple common sense. By approving the Right of Way (“ROW”) for an unnecessary and harmful hydroelectric pump storage facility (“the Project”) on the doorstep of Joshua Tree National Park, BLM has knowingly contributed to the destruction of fragile desert resources, most especially the precious, ancient water reserves from the Chuckwalla aquifer, has ignored objective evidence that it should have considered, and has misinterpreted the law.

As an initial matter, BLM should not have approved a ROW for a project that has no legal right to be constructed in the first place. This past June, the Federal Energy Regulatory Commission (“FERC”) license for the Project expired and can no longer be extended. BLM and Eagle Crest attempt to circumvent this issue completely; BLM is silent on the issue while Eagle Crest wrongly claims that the license is still “valid” despite the clear directive from Congress that a license “shall” be terminated in such a situation. In approving the ROW for the Project, BLM has set into motion the creation of a “bridge to nowhere” – transmission and water lines that stretch for miles over delicate desert habitat for endangered species like the desert tortoise, all leading to an unlicensed and unfunded project that will almost certainly never be built.

BLM tries to cabin its own analysis of the purpose and need for the ROW by limiting it to Eagle Crest’s application, but NEPA requires that BLM evaluate the purpose and need for the Project as a whole. By failing to update the purpose and need analysis, BLM inappropriately forecloses consideration of a host of viable alternatives to the Project itself (and therefore viable alternatives to the ROW itself). These alternatives, such as battery storage and peak smoothing, are tossed aside by BLM, which repeatedly refers back to its cursory answers in the Protest Resolution Report (“Protest Report”) and Responses to Comments rather than address these arguments directly. BLM’s explanations in its Responses often fail to acknowledge aspects of commenters’ concerns, such as the overabundance of electricity generation and rapid advances in battery
technology. When BLM actually does address an issue, such as battery storage, it picks negative facts from reports that actually praise the technology’s potential. Such omissions and mischaracterizations cannot be considered adequate appraisals of alternative technologies.

Finally, the analysis of the impacts of the Project on groundwater in the Chuckwalla Basin is factually and legally inadequate in a multitude of ways. The Final Environmental Assessment (“FEA”) supporting the ROW tiers to FERC’s Final Environmental Impact Statement (“FEIS”) for the Project, but it fails to account for significant scientific developments with direct bearing on the Project and its impact on the Chuckwalla Aquifer. Several studies – co-authored by BLM – which update numbers key to the long-term health of the aquifer became available between the certification of the FERC FEIS and the publication of the BLM FEA; yet BLM failed to include, much less acknowledge, their highly salient results. Instead of responding to Appellants’ arguments about these studies, BLM claims that it updated the FERC FEIS with information other than the aforementioned studies. But in the update, BLM mischaracterizes the findings of the reports it cites, stacks the deck to paint a more flattering portrait of the water situation in the Project area, relies on information it previously recommended the State Water Resources Control Board ("State Water Board") “re-evaluate,” and in one instance falsely claims that it used a report which does not appear in the FEA at all. An abundance of objective evidence conclusively establishes that BLM fell far short of its duty under NEPA to take a “hard look” at the Project’s impacts on groundwater.

If constructed, the Eagle Crest pumped storage project will likely become a stranded asset in the middle of the desert, as superior storage technologies and energy conservation practices overtake an outmoded approach. In sum, the Eagle Crest Project is unlicensed and the ROW unnecessary. BLM has ignored science, reason, and its own regulations. Its Decision Record (“Decision”) to approve the ROW and California Desert Conservation Area (“CDCA”) Plan Amendment should be revoked, and its Final Environmental Assessment and Finding of No Significant Impact (“FONSI”) should be remanded.
ARGUMENT

I. Eagle Crest’s FERC License Has Expired and the Right of Way and Land Use Plan Amendment Are Unnecessary.

The expiration of the Project’s license means that BLM’s issuance of the ROW and CDCA Plan Amendment is now moot. Neither BLM nor Eagle Crest seriously dispute that the license issued by FERC for the Eagle Mountain Pumped Storage Project expired on June 19, 2018. Without a license for the Project, the Project cannot be built. And without a Project, there is simply no reason for BLM to issue a right-of-way over 1,150 acres of public land for transmission lines.

BLM does not address the expiration of the license at all. Eagle Crest summarily claims that the license term is for 50 years and “remains valid and in effect,” but cites no facts or law. Eagle Crest Answer at 3. Eagle Crest’s claim is simply not true. As discussed in the Statement of Reasons, the Federal Power Act requires a project to commence construction no later than two years after issuance of a FERC license; Eagle Crest was originally required to commence construction of the Project by no later than June 19, 2016, two years after it was issued its FERC license. Article 301, Order Issuing Original License, 147 FERC ¶ 61,220 (June 19, 2014). The Act allowed the deadline to be extended once, for no longer than two additional years. 16 U.S.C. § 806.1 Eagle Crest applied for and obtained a two-year extension but did not commence construction by June 19, 2018. If the licensee has not commenced actual construction by the original or extended deadline, the statute mandates that the license “shall” be terminated upon a written order by FERC. Id. In its Answer, Eagle Crest addresses none of this legal authority.

Beyond its practical effect of stopping the Project, the expiration of the license also renders BLM’s FEA inadequate in multiple ways. First, there is no longer a legitimate purpose or need for the ROW under NEPA. BLM’s cited purpose for the project, “to respond to a [Federal Land Planning and Management Act (“FLPMA”)] ROW application submitted by Eagle Crest to

1 A bill passed in October 2018 allowing licenses to be extended up to eight years under the Federal Power Act. Water Resources Development Act, sec. 3001, Pub. L. 115-270, 132 Stat. 3765 (Oct. 23, 2018). However, these revisions do not apply retroactively, and the Project’s time for commencement-of-construction has already elapsed.
construct, operate, maintain, and decommission a gen-tie line and water supply pipeline on public
lands,” BLM Answer at 4-5, no longer applies because the gen-tie line and pipeline have no
independent function. Second, BLM relies entirely upon the FERC license as a “valid existing
right” (“VER”) in exempting the ROW from the requirements of the Desert Renewable Energy
Conservation Plan (“DRECP”). In its Answer, BLM admits that the Project unavoidably conflicts
with a range of required Conservation Management Actions (“CMAs”) of the DRECP but asserts
that the Project’s license is a VER that predates the DRECP. BLM Answer at 12 (“As a valid
existing right, the BLM recognized that when a DRECP CMA was in conflict with the FERC
license for the Project, the agency could not require compliance with the CMA.”); see also FEA at 6
(“The June 2014 FERC-issued License is a ‘valid existing right’ to which the [September 2016]
DRECP is ‘subject’.”). But BLM provides no rationale for how a project with an expired license
can still retain its VER and thus continue to ignore the DRECP’s requirements. A new iteration of
the project will need to restart the permit process from square one and will have to comply with the
DRECP and its CMAs.

Finally, throughout the FEA, BLM relies on the environmental requirements in the FERC
license in discussing how the ROW’s anticipated environmental impacts will be mitigated, even
cutting and pasting blocks of text directly from the FERC license. See, e.g., FEA at 26-33
(“crosswalk” analysis between FERC license requirements and DRECP “goals and objectives”); 83-
84 (relying on FERC license article 423 for air quality monitoring and protection); 93-94 (FERC
license articles 409 through 413 for species protection); 99 (FERC license article 425 for protection
of cultural resources); FEA at 110-12 (FERC license articles 401, 402, and 406 for protecting
surface water quality); 113 (FERC license article 404 for monitoring groundwater). Many of the
mitigation measures set forth in the FEA simply repackage parts of the FERC license; thus, in the
absence of the FERC license, these mitigation measures would evaporate, and the environmental
impacts that must be addressed by the FEA would be significantly more intense and severe.
II. BLM Improperly Defined the Purpose and Need for the Project and Ignored Viable Project Alternatives.

Even if the Project’s FERC license had not expired, there are still numerous problems with the existing FEA. For example, BLM argues that its analysis of purpose and need fully complies with NEPA mandates. BLM Answer at 4. It does not. BLM claims that the purpose and need for the ROW and CDCA Plan Amendment is to respond to Eagle Crest’s application for a ROW grant. FEA at 7. But “agencies should speak to broader considerations than simply the permit application when stating the purpose and need for an action.” Backcountry Against Dumps v. Chu, 215 F. Supp. 3d 966, 978 (S.D. Cal. 2015) (holding that the Department of Energy failed to consider its statutory mandates and had set too narrow of a purpose and need). The law does not allow BLM to narrow its scope of purpose and need to simply respond to Eagle Crest’s application for a ROW permit and reflect the goals of the applicant without any of its own review. As the Ninth Circuit has explained, “[o]ur holdings in Friends and Carmel-By-The-Sea forbid the BLM to define its objectives in unreasonably narrow terms. The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives . . .” Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010).

When BLM does discuss its public goals, it does so in a limited and one-sided manner. It cites FLPMA glancingly, but relies more heavily on other authorities, including Executive Order 13783, Executive Order 13212, Executive Order 13807, and Section 211 of the Energy Policy Act of 2005, all of which call for BLM to increase the production of energy and “streamline the environmental review process.” Decision Record at 2. But these policies do not support this specific BLM approval: this Project does not produce energy – it stores energy at a net energy loss. Nor can they override BLM’s legal obligations. In selectively choosing among various policy preferences, BLM ignores its more basic legal mandates to protect and conserve public land values and resources. Section 1701(a) of FLPMA declares Congress’ intent that BLM safeguard environmentally responsible multiple use of public lands:
The public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. 1701(a)(8). BLM also ignores Department of Interior’s Secretarial Order 3285, which “encourages timely and responsible development of renewable energy and associated transmission while protecting and enhancing the Nation’s water, wildlife, and other natural resources.” (emphasis added). The same order directs BLM to “develop best management practices for renewable energy and transmission projects on the public lands to ensure the most environmentally responsible development and delivery of renewable energy.” Id. As it stands now, the stated BLM ROW purpose and need directly conflicts with this policy, since there are other, more environmentally responsible means for storing and transmitting renewable energy.

Even BLM’s own Land Use Plan Amendment (“LUPA”) for developing desert renewable energy, the DRECP, contradicts BLM’s decision to approve the ROW. BLM’s first listed objective for the DRECP is to “[c]onserve biological, physical, cultural, social, and scenic resources.” DRECP Record of Decision at 8. In particular, the DRECP is supposed to “[c]omply with Congressional direction regarding management of the CDCA in Section 601 of FLPMA, including to ‘[p]reserve the unique and irreplaceable resources, including archaeological values, and conserve the use of the economic resources’ of the CDCA.” Id. (citation omitted). FLPMA and the DRECP’s conservation mandate thus unequivocally command BLM to broadly consider alternatives to the ROW and the larger Project.

If BLM had hewed to NEPA in defining the purpose and need for the Project – even if the agency only adopted the Applicant’s stated purpose of helping “provide energy, capacity, and ancillary services to the California-South sub-region of the statewide electrical grid system” – the agency would have reached alternative energy technologies that would accomplished the project’s intended purpose with lesser environmental impacts. A proper purpose and need analysis would account for the changing state of energy technology and the electricity market in California, which is discussed further below. But BLM maintains that it was “appropriate” for the agency to “focus on the limited scope of the BLM’s approval.” BLM Answer at 6. Because BLM only considered
two options – granting the application (with minor variations in the ROW path) or denying the
application – it unlawfully limited its statement of purpose and need.

III. BLM’s Responses to Comments Do Not Adequately Address Appellants Objective
Proof of Clear Errors of Law and Demonstrable Errors of Fact.

Respondents argue that BLM’s Protest Report and Response to Comments already
addressed all of Appellant’s claims, and that Appellants’ claims amount to no more than a
difference of opinion; thus, BLM claims, Appellants have failed to meet their burden of showing
BLM error. See Eagle Crest Answer at 7; BLM Answer at 3-4, 7-10. But BLM’s Response to
Comments were far from adequate – they overlooked objective evidence offered by Appellants,
relied on outdated or insufficiently verified data, or made claims that were unsupported by the
record. M.K. Resources Co., American Girl Mining Joint Venture, and Hecla Ltd., 179 IBLA 299,
301-03 (2010) (reversing a BLM decision for failing to take a hard look even when BLM alleged it
had addressed the concerns of the appellant earlier in the process).

An appellant alleging that BLM failed to take a hard look at the environmental
consequences of a proposed action “must demonstrate, with objective proof, that [BLM’s decision]
was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to
consider an environmental question of material significance to the action for which the analysis was
prepared.” Randy A. Green, Wallis V. McPherson, John and Susan Simpson, 177 IBLA 264, 280
(2009) (citing Wilderness Watch, 176 IBLA 75, 86 (2008)).

Appellants have met this standard with a showing of objective proof. Prior IBLA decisions
reveal many ways in which appellants have presented evidence necessitating a reversal of BLM’s
decision, as here. For example, BLM’s failure to review outdated information to ensure its

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2 Eagle Crest incorrectly claims that demonstrating clear error is not enough, that an appellant must
“address[] BLM’s response to the arguments in the protest decision,” Klamath-Siskiyou Wildlands
Ctr., et al., 192 IBLA 291, 302 (2018), and connect its allegations “to an affirmative showing that
BLM failed to consider a substantial environmental question of material significance,” Bark (In Re
Rusty Saw Timber Sale), 167 IBLA 48, 76 (2005). See Eagle Crest Answer at 5. These two cases
are in the context of appealing the denial of a protest, which has a different standard. For
challenges to decisions based on NEPA documents, such as this case, demonstrating either clear
error or a failure to consider a materially significant question is sufficient; both are not required.
continuing adequacy and accuracy necessitates remand. See id. at 281 (finding there was no
indication in the EA that “BLM considered whether the biological resource information from
2000 . . . adequately and accurately identified the wildlife and vegetative species and habitat in the
area in 2005”). Evidence of BLM claiming it did something or would change something that it did
not actually do can also be fatal to its decision. See M.K. Resources Co., 179 IBLA at 304 (BLM’s
failure to make changes in the final EA it promised in response to public comments was grounds for
reversal). So has demonstrating that BLM unjustifiably relied on one piece of evidence to make
general conclusions that cannot be rationally supported. See Randy A. Green, 177 IBLA at 281
(agreeing with appellants’ contention that “the wildlife habitat study BLM conducted on January
11, 2000, was insufficient to establish species use during the winter, let alone throughout the year”
without further analysis); Wyoming Outdoor Council, et al., 158 IBLA 155, 171 (2003) (finding the
Project EA, which “relie[d] on one water sample to make conclusions about water quality for the
entire Project area,” to be insufficient under NEPA). Finally, evidence that BLM failed to discuss
crucial information or came to a conclusion that is “contrary to other evidence in the record” has
been found to be adequate objective proof of error. See Wyoming Outdoor Council, et al., 158
IBLA at 170-71 (remanding to BLM because the EA “contain[ed] no discussion of [the sodium
adsorption ratio] for produced waters from the Project, despite the importance of that ratio” and
“cite[d] a water management plan as a mitigation measure” that was “contrary to other evidence in
the record”).

A. BLM Cannot Tier to the FERC FEIS Without Ensuring It Is Accurate and
Updated; Its Failure to Do So is a Clear Error of Law.

Respondents treat tiering as an impenetrable shield, referring to how the BLM Handbook,
IBLA decisions, and Ninth Circuit cases all explicitly state that tiering is a valid exercise under
NEPA. See BLM Answer at 5-6; Eagle Crest Answer at 8-9. Appellants do not dispute that tiering
can be appropriate – but only in certain circumstances, of which this is not one. Because BLM
adopted FERC’s FEIS wholesale without sufficient update, analysis, or explanation – in violation of
NEPA regulations as well as IBLA and Ninth Circuit precedent – its actions are a clear error of law
and should be reversed.
“Tiering” allows agencies to incorporate by reference previous NEPA analysis and tailor it specifically to the immediate site or project. Agencies may not, however, tier blindly to previous NEPA analyses without ensuring that the previous information remains accurate and updated. NEPA regulations explicitly require NEPA analyses that are tiering to prior NEPA documents to "include a finding that the conditions and environmental effects described in the broader NEPA document are still valid," 43 C.F.R. § 46.140, and “[t]o the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.” Id. § 46.140(b).

The Board has repeatedly refused to uphold BLM NEPA documents that adopt prior analyses wholesale without critically assessing whether the information is still valid or accurate in current conditions. For example, in Randy A. Green, the Board specifically acknowledged that it “may be appropriate” to use data from 2000 to assess impacts in 2005 because “on-the-ground conditions in 2005 may have remained substantially unchanged since 2000.” 177 IBLA at 281. But the Board still remanded BLM’s decision for its failure to actually assess whether that assumption about conditions was true, or whether the old information provided a reasonable basis for BLM’s conclusion about the proposed action’s impacts to wildlife and vegetation. Id. This doctrine holds true in the Ninth Circuit as well. See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 997 (9th Cir. 2004); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 810 (9th Cir. 1999); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998).

In its Response to Comments, BLM states that it “supplemented FERC’s FEIS analysis with substantial additional information developed subsequent to completion of the FEIS” and goes on to list several sources it allegedly used to update the FERC FEIS. Response to Comments at 304. But BLM failed to adequately address and update many sections of the FERC FEIS, see Appellants’ Statement of Reasons; two of the most glaring, the energy market in California and groundwater, are discussed below in more detail.
B. Rapid Evolution of Energy Technology and Shifts in California’s Electricity Market Require BLM to Update the FERC FEIS.

In their defense of BLM’s statement of purpose and need, Respondents assert that “BLM has no obligation to reevaluate the analysis undertaken by FERC,” Eagle Crest Answer at 8, because “[a]gencies need not conduct subsequent environmental analyses of issues already thoroughly evaluated in the earlier impact statement.” BLM Answer at 5. As evidenced above, this is plainly incorrect. BLM does have an obligation to ensure that analysis is up-to-date and accurate for current conditions. In fact, the courts have specifically held that an agency cannot tier to a document that does not account for significant technological changes created after the document’s creation: “Essentially, the BLM must conduct an EA-level analysis to determine whether any new technology, not analyzed in the EIS, has significant effects. If the new technology has significant effects, the BLM must create a new EIS to analyze those effects.” Dine Citizens Against Ruining Our Env’t v. Jewell, 312 F. Supp. 3d 1031, 1091 (D.N.M. 2018) (holding BLM’s analysis regarding new hydraulic fracturing technology was sufficient under NEPA because its potential significant effects underwent adequate analysis). Simply adopting the purpose and need statement from FERC’s 2012 FEIS without any critical examination – given the intervening changes in energy technology and the energy market with significant implications for the contemporary purpose and need for this Project – does not fulfill BLM’s obligation under NEPA.

Respondents contend that Appellants offer no objective proof of the viability and economy of other forms of energy storage technology, and that BLM has already addressed similar complaints in its Response to Comments or the Protest Report. See BLM Answer at 5, 7; Eagle Crest Answer at 10. But Appellants have offered numerous pieces of evidence regarding the host of significant changes in electricity technology that have arisen over the past years, as analyzed by expert agencies including the California Public Utilities Commission (“CPUC”), the California Independent Systems Operator (“CAISO”), and others. BLM has only cursorily discussed this information; going so far as to ignore reports and orders of sister state agencies that deem large quantity pumped storage capacity to be inappropriate for California’s energy needs at this time. For example, BLM dismisses other viable storage alternatives to pumped storage: “Consideration of
alternatives, as suggested by several comments, which include a different Project or means of
energy storage, do not meet the purpose and need of the EA.” Response to Comments at 341. But
the relevant question is, given California’s evolving energy system, whether there are viable
alternatives that satisfy BLM’s public lands management mandates. As an initial matter, there is no
need for increased energy storage capacity when the grid already enjoys a significant surplus into
the foreseeable future. California’s power plants are on track to be able to produce at least 21%
more electricity than demanded by 2020, based on official estimates – and this figure fails to
account for the rapid adoption of rooftop solar panels that also contribute to the surplus. Penn, I. &
Menezes, R. “Californians are paying billions for power they don’t need.” Los Angeles Times (Feb.

During a hearing on the closing of a power plant due to the continuing introduction of newer plants to the grid,
former Public Utilities Commissioner Mike Florio stated: “Put simply, for the foreseeable future,
we have more power plants than we need.” Id. Consumption has fallen steadily since 2008 while
regulations have encouraged utilities to continue constructing more power plants, most of which
operate at 50% below their generating capacity. Id. California has no need to store energy when
there is too much to begin with.

The only alternative to pumped storage that receives any real attention from BLM in the
Response to Comments is battery storage technology. Yet BLM’s treatment of this revolutionary
technology does not match real-world facts and the very sources it cites, which show batteries to be
a competitive and commonly adopted storage option. BLM’s claims that “[w]hile batteries are a
useful form of energy storage, they are a complement to bulk energy storage like pumped storage,
not an alternative.” Response to Comments at 342; see also Protest Report at 22. BLM further
claims that battery storage is “a new market development . . . [that] may not be relevant in all
systems or under all scenarios.” Response to Comments at 342. However, as discussed in the

3 All articles cited here relating to energy technology were incorporated by reference in Appellants’
Statement of Reasons; tellingly, BLM and Eagle Crest in their Answers do not address any of this
new evidence, instead only referring back to BLM’s earlier Response to Comments and Protest
Report.
Statement of Reasons, these claims are simply untrue. At the beginning of 2017, Southern California Edison had nearly 400 megawatts of battery storage online. Southern California Edison. 

“Leading the Deployment of Battery Storage.” (2018), available at http://www.edison.com/home/innovation/energy-storage.html. Tesla alone provided Southern California Edison with 80 megawatt-hours of storage. Maloney, P. “Tesla's 80 MWh battery storage facility starts operations for SoCal Edison.” Utility Dive (Feb. 2, 2017), available at https://www.utilitydive.com/news/teslas-80-mwh-battery-storage-facility-starts-operations-for-socal-edison/435171/. This rapid growth shows no sign of slowing, either – by 2021, as much as 1800 megawatts of new energy storage is expected to come online nationwide, comprised almost entirely of large-scale lithium ion batteries. Cusick, D. “Battery Storage Poised to Expand Rapidly.” Scientific American (Jan. 1, 2017), available at https://www.scientificamerican.com/article/world-s-largest-storage-battery-will-power-los-angeles/. Michael Picker, President of the CPUC, when asked to comment on a recent San Diego county battery storage facility installation, remarked that he “didn’t expect to see these kinds of prices in batteries until 2022, 2024 . . . we are far in advance of where we expected to be.” “World’s largest lithium ion storage battery.” The Escondido Grapevine (Feb. 26, 2017), available at http://escondidograpevine.com/2017/02/26/worlds-largest-lithium-ion-storage-battery/. The CPUC prioritized increased and speedy deployment of battery storage and other storage technologies with a 2017 rulemaking, which directs Pacific Gas and Electric, Southern California Edison, and San Diego Gas & Electric to acquire 1,325 megawatts of energy storage by 2020. CPUC Rule 15-03-011 at 3. Notably, this rulemaking explicitly rejects eligibility of pumped storage projects larger than 50 megawatts.4

In its Response to Comments, BLM relies on outdated legislation regarding pumped storage: Assembly Bill 33, passed in 2015. AB 33 directs the CPUC and California Energy Commission to evaluate and analyze the potential of different bulk energy storage methods, including pumped hydroelectric storage, in terms of ability to integrate renewables into the grid. Response to Comments at 342. BLM quotes the bill as saying “The Legislature finds and declares” that pumped hydroelectric storage meets the grid’s need “for rapid ramping capability and the capacity to utilize over-generation from renewable energy resources.” Id. However, CPUC Rule 15-03-011, which arose from the legislature’s mandate to CPUC to evaluate the issue, directly contradicts the

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The only source upon which BLM relies to support its assertions regarding battery technology is a set of 2015 reports by the International Renewable Energy Agency (“IRENA”). Yet BLM leaves out the report’s actual argument. One of the IRENA reports emphasizes the unprecedented strides that batteries have made as an energy storage option. “Battery Storage for Renewables: Market Status and Technology Outlook.” International Renewable Energy Agency (Jan. 2015), available at https://www.irena.org/documentdownloads/publications/irena_battery_storage_report_2015.pdf.

For one, the report directly contradicts BLM’s insinuation that battery storage is unproven: “From a technological perspective, battery storage is mature and there are hundreds of suppliers providing reliable systems.” Id. at 1. The report shows that world battery storage capacity is growing almost exponentially; IRENA forecasted global annual power capacity to grow from only 360 megawatts in 2015 to 14,000 megawatts in 2023. Id. at 24. Annual revenue for utility-scale battery operations is projected to grow from about $220 million in 2014 to $18 billion dollars. Id. IRENA’s report predicts future growth of battery storage technology: “[B]attery storage technology is an increasingly attractive solution. This is because more variable renewable energy is coming on stream, the technology’s cost is declining and performance is continually improving.” Id. at 40. Rather than support BLM’s claim that battery energy storage is “not relevant,” the report it cites shows that battery storage is a viable, current alternative to pump storage that BLM should have fully explored in its analysis.

Other developments in the grid fail to find any mention whatsoever in BLM’s analysis. For one, natural gas peaker plants have made great strides recently. The California Energy Commission unanimously approved a modernized 1,040-megawatt natural gas-fired power plant that will complement renewable energy sources, such as wind and solar, and include a 100-megawatt battery energy storage facility expected to be the largest in the world. Belk, S. “Construction of AES Alamitos Energy Center to Start in July.” Beachcomber (Apr. 27, 2017), available at

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legislature’s finding. The CPUC instead determined that large pumped hydroelectric storage projects above 50 megawatts would not be eligible for this procurement target, finding that investment here would stifle newer storage innovations and “inhibit the fulfillment of the market transformation goals of the program.” CPUC Rule 15-03-011 at 9-11.
Furthermore, although the Project is proposed as a solution to alleviate a strained transmission system, the transmission system needs no such help. As discussed in the Statement of Reasons, CAISO’s 2017-2018 Transmission Plan found that “the Eagle Mountain storage project did not materially reduce any of the identified congestion [in the grid].” Id. at 11. Yet somehow none of these facts can be found anywhere within BLM’s Response to Comments or its Protest Report, nor did either BLM or Eagle Crest discuss them in their answers.

Finally, nowhere are the changed conditions in the Southern California energy market more apparent than in the current undetermined status of the Project. Since 2012, Eagle Crest has been unable to secure a purchaser for energy from its proposed pump storage project. Such a lack of certainty for the ultimate destination of an energy project’s power shows that this Project does not meet a true need in today’s local energy market.

In its Response, BLM claims that “[a]ppellant merely questions whether other forms of energy storage could achieve the goals of the project.” BLM Answer at 7. But the facts noted above and in Appellants’ Statement of Reasons tell a completely different story. These are not mere questions or differences of opinion, but the conclusions of expert agencies that BLM neglected to acknowledge. The FEA thus failed to adequately update the purpose and need of the project, and did not incorporate these reasonable alternatives. BLM’s analysis is incompatible with NEPA.

C. BLM Cannot Rely Upon Erroneous Facts or Ignore New Information About Groundwater Impacts.

Eagle Crest attempts to portray Appellants’ arguments as “nit-picking,” but the substantial body of evidence on groundwater impacts effectively ignored by BLM demonstrates a systematic failure by BLM to address, much less incorporate, highly relevant information into its FEA – a significant omission in the context of the water-scarce desert ecosystem of the Project. Even now, Respondents repeatedly point to the allegedly “significant groundwater update performed by BLM” on the FERC FEIS as evidence of the legal adequacy of BLM’s groundwater impacts analysis.

Eagle Crest Answer at 12; see BLM Answer at 7; Protest Report at 105. But two major issues
render this analysis an insufficient update to the already deficient foundation of the FERC FEIS:

1. The FEA’s Analysis of the Project’s Impacts on Groundwater Fails to Include Highly Relevant Information that BLM Itself Produced.

The first major flaw with BLM’s groundwater impacts analysis is its inexplicable failure to consider significant scientific information concerning the water recharge in the Chuckwalla aquifer. As discussed in the Statement of Reasons, instead of updating the outdated recharge estimates in the 2012 FERC FEIS and 2013 State Water Board Final Environmental Impact Report (“FEIR”), BLM casually disregarded important scientific developments that had occurred since their publication—namely, expert reports published in 2012, 2013, and 2017 that were co-authored by BLM’s very own staff and experts. In doing so, BLM embraced outside numbers that it had previously disputed. Statement of Reasons at 25. This was no trivial error of minor environmental significance. Given the severe scarcity of water in the desert where the Project is located, even small errors in the recharge estimate analysis could have devastating implications for the health of the surrounding ecosystem and communities. BLM’s efforts here mirror the agency’s actions in *Wyoming Outdoor Council, et al.*, where BLM concluded the impacts of discharged waters from a project would not be significant based on water quality analysis of one water sample in the project area, despite appellants providing several documents that suggested BLM’s analysis of the effects of discharged waters was insufficient, two of which were produced by a BLM scientist. 158 IBLA at 163. The Board found “BLM’s effort to be incomplete and inadequate” for failing to consider “multiple documents supplied by appellants demonstrating the serious water quality issues presented by [coal bed methane]-discharged waters,” and remanded BLM’s decision. Id. Here, BLM’s arrival at its finding of no significant impact without conducting a thorough and in-depth

5 The estimates in these reports are very different than the numbers BLM used in its FEA. For example, the 2012 Report suggested annual groundwater recharge between 3,013 and 6,026 acre-feet/year, while the 2013 Report suggested recharge was 3,200 acre-feet/year. BLM chose to rely upon exponentially larger numbers: the 2012 FERC FEIS estimated recharge at 9,600-15,000 acre-feet, FEA at 68, and the 2013 State Water Board FEIR estimated 12,700 acre-feet, id.
examination of the implications of the 2012, 2013, and 2017 studies for its own groundwater
analysis is a similarly incomplete and inadequate effort.

Respondents argue that BLM already explained why it did not consider certain data in its
FEA in the Protest Report. BLM Answer at 8; Eagle Crest Answer at 12-13. But BLM’s Protest
Report only references its 2017 study, with no mention of the equally relevant studies conducted in
2012 and 2013, which NPCA discusses in its protest.6 Protest Report at 17. Additionally, BLM’s
reason for not addressing the 2017 study is strange; it claims it can disregard the 2017 study
because it “makes assumptions regarding levels of groundwater use for projects” that may be
incorrect because those solar projects may not be built or may not use as much water as previously
thought.7 First, the four solar projects used in the 2017 study are the same four solar projects that
BLM uses in the FEA’s cumulative water use assessment (Desert Sunlight, Palen Solar, Genesis
Solar, and Desert Harvest). See FEA at 132; 2017 Report at 27. Yet BLM discards this study for
making the exact same assumptions about current projects in the basin as it does in its FEA. BLM’s
ignorance of its own experts and misreading of its own reports is evidence of the rushed and sloppy
analysis behind the FEA. Second, even if BLM’s assertion about the 2017 study’s assumptions
about water use is true, it does not change the study’s estimate of the aquifer’s recharge rate, which
it says could be as low as 7,107 acre-feet/year. 2017 Report at 1. That recharge estimate – which
critically informs BLM’s assessment of whether the Eagle Mountain Project will overdraft the

6 The Response to Comments mentions the 2013 study and disregards it for not being as “detailed
and site specific” as the modeling done in the FERC FEIS, “determin[ing] it would not be
informative to employ the 2013 Riverside East SEZ/Argonne Report in a reanalysis of the more
detailed, site-specific groundwater assessment in the FERC FEIS and State Water Board EIR.”
Response to Comments at 409. But this reasoning ignores the fact that the model in the FERC FEIS
is a simplistic analytical model, not an advanced numerical one, which is required by the DRECP,
see DRECP LUPA (2016) at 143; which means the benefits of the 2013 numerical model likely far
outweigh any benefits that having a site-specific but outdated model might provide. That should
have been sufficient enough justification for BLM to give the 2013 model more than a passing
glance.

7 BLM also points out in its Protest Report that the study was published in June 2017, two months
after the BLM’s FEA was released. Protest Report at 17. However, the study was co-authored by
BLM; BLM should have known enough about the study’s results to know whether the data it was
using in the FEA was accurate or not.
aquifer – is entirely independent of the study’s assumptions about how many projects will be using water in the basin.

BLM offers another nonsensical reason for why it need not address the 2012, 2013, and 2017 studies. In their Answers, Respondents argue that because BLM co-wrote the 2017 study, it is “uniquely qualified” to know whether the report should change BLM’s analysis in the FEA. BLM Answer at 8 n. 4; Eagle Crest Answer at 13. The Supreme Court has “frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983).

Simply stating “we wrote it, so we know it’s not relevant,” does not rise to the level of a cogent explanation for why BLM refused to consider the results of three separate studies, all of which specifically analyzed groundwater in the Chuckwalla Basin and cast doubt on the estimate BLM was using in the FEA. The fact that the data was produced by the same agency is irrelevant; in Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 491-95 (2011), the Ninth Circuit found that BLM failed to take a hard look at the environmental impacts of its action because “BLM failed to address concerns raised by its own experts” and “gave short shrift to a deluge of concerns from its own experts” by not responding “objectively and in good faith.”

BLM cannot come up with a rational reason for disregarding or ignoring the 2012, 2013, and 2017 studies because there isn’t one. Appellants are not demanding BLM consider unrelated or noncredible studies or evidence that is currently scientifically unattainable. See WildEarth Guardians v. Jewell, 738 F.3d 298, 309 (D.C. Cir. 2013) (holding BLM’s decision was justified “[b]ecause current science does not allow for the specificity demanded by the Appellants”). On the contrary, Appellants simply ask that BLM consider highly relevant information – which the agency itself produced – that would have significant implications for the Project’s effect on groundwater and the surrounding ecosystem. The enormity of this oversight constitutes a failure to consider a “substantial environmental question of material significance to the proposed action.” Randy A. Green, 177 IBLA at 280. BLM’s decision should be remanded.
2. BLM’s Purported “Update” of the FERC FEIS Relies on Misstated or Flat-out Missing Sources.

Not only did BLM ignore a substantial amount of directly relevant data, its claim that it comprehensively updated the FERC FEIS with new documents does not stand up to scrutiny. BLM mischaracterizes some of these documents, improperly relies on others, and in some cases it is not evident how BLM used the document at all. Below, Appellants’ address the problems with each document in BLM’s Protest Report in turn:

- “Relevant information developed by the California State Water Resources Control Board in its formulation of water quality protection measures.”

Protest Report at 17; Eagle Crest Answer at 12. The problems with this statement are: 1) the information from the State Water Board’s 2013 FEIR is outdated and has been shown to most likely be inaccurate (discussed above); 2) BLM told the State Water Board prior to the publication of its 2013 FEIR to reconsider the Board’s groundwater analysis; and 3) the State Water Board’s FEIR is not a NEPA document and was never available to public challenge.

Incredibly, BLM cites information developed by the State Water Board as evidence that its groundwater analysis is accurate when BLM previously told the State Water Board to reevaluate that same information because of its likely inaccuracy. BLM’s April 10 letter states: “the [BLM] has identified considerable uncertainty regarding groundwater recharge estimates . . . in support of the Eagle Mountain Pumped Storage Project. . . . There is a potential for overdraft conditions to occur within the Chuckwalla Basin . . . The BLM suggests that the State Water Resources Control Board (Water Board) consider re-evaluation of these groundwater issues . . .” BLM, Comments on Draft Final Water Quality Certification for the Eagle Mountain Pumped Storage Project, at 2 (Apr. 10, 2013), available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/eagle_mountain_pumped_ferc13123/comments041013/blm.pdf. (emphasis added). In the same letter, BLM also takes aim at the consultant report that serves as the basis for the “central technical analysis” of the FERC FEIS and the State Water Board’s draft EIR. Id. at 7. BLM notes that the consultant report considered two methodologies to estimate basin recharge: one “well recognized”
that “produced a recharge rate of about 600 afy to 3,100 afy” but was discarded as “unrealistically low,” while the other method, which was “not well explained,” reached a “much higher range of values and was embraced.” Id. BLM warns the State Water Board that this “may appear to be arbitrary, capricious, and unwarranted.” Id.

BLM makes zero mention of its April 10, 2013 letter in the FEA, the Protest Report, or its Answer.8 Eagle Crest at least tries to address the issue by arguing BLM’s flip-flopping on the same information is actually a “reasonably discern[able]” path; a conclusion benefitted by Eagle Crest conveniently omitting of the contents of the April 10, 2013 letter and instead focusing on the “uncontroversial statement” in the April 19, 2013 letter. Eagle Crest Answer at 14. Eagle Crest also bizarrely argues that Appellants are “twist[ing] the comments that BLM made in the SWRCB proceeding.” Id. It is unclear how quoting the exact contents and providing a full copy of the April 10, 2013 letter constitutes “twisting” BLM’s comments; they speak for themselves.

Even if there was a legitimate explanation for BLM deciding to use the information it once told another government agency not to, BLM does not provide it in the FEA, Protest Report, its Answer, or any other documents. Generally referring to the State Water Board’s authority on groundwater is not a “reasoned explanation” for why BLM changed its mind on the accuracy of the State Water Board’s analysis. See F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio . . .”).

Additionally, though BLM does not formally tier to the State Water Board’s FEIR,9 it does heavily rely on it; throughout the record BLM repeatedly states it “continues to rely on the State

8 BLM’s Response to Comments references the April 10 letter once, in a way that makes it seem like at a FERC and BLM meeting, BLM staff retracted the position it took in the first letter by submitting the April 19 letter. Response to Comments at 307. But BLM’s description omits an earlier part of the same FERC and BLM meeting where BLM staff confirms that “hydrology is a major issue,” and that “BLM staff is not withdrawing its April 10, 2013 to the State Water Board on the same subject matter.”

9 This would be unlawful because courts have consistently refused to allow agencies to “tier[] to a document that has not itself been subject to NEPA review” because “it circumvents the purpose of
Water Resources Control Board (SWRCB) as the experts on groundwater in the Chuckwalla Basin.” Protest Report at 17; see, e.g., FEA at 66 (“BLM’s analysis of FERC Project groundwater impacts relies on the analysis conducted by the State Water Board”); Response to Comments at 307 (“the State Water Board is the expert and controlling governmental agency on groundwater use and conditions in the Chuckwalla Valley”). BLM’s heavy reliance on the State Water Board is problematic because – in addition to the FEIR’s failure to analyze the 2012 Report, and BLM’s own disparagement of the State Water Board’s findings – the public never had an opportunity to challenge the State Water Board’s FEIR and corresponding Clean Water Act section 401 certification. Statement of Reasons at 28. As the State Water Board itself recognizes, NPCA’s challenge to its FEIR was dismissed “as moot without addressing the substance of the petition.” State Water Board Letter to Neal Desai, dated August 29, 2018 (see Appellants’ Statement of Reasons Exhibit 1) (emphasis added). That means that for its FEA, BLM significantly relied on and in fact deferred to the authority of a document that was completely insulated from public challenge.

- “The [National Park Service (“NPS”)] Joshua Tree National Park “Finding of No Significant Impact, Eagle Mountain Boundary Study Including Possible Land Withdrawal Environmental Assessment” (Dec. 12, 2016) (NPS FONSI, 2016) for its discussion of groundwater. The data and discussion contained in these separate and thorough groundwater models and impacts analyses are consistent with and support FERC’s assessment of potential groundwater impacts associated with the Project, and, BLM has concluded that the groundwater findings and conclusions in the FERC FEIS groundwater assessment remains accurate.” Protest Report at 17; Eagle Crest Answer at 12. BLM grossly mischaracterizes the contents of the NPS FONSI and its associated EA by claiming it contains “separate and thorough groundwater models and impacts analyses” that “are consistent with and support FERC’s assessment.” (emphasis added). The NPS EA’s analysis of groundwater is best described as surface-level, not thorough; the NPS did not independently confirm the State Water Board’s 12,700 acre-feet/year recharge estimate, nor did it cite any of the 2012, 2013, or 2017 studies discussed earlier. See NPS Final EA, 2016 at 138-39, 186-89. This is clear from NPS’s own words in the FONSI, which says ____________________________

NEPA.” Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002).
the “Boundary Study/EA ultimately restates the SWRCB finding.” NPS FONSI at 59 (emphasis added). NPS’s choice of the word “restates” rather than “confirms,” “supports,” or “provides additional evidence of,” makes it clear that NPS merely regurgitated the results of State Water Board’s analysis. The NPS FONSI also states:

Details on groundwater pumping data is [sic] not included in the Boundary Study/EA because the analysis is intended to be broad, since a boundary adjustment is a policy change with no immediate physical impact on resources. The Boundary Study/EA (page 181) refers readers to the Eagle Mountain Pumped Storage Hydroelectric Project FEIS and final FERC license requirements (2014) for more information on the effects of the pumped storage project on groundwater.

NPS FONSI at 58. This does not constitute “support” of FERC’s assessment so much as a complete deferral to it.

Additionally, BLM uses the NPS FONSI to indicate total agreement between the relevant state and federal agencies on the issue of groundwater in the Chuckwalla basin. But BLM neglects to mention that the NPS Draft EA stated: “The issue of groundwater recharge is a complicated and controversial topic, and experts from state and federal agencies do not agree on the extent of recharge to groundwater aquifers. The debate over recharge for the Chuckwalla groundwater basin specifically will likely continue until more studies are complete and empirical data can be analyzed.” NPS Draft EA at 134. In the Final EA, in response to a public comment, NPS backs down and removes that statement. NPS FONSI at 59. But the FONSI still states that “[t]he issue of groundwater recharge is debated among federal and state agencies and the statements in the Boundary Study/EA reflect this fact.” Id. BLM’s allegation that the NPS FONSI contained a detailed analysis that was used to update the FERC FEIS, when in fact the NPS merely reiterated what had already been said by FERC and the State Water Board without any further discussion – much less a thorough analysis – constitutes a clear and demonstrable error of fact necessitating reversal of BLM’s decision.

- “California Environmental Protection EA, “Indicators of Climate Change in California,” [“(Indicators Report”)] (2013) to assess the impact of climate change on water quantity. The report notes that annual precipitation in California has been variable year to year and that no clear precipitation trend is evident in the climate records reviewed by the California Environmental Protection Agency. The EA in an update to Section 3.1.1 has been modified to further address climate change impacts and recognizes that the climate in the FERC
Project area is anticipated to become warmer in future decades, but precipitation is not anticipated to change: ‘Therefore, groundwater recharge is not anticipated to change, and so water supply for the project will be stable.’”

Protest Report at 17; Eagle Crest Answer at 12. There are numerous problems with this claim. First, the Indicators Report is not referenced, discussed, or even cited in Section 3.1.1 in the FEA, nor anywhere else in the FEA for that matter (other than the list of references), so exactly how BLM used it to update its groundwater analysis is unclear. Second, BLM mischaracterizes the findings of the report. The report states: “[o]verall, relatively little change in net annual precipitation is projected for the northern tier of the state, with moderate decreases in southern California . . . . Previous research has demonstrated the concern of future limited supply of water.” Indicators Report at 64 (emphasis added). That is a far cry from BLM’s assertion that “the report notes . . . that no clear precipitation trend is evident.” Protest Report at 17.

Finally, BLM’s assertion that section 3.1.1 has been updated to discuss how precipitation is unlikely to change and thus groundwater levels will remain constant is completely false – section 3.1.1 discusses climate change in the air quality context but makes no mention of precipitation or groundwater. See FEA at 55. The quote at the end of the paragraph (“Therefore, groundwater recharge is not anticipated to change, and so water supply for the project will be stable.”) does not appear in the FEA at all, and in fact contradicts some of BLM’s other statements on the record about climate change and water supply.10 This is analogous to BLM’s actions in M.K. Resources Co., where in its response to a comment on the draft EA raising potential public health issues posed by off-site use of waste rock, BLM claimed it had conducted testing demonstrating that the waste rock material was not hazardous, and that “[t]he [final] EA w[ould] be corrected to reflect this subsequent work.” 179 IBLA at 303. Yet the final EA was unchanged from the draft EA; thus, the Board remanded BLM’s decision. Id. at 304-05. Here, BLM repeatedly claims that it has updated

10 For example, “[e]vaporation rates may increase as a result of warmer air temperature, which could potentially increase the need for make-up water supplies,” BLM Response to Comments at 354 (no additional analysis), and “[g]lobal climate change is likely to affect the prospects for the long-term conservation of the desert tortoise and presents a serious risk; frequent and/or prolonged droughts with an increase in temperature could reduce forage.” BLM Response to Comments at 364, 382; FEA at 134 (no additional analysis).
section 3.1.1, Protest Report at 17, 50; Response to Comments at 354, yet no such update, nor any
discussion of climate change’s effects on precipitation and groundwater at all appears in that section
or anywhere else in the FEA.\textsuperscript{11} This is grounds for reversal of BLM’s decision.

- “Updated cumulative assessment of potential groundwater effects from the FERC Project in
  the Chuckwalla Valley Groundwater Basin. When the FERC FEIS was prepared, an
  estimated 14 solar projects were planned . . . . Since that time, many of these proposed solar
  projects have been withdrawn. In addition, water usage estimates were lowered to reflect
  the cancellation of the Eagle Mountain landfill project . . . . A revised water balance
  calculation was developed based on these changes in water use and was incorporated in the
  EA (see Tables 6-1 to 6-3).”

Protest Report at 17; Eagle Crest Answer at 12. As mentioned above, this cumulative water
estimate is the only thing BLM actually changed from the FERC FEIS’s groundwater analysis;
which makes its deficiencies all the more troublesome. The referenced Table 6-2 in the FEA
purports to show the dramatic decrease in the cumulative water use estimates since 2012-2013.
This decrease, however, as BLM acknowledges, includes the Eagle Mountain landfill project
originally proposed for the site – a project that could not have co-existed with the pumped-storage
project, and therefore would never have been simultaneously drawing water from the aquifer.
Including it in the revised estimates gives the false impression that the cumulative use estimate has
dramatically dropped 114,560 acre-feet, when without the landfill project the difference is only
72,795 acre-feet.

BLM’s failure to consider at least five other reasonably foreseeable solar projects that had
applied for approval within the Chuckwalla Valley/Palo Verde Mesa area at the time the FEA was

\textsuperscript{11} The FEA’s failure to discuss the Indicators Report renders not only its groundwater update
deficient, but its entire analysis of the potential impacts of climate change on the Project. In
response to Appellants’ charge that the agency neglected to account for California’s historic
drought – a significant intervening event necessitating preparation of an EIS – and other effects of
climate change, both Eagle Crest and BLM claim that “BLM did evaluate the information on
climate change in FERC’s EIS and determined it was sufficient.” BLM Answer at 10; see Eagle
Crest Answer at 19. But the citations to the FEA, Protest Report, and Response to Comments that
BLM and Eagle Crest give in support of this claim all rely on the supposed use of the Indicators
Report, which Appellants have established was not actually used. See BLM Answer at 10 (citing
Response to Comments at 350-54; Protest Report at 17); Eagle Crest Answer at 19 (citing Response
to Comments at 310, 352-54, 364, 382).
being developed casts additional doubt on the accuracy of that estimate. Eagle Crest and BLM
claim these projects “are either unannounced or in their very early stages of planning,” and
therefore “BLM is not required to speculate about” them. Eagle Crest Answer at 15-16; see BLM
Answer at 10; Protest Report at 19-21. But long before the issuance of the FEA in 2017, all five of
the projects had submitted applications to BLM\(^{12}\) – which is the same stage many of the 14 projects
included in FERC’s FEIS were at when the FEIS was issued. FERC FEIS at 111-12. In fact,
FERC’s FEIS even included two placeholder projects “to represent future solar projects without
active applications at present.” Id. at 113 (emphasis added). By including solar projects at the
application stage in the 2012-2013 cumulative water usage estimate, and then claiming projects at
the exact same stage are “too speculative” to include in the 2016 estimate, BLM is stacking the
deck to create the impression that groundwater usage has substantially decreased since the FERC
FEIS was completed to justify its claim that no further detailed analysis of groundwater is
necessary. Besides being arbitrary and capricious decision-making, that is a demonstrable error of
fact necessitating reversal of BLM’s decision.

  (DRECP FEIS/LUPA) and, in its EA, BLM conducted a comparative analysis of the
  DRECP FEIS/LUPA land designations and CMA and FERC License requirements directed
  at groundwater (see Section 1.7.1, App. A, Table 4-6 and Table 1-3).”

Protest Report at 17; Eagle Crest Answer at 12. This summary fails to mention that the Project
violates at least 12 CMAs, including the requirement that “an activity’s groundwater extraction
shall not contribute to exceeding the estimated perennial yield for the basin.” FEA at 28-29. BLM

\(^{12}\) Desert Quartzite (submitted Sept. 27, 2007), Crimson Solar (submitted May 12, 2009), Jupiter
(submitted July 6, 2015), Io Solar (submitted May 23, 2016), and SunPower (submitted July 16,
Additionally, while these events happened after the issuance of the FEA, it is worth mentioning that
several of these projects have moved forward expeditiously; for example, BLM issued a notice of
intent to prepare an EIS for the Crimson Solar Project on March 9, 2018,
https://eplanning.blm.gov/epl-front-office/projects/nepa/88925/136839/167194/2018-
04691_Federal_Register_Notice.pdf, and released a Draft EIS for the Desert Quartzite Project on
Aug. 20, 2018, https://eplanning.blm.gov/epl-front-
admits that the Project will overdraft the basin for three to four years. With no valid license, the project will no longer have a valid existing right and therefore will be in violation of the DRECP.

In summary, the BLM FEA’s “update” of the FERC FEIS largely relies on data that BLM itself had disparaged and urged others not to use, and completely omits the salient data in the 2012, 2013, and 2017 studies. Its conclusions about groundwater quantity in the Chuckwalla Basin are therefore factually and legally deficient and cannot be upheld.

IV. The Scientific Controversy Surrounding the State of Groundwater in the Project Area Warrants Preparation of a Full EIS.

Respondents claim that Appellants have not demonstrated that there is a significant scientific dispute about the proposed action, and thus have not demonstrated a controversy worthy of an EIS. BLM Answer at 11; Eagle Crest Answer at 21. On the contrary, Appellants have identified both “specific error in BLM’s analysis or methodologies” and “dispute over the size, nature, or effect” of the action. Wallace Forest Conservation Area Advisory Comm., 192 IBLA 108, 122 (2017). The Ninth Circuit has held that when information “cast[s] significant doubt on the adequacy of the [agency’s] methodology and data,” the dispute “thus goes beyond a disagreement of qualified experts.” Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 736 (9th Cir. 13)

13 Eagle Crest also claims: “Appellants ignore well-settled law that the factors under section 1508.27 do not require an agency to prepare an EIS simply because the impacts of the proposed action are ‘highly controversial’ or ‘largely unknown.’” Eagle Crest Answer at 20 (citing Missouri Coal. for the Environment, 172 IBLA 226, 249 (2007)). But this is only half the picture. “Highly controversial” impacts are not sufficient to require an EIS if they do not raise a substantial question regarding whether the proposed action may have a significant impact upon the human environment; for example, a controversy over whether a project will cause the local coffee shop to be overwhelmed with tourists. If an agency considers the section 1508.27 factors and finds one of them indicates an action is likely to significantly affect the quality of the human environment, it must prepare an EIS. Eagle Crest’s incomplete depiction of section 1508.27 flies in the face of well-established Ninth Circuit precedent holding that a finding that one of the section 1508.27 factors is applicable to a project can require the preparation of an EIS. See, e.g., Barnes v. U.S. Dep’t of Transp., 655 F.3d 1124, 1140 (9th Cir. 2011) (“Any of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.”); Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005) (“We have held that one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.”); Ctr. for Biological Diversity v. Bureau of Land Mgmt., 937 F. Supp. 2d 1140, 1155 (N.D. Cal. 2013) (“The presence of any one of these factors may be sufficient to require an EIS.”).

As discussed in Appellants’ Statement of Reasons, numerous legitimate sources have indeed cast significant doubt on the adequacy of BLM’s methodology and data regarding the groundwater water balance in the Chuckwalla Basin. See Statement of Reasons at 36-37 (describing BLM’s April 10, 2013 letter to the State Water Board; comments submitted by hydrogeologist Andy Zdon; the results of BLM-co-authored studies in 2012, 2013, and 2017; EPA’s low rating of the FERC FEIS; and NPS’s concerns about the Project’s impacts on Joshua Tree National Park). These comments are beyond a mere plea for more information; they are methodologically sound and scientifically up-to-date analyses of the specific Project that come to vastly different conclusions than the ones BLM relies on to make its decision. And they are warnings from other agencies – and at one point, before it bizarrely and unexplainedly switched positions, BLM itself – that BLM’s data are outdated and inaccurate.

This dispute is no mere academic exercise; its resolution has far-reaching consequences for the long-term water supply of the ecosystems and communities surrounding the Project area. If the FEA’s estimates about aquifer recharge are off – which the aforementioned body of evidence suggests they are – the Project will overdraw from the aquifer, not just for the first few years as acknowledged by the FEA, but for far longer and far more intensely. This could lead to subsidence (sinking or caving of land), changes to surface water volume and flow (potentially including the Colorado River and water resources within Joshua Tree National Park), loss of water resources that local communities as well as the desert ecosystem are highly dependent on, and a number of other impacts that are currently unknown due to lack of data. Because the controversy over the correct water balance analysis for the Chuckwalla Basin undoubtedly has substantial implications for the true extent of the adverse environmental impacts of the Project, a full EIS is required in order to adequately address and mitigate those significant impacts.

CONCLUSION

For the reasons stated above, the Appellants respectfully request the IBLA to set aside the BLM’s Decision of Record approving the ROW and CDCA Plan Amendment, to remand its Final
Environmental Assessment and Finding of No Significant Impact ("FONSI"), and to require BLM to prepare a full EIS.

DATED: November 28, 2018

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By:

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On November 28, 2018, I served true copies of the following document(s) described as APPELLANTS’ REPLY BRIEF on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Mills Legal Clinic at Stanford Law School for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Stanford, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address anamv@stanford.edu to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

IBLA No. 2018-193
Executed on November 28, 2018, at Stanford, California.

Ana Villanueva