

See the Mojave!

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The Mojave Desert symbolizes different things to different people. It was long regarded as a barren wasteland that was inhospitable to human presence, with temperatures soaring as high as 134 degrees.¹ That is perhaps still the most common view today as most

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people see the Mojave as they drive across it from Los Angeles to Las Vegas. By the late nineteenth century, though, some people saw the Mojave as a resource to be exploited by miners, ranchers, military installations, and other settlers. Most recently, numerous writers and travelers have extolled the scenic value of the desert, prompting Congress to consider preserving the desert landscape. Nevada Senator Harry Reid has rhapsodized that “[t]here is no place on the Earth that has better scenery than” the Mojave Desert.² Heeding Senator Reid’s advice, Congress enacted the California Desert Protection Act (CDPA) of 1994,³ which seeks to protect the visual beauty of the desert by establishing the Mojave National Preserve, Death Valley National Park, Joshua Tree National Park, and dozens of new wilderness areas.⁴

The law has struggled with such contrasting perceptions of the same sights. Historically, courts judged aesthetic regulation as beyond the scope of the police power.⁵ The prevailing view was that aesthetic sensibilities were a matter of private individual taste and not worthy of the exercise of the coercive power of the state. At the same time, Congress and state legislatures protected designated areas because of their scenic values. The United States has long prided itself for its scenery, which offered an alternative to the cultural treasures of Europe. “America’s Best Idea” was to establish national parks, which are monuments to the nation’s scenic beauty.⁶ Today,

¹ See SW. PARKS & MONUMENTS ASS’N, *AMERICAN DESERTS HANDBOOK: MOJAVE DESERT* 16 (2001) (stating that the highest temperature ever recorded in the Western Hemisphere—134 degrees—was recorded at Furnace Creek in the Mojave Desert on January 10, 1913). Baker, California—the northern gateway to the Mojave National Preserve—commemorates the nearby climatic feat with a 134-foot tall thermometer. CHERI RAE & JOHN MCKINNEY, *MOJAVE NATIONAL PRESERVE: A VISITOR’S GUIDE* 110 (3d ed. 2010). Baker, however, is not uniformly appreciated. See BILL BRYSON, *THE LOST CONTINENT: TRAVELS IN SMALL-TOWN AMERICA* 250 (1989) (finding it difficult to imagine that “people live out there, in awful little towns like Baker and Barstow”).

² 140 CONG. REC. 7117 (daily ed. Apr. 12, 1994) (statement of Sen. Harry Reid).

³ California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (codified at 16 U.S.C. 410aaa).

⁴ Generally, a “national preserve” is like a “national park” except that hunting and certain other activities may be allowed. See generally ELISABETH M. HAMIN, *MOJAVE LANDS: INTERPRETIVE PLANNING AND THE NATIONAL PRESERVE* 32–33 (2003) (distinguishing between national parks and national preserves).

⁵ See generally John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 286 (2001) (describing the traditional approach to aesthetic concerns).

⁶ See generally DAYTON DUNCAN & KEN BURNS, *THE NATIONAL PARKS: AMERICA’S BEST IDEA* 239 (2009) (quoting Robert Sterling Yard’s characterization of national parks as “the Exposition of the Scenic Supremacy of the United States”).

courts and legislatures alike act to preserve what they variously describe as scenic areas, visual resources, and viewsheds from things that could detract from their aesthetic values.

This Article examines how the law is being asked to adjudicate disputed sights in the context of the Mojave Desert. The Mojave is the best-known and most explored desert in the United States. For many people, though, the Mojave is missing from any list of America's scenic wonders. The evolution in thinking about the Mojave's aesthetics takes places in two acts. In the first act, covering the period from the nineteenth century to 1994, what began as a curious voice praising the desert's scenery developed into a powerful movement that prompted Congress to enact the CDPA. The second act begins around 2005, when the nation's energy policy again turned to the potential of renewable energy. The Mojave is an obvious location for large-scale solar energy development, but supposedly green technology threatens many of the scenic values that Congress decided to protect in the CDPA.

Part I examines the historic understanding of the Mojave Desert and the recent efforts to identify and protect its scenic landscapes. The Mojave has alternately been seen as a wasteland to be avoided, a resource to be exploited, and a scenic landscape to be preserved. Those perceptions collided during the lengthy debate that culminated in the enactment of the CDPA, which took millions of acres from the Bureau of Land Management's (BLM) multiple-use management and placed it in two new national parks and a new national preserve under the authority of the National Park Service. Both agencies now struggle to manage aesthetic values of the Mojave Desert lands under their jurisdiction, especially in the Mojave National Preserve.

Part II considers the latest challenge to the Mojave's scenic landscape presented by hundreds of proposals to build large solar facilities in the desert. Some people see the proposed solar farms as an encouraging reminder of the commitment to develop green, clean, and renewable energy, but others object that the shiny, metallic panels suggest an industrial presence that interferes with the aesthetic value of vast desert landscapes. Those solar projects have generated the same contested reaction of the Mojave as a wasteland, a resource, or a scenic landscape. The proposed projects have also introduced a new division within the environmental community, with some seeing solar facilities as green, renewable energy that symbolizes environmental progress, while others see solar projects as industrial facilities that are out-of-place in the desert's most scenic landscapes.

All of the interested parties—including state and federal agencies, national and local environmental organizations, and solar producers—are now struggling to decide where in the Mojave Desert solar projects should be placed. Part III thus outlines the three general approaches to locating solar projects within the Mojave. First it considers an administrative zoning scheme that would identify places within the Mojave where solar projects should be located and places where they should not be located. That is the approach taken by the BLM in the draft programmatic environmental impact statement (EIS) that the agency released in December 2010.⁷ The second alternative is for Congress to prescribe the sights of the Mojave itself. Senator Dianne Feinstein has introduced legislation that would shield parts of the Mojave from solar development while encouraging such development elsewhere.⁸ The third alternative is reactive instead of prospective. It would simply consider applications for solar projects within the Mojave as developers submit them.

The common theme that runs through this article is that the law needs to develop better ways to address the importance of visual perception of both natural and cultural sights. The sights of the Mojave Desert elicit different reactions from different people. Each of these reactions is both strongly held and reasonable, which challenges the law's ability to accommodate them. The experience with desert preservation and the proposed solar facilities shows that the law needs to find a way to respect contrasting perceptions of the same things. Sometimes this can be achieved by putting the right thing in the right place. Often, though, the same sight that some people treasure is a sight that others find offensive. In such cases, we should prefer decision-making processes that solicit public involvement, which first identifies those contrasting perceptions and then seeks to honor them. The role of public input is especially critical on government property, which characterizes most of the Mojave Desert. That is why a prospective approach is better than a reactive one. The BLM's administrative zoning approach holds promise, but historically Congress has made most decisions about scenic preservation. Congress has intervened to insure the appropriate response to the conflicting public perceptions for each of

⁷ U.S. DEP'T OF ENERGY & NAT'L SYS. OF PUB. LANDS, DES 10-59, DOE/EIS-0403, DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES (2010) [hereinafter DRAFT SOLAR PEIS], available at <http://solareis.anl.gov/documents/dpeis/index.cfm#vol1>.

⁸ See California Desert Protection Act of 2011, S. 138, 112th Cong. (2011).

the three contested Mojave Desert sights. That congressional action and the attendant place-based lawmaking offer the best hope of honoring the contrasting perceptions of the sights of the Mojave.

I

THE MOJAVE DESERT AS SCENIC

The people who have seen the Mojave Desert during the past 200 years have perceived it as a wasteland to be avoided, a resource to be exploited, or a beautiful landscape to be preserved. Those three perceptions evolved consecutively, and today they exist together. The law has attempted to respond to those changing views of the desert, but the lengthy debate over the CDPA and its implementation demonstrates the difficulty in crafting and applying laws that depend on how we see things. This Part explains the evolution of the contrasting perceptions of the Mojave, the development of the law governing the Mojave and the enactment of the CDPA, and how that process emphasized claims of the Mojave's scenic value but failed to develop legal tools to preserve those values.

A. *The Perceptions of the Mojave Desert*

The Mojave Desert occupies about 35,000 square miles in Southeastern California as well as parts of Nevada, Utah, and Arizona, making it the smallest of the four deserts in the United States.⁹ The Mojave is not a flat expanse of sand; instead, it contains mountains that rise nearly 12,000 feet above sea level, and the desert drops 282 feet below sea level in Death Valley.¹⁰ It receives an

⁹ JACK DYKINGA & JANICE EMILY BOWERS, DESERT: THE MOJAVE AND DEATH VALLEY 13 (1999); see also BUREAU OF LAND MGMT. & NAT'L PARK SERV., THE CALIFORNIA DESERT 25 (1968), reprinted in *California Desert: Hearing on S. 63 Before the Subcomm. on Pub. Lands of the S. Comm. on Interior & Insular Affairs*, 93rd Cong. 113 (1974) [hereinafter 1968 CALIFORNIA DESERT REP.] ("The Mojave Desert . . . is a wedge shaped piece of southern California extending eastward from about the northeast corner of Los Angeles County to include the lands along the California-Nevada Border and the Colorado River. The Mojave Desert is bounded on the northwest by the Sierra Nevada and on the east by the Colorado River. On the south and west, it lies against the Colorado Desert and the Transverse Ranges.").

¹⁰ DYKINGA & BOWERS, *supra* note 9, at 13; see also 1968 CALIFORNIA DESERT REP., *supra* note 9, at 27 ("The Mojave Desert should not be thought of as a huge flat desert surface, for its topography is accented throughout with hills and mountains, which vary impressively in size."); RAE & MCKINNEY, *supra* note 1, at 28 (observing that the Mojave Desert is "situated south of the Great Basin, north of the Sonoran, and northwest of the Chihuahuan" Deserts).

average of two to five inches of rain per year, so most of the desert's water comes from springs, seeps, and seasonal rivers.¹¹ The Mojave's most striking natural landmarks include the Kelso Dunes, a rare patch of sand whose vibrations produce a booming sound, and Cima Dome, "[t]he most symmetrical natural dome in the United States."¹² The presence of the Joshua tree defines the extent of the Mojave Desert, and that ubiquitous tree has elicited conflicting responses ever since John Fremont described it as "the most repulsive tree in the vegetable kingdom."¹³ The rest of the Mojave's plant community includes numerous endemic species, colorful wildflowers, the abundant creosote bush, and the cholla plant that one early writer described as "an ugly object . . . with stubby arms standing out like amputated stumps."¹⁴ Desert tortoises and bighorn sheep are the best known of the Mojave's animals, along with numerous reptiles and a wild burro population that descended from the animals used by miners during the nineteenth century.¹⁵

The human presence in the Mojave Desert began with the Native Americans who traveled through the desert for thousands of years and engaged in extensive turquoise mining operations there.¹⁶ The Mohave Indians led the first European to visit the area—Spanish explorer Father Francisco Garcés—through the desert in 1776.¹⁷ Jedediah Smith crossed the Mojave in 1826,¹⁸ and he was soon followed by John Fremont, Kit Carson, and other explorers. The

¹¹ SW. PARKS & MONUMENTS ASS'N, *supra* note 1, at 10, 16. The tiny town of Bagdad, California, once went 767 days without any precipitation. *Id.* at 16.

¹² HAMIN, *supra* note 4, at 13, 15.

¹³ DAVID DARLINGTON, *THE MOJAVE: A PORTRAIT OF THE DEFINITIVE AMERICAN DESERT* 18 (1996) (quoting John Fremont's April 13, 1844, diary entry); *see also* RAE & MCKINNEY, *supra* note 1, at 38 (noting that writer Charles Francis Saunders also described Joshua trees as "grotesque"); SW. PARKS & MONUMENTS ASS'N, *supra* note 1, at 20–22 (describing the Joshua tree and the initial reactions to it).

¹⁴ J. SMEATON CHASE, *CALIFORNIA DESERT TRAILS* 55 (1919).

¹⁵ *See generally* RAE & MCKINNEY, *supra* note 1, at 45–55. Some of the Mojave's wildlife is disappearing, most recently including the Mojave ground squirrel. *See* Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the Mohave Ground Squirrel as Endangered with Critical Habitat, 75 Fed. Reg. 22,063 (proposed Apr. 27, 2010) (to be codified at 50 C.F.R. pt. 17).

¹⁶ *See* HAMIN, *supra* note 4, at 16 (noting that the Mojave Desert "may be the site of the oldest human habitation in the Americas"). *See generally* ERIC CHARLES NYSTROM, *FROM NEGLECTED SPACE TO PROTECTED PLACE: AN ADMINISTRATIVE HISTORY OF MOJAVE NATIONAL PRESERVE* 9–45 (2003) (recounting the history of the Mojave Desert generally and the history of Native American use of the desert in particular).

¹⁷ NYSTROM, *supra* note 16, at 12.

¹⁸ *Id.*

United States acquired the Mojave Desert from Mexico as a result of the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican War.¹⁹

The initial American visitors saw the Mojave as an obstacle to be overcome, not a destination in itself, and certainly not a place to remain. One early twentieth-century writer warned that the Mojave was “a grim desolate wasteland. It is the home of venomous reptiles and stinging insects, of vicious thorn-covered plants and trees, and of unbearable heat.”²⁰ Another reported that the Mojave “has been generally recognized as one of the least attractive portions of the southwest” and that the desert’s “sand and dust have appeared to function mainly as barriers to human progress.”²¹ The desert, in short, was “the opposite of all that we naturally find pleasing.”²² This perception of the Mojave as a hostile environment gained further support in popular depictions of the desert in movies and novels during the twentieth century.²³

The second group of Americans saw the Mojave as a resource to be exploited. Miners turned to the desert as the gold fields of northern California lost their luster. Mining was the fulfillment of George Wharton James’s view of the desert: “A place which is obviously so cursed that nothing will grow on it must have been created by the Lord of all things for some purpose and the only purpose it could possibly have was to carry minerals hidden somewhere below its

¹⁹ *Id.* at 13.

²⁰ Randall Henderson & J. Wilson McKenney, *There Are Two Deserts*, DESERT MAG., Nov. 1937, at 5.

²¹ John C. Merriam, *Extinct Faunas of the Mohave Desert, Their Significance in a Study of the Origin and Evolution of Life in America*, 86 POPULAR SCI. MONTHLY, Mar. 1915, at 245, 246.

²² CHASE, *supra* note 14, at 2; *see also id.* at 148 (referring to the Mojave Desert as “this strange dead land” that most of the world looks at “as foreign and unimaginable as if it were some territory of Mars”); RAE & MCKINNEY, *supra* note 1, at 63 (“The open space and barrenness of the desert was viewed by overland travelers as an obstacle to life itself; they hardly considered settling in such an environment. All they wanted to do was get through it as quickly and safely as possible.”); PETER WILD, TRUE TALES OF THE MOJAVE DESERT: FROM TALKING ROCKS TO YUCCA MAN, at XII (2004) (“[T]he Mojave Desert was a bewildering phenomenon in ways beyond concerns for survival [of the early Spanish and American travelers]. That a supposedly benevolent Providence would create a useless expanse in the Great Plan for a good earth presented an unfathomable reality shaking travelers’ deepest foundations.”).

²³ *See, e.g.*, DARLINGTON, *supra* note 13, at 10 (noting that “[i]n the heyday of the cinematic Western, the Mojave was the most prolific location”); LOUIS L’AMOUR, MOJAVE CROSSING (1964).

forbidden surface.’”²⁴ Silver was mined during the 1860s and 1870s; gold during the 1890s and the beginning of the twentieth century; and copper, zinc, iron, borates, and soda ash were all mined during the first half of the twentieth century.²⁵ Numerous ghost towns attest to the heyday of mining in the Mojave Desert and the decline of mining operations in recent decades. Some mining persists, though, for gold, limestone, sand, and gravel.

Ranchers soon followed the miners and began to supply them with needed food. Ranching in the desert required innovative sources of water, which ranchers quickly developed for their benefit as well as benefiting area wildlife.²⁶ Ranching peaked during the early decades of the twentieth century but has almost entirely disappeared since then. But people kept coming to the Mojave even as mining and ranching faltered. The first railroad reached the Mojave during the 1890s, and the Union Pacific arrived during World War I and still runs its trains through the desert today.²⁷ Federal homestead laws further encouraged people to settle in the desert.²⁸ The Federal Aid Road Act of 1916 funded the construction of the famed Route 66 during the 1920s along the southern edge of the Mojave.²⁹ The Great Depression of the 1930s prompted many people to seek their fortune in California, and John Steinbeck memorialized their passage across the “bright and terrible” Mojave Desert in *The Grapes of Wrath*.³⁰ The population of Las Vegas—the largest city in the Mojave Desert—jumped as gambling increased during Prohibition and again as the Hoover Dam was built during the 1930s. The Mojave’s climate attracted ailing veterans of World War I, who were then joined by numerous military bases that were established in the desert during and following World War II.³¹ Congress authorized the construction of

²⁴ RAE & MCKINNEY, *supra* note 1, at 67 (quoting author George Wharton James); *see also* CHASE, *supra* note 14, at 148 (describing the Mojave Desert as “a veritable treasure house of mineral”).

²⁵ *See generally* DARLINGTON, *supra* note 13, at 190–221 (describing the history of mining in the Mojave).

²⁶ *See* NYSTROM, *supra* note 16, at 16–21.

²⁷ *Id.* at 27–30.

²⁸ *Id.* at 31.

²⁹ *See* MICHAEL WALLIS, *ROUTE 66: THE MOTHER ROAD 5* (1990).

³⁰ JOHN STEINBECK, *THE GRAPES OF WRATH* 118 (1939).

³¹ *See* Charles Wilkinson, *Foreword* to *THE MOJAVE DESERT: ECOSYSTEM PROCESSES AND SUSTAINABILITY*, at xviii–xix (2009) (describing the growth of military installations in the Mojave and reporting that such installations are “the dominant intensive land use in

interstate highways with the Federal-Aid Highway Act of 1956, and by 1973, Interstate 40 was completed across the Mojave.³² By 2000, three million people lived in the Mojave Desert, and tens of millions lived in the nearby metropolises of Los Angeles, San Diego, and Phoenix. Currently, most residents live on the Mojave's edges, and the rest of the desert remains lightly populated.³³ The urban growth "led to a rapid proliferation of designated rights-of-way for roads, oil and gas pipelines, telephone and power lines, and microwave towers" all through the Mojave.³⁴

The third group of visitors came to appreciate the aesthetics of the Mojave Desert. There were expressions of that aesthetic sensibility in the reports of some of the Mojave's earlier visitors. In 1901, the renowned art critic John Van Dyke wrote a popular book extolling the beauty of the desert.³⁵ Van Dyke proclaimed, "In sublimity—the superlative degree of beauty—what land can equal the desert with its wide plains, its grim mountains, and its expanding canopy of sky!"³⁶ Edna Bush Perkins wrote an account of her adventures driving through the desert, celebrating the Mojave's mesas as "beautiful sweeps that completely satisfy the eye."³⁷ Edward Abbey wrote the

the Mojave Desert"); see also DARLINGTON, *supra* note 13, at 150–67 (detailing the history of military installations in the Mojave).

³² NYSTROM, *supra* note 16, at 34.

³³ See *Aaron v. United States*, 311 F.2d 798, 801 (Ct. Cl. 1963) (stating that the Mojave Desert was "a sparsely settled community" and that a military airport "was located [there] . . . to get away from the congested areas").

³⁴ Lary M. Dilsaver & William Wyckoff, *The Political Geography of National Parks*, 74 PAC. HIST. REV. 237, 258 (2005).

³⁵ See JOHN C. VAN DYKE, *THE DESERT: FURTHER STUDIES IN NATURAL APPEARANCES* (illustrated ed. 1918). Van Dyke described California's desert as "the most decorative landscape in the world, a landscape all color, a dream landscape." *Id.* at 56. Van Dyke's book "was reprinted fourteen times between 1901 and 1930," again in 1976 and in 1980, and he has been credited as "the first Anglo-American successfully to capture the beauty of the desert in words." David Teague, *A Paradoxical Legacy: Some New Contexts for John C. Van Dyke's The Desert*, 30 W. AM. LITERATURE 163, 164, 168 (1995).

³⁶ VAN DYKE, *supra* note 35, at 232.

³⁷ EDNA BRUSH PERKINS, *THE WHITE HEART OF MOJAVE: AN ADVENTURE WITH THE OUTDOORS OF THE DESERT* 42 (1922). Perkins further described the Mojave as "like a tiger, terrible and fascinating." *Id.* at 19. "With every mile," she exclaimed, the Mojave "had become more terrible and more beautiful." *Id.* at 52. At the end of their trip, Perkins concluded that "the adventure with the outdoors is the adventure with beauty." *Id.* at 222. For other early appreciations of the Mojave's scenery, see MARY AUSTIN, *THE LAND OF LITTLE RAIN* 16–17 (1st ed. 1903) (celebrating "the divinest, cleanest air to be breathed anywhere in God's world"); EDMUND C. JAEGER, *THE CALIFORNIA DESERTS* 187 (4th ed. 1965) (describing the area around Death Valley as "one of splendid scenic beauty, with

most famous appreciation of the desert in 1968,³⁸ and the popularity of the Mojave's landscape has continued to increase since then.³⁹ Peter Reyner Banham, an art professor, extolled the Mojave's scenic virtues in a 1982 book.⁴⁰ Even the Marines acknowledge that "[p]eople were and remain captivated by the stark and pristine beauty of the panoramic vistas, colorful granitic and volcanic landforms, and the vast undulating alluvial fans leading to sand dunes demarking the margins of scattered Pleistocene era playas."⁴¹

B. *The Law of the Mojave Desert*

The evolution of the perceptions of the Mojave Desert also produced an evolution in the law governing the desert. A visitor wrote in 1903 that "[n]ot the law, but the land sets the limit."⁴² That was almost literally true, for few federal laws imposed any restrictions on the use of the public domain lands until the second half of the twentieth century.⁴³ Nothing in the law sought to preserve the desert's scenery.⁴⁴ The first steps to preserve the aesthetic and other

remarkable rock formations, deep canyons, and broad desert basins"); and Henderson & McKenney, *supra* note 20 (proclaiming that "[f]or those seeking beauty, the Desert offers nature's rarest artistry").

³⁸ See EDWARD ABBEY, *DESERT SOLITAIRE: A SEASON IN THE WILDERNESS* (1968).

³⁹ There are many recent books praising the Mojave's scenery. See, e.g., DARLINGTON, *supra* note 13, at 1–2 ("[T]he blinders were somehow removed and a new view was revealed to civilization: *the desert is beautiful!*"); RAE & MCKINNEY, *supra* note 1; SW. PARKS & MONUMENTS ASS'N, *supra* note 1; Suzanne Venino, *Desert Splendor: Mojave's Singing Dunes and Magic Mountains*, in *AMERICA'S HIDDEN WILDERNESS: LANDS OF SECLUSION* 138 (1988).

⁴⁰ See PETER REYNER BANHAM, *SCENES IN AMERICA DESERTA* 17 (1982) (stating that "the consuming compulsion to return [to the desert] feeds upon one thing above all else—visual pleasure").

⁴¹ *Fact Sheet—The Viewsheds of MCAGCC*, U.S. MARINE CORPS, 2 (May 2009), <http://www.marines.mil/unit/29palms/LAS/Documents/factsheets/Project%20Fact%20Sheet%20Viewshed%20FINAL%20090515.pdf>.

⁴² AUSTIN, *supra* note 37, at 3. Bruce Babbitt, who served as Secretary of the Interior when the CDPA was passed, credited Mary Austin's book for his belief that the desert is special. See *California Desert Protection Act of 1993: Hearings on S. 21 Before the Subcomm. on Pub. Lands, Nat'l Parks & Forests of the S. Comm. on Energy & Natural Res.*, 103d Cong. 133–34 (1993) [hereinafter *1993 Senate Hearing on CDPA*].

⁴³ See JAMES R. SKILLEN, *THE NATION'S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST* 214 (2009) (stating that "[b]y the time the BLM was formed [in 1946], the public lands had had more than a century of unregulated or loosely regulated private use").

⁴⁴ See *California Desert: Hearing on S. 21, H.R. 2929, and S. 2393 Before the Subcomm. on Pub. Lands, Nat'l Parks & Forests of the S. Comm. on Energy & Natural Res.*, 102d Cong., pt. 1, at 321–22 (1992) [hereinafter *1992 Palm Desert Senate Hearing*];

environmental values of the Mojave began during the late 1960s. In 1968, the BLM published a report entitled *The California Desert* that included a section on protecting the desert from “visual pollution.”⁴⁵ The report instructed that the

BLM should fully consider the visual appearance of the desert in all future development on public lands and should take action to minimize or erase existing scars on the desert landscape. Visual appearance should be a consideration in connection with utility rights-of-way, mining activity, construction, residential occupancy, military operations, roads and highways, use of vegetation, and recreational activity.⁴⁶

California Representative (and former Olympic decathlete) Robert Mathias introduced the first bill to protect the desert in 1971.⁴⁷ Another bill proposed by California Senator Alan Cranston would have found that “the desert environment is seriously threatened by air pollution, indiscriminate off-road vehicle use, improper grazing, careless mining operations, unplanned development and construction, poor land use, and the pressures of growing recreational use.”⁴⁸ These proposals set the stage for Congress to legislate the first specific management provisions for the Mojave Desert with the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976. The FLPMA established a general framework for managing the multiple uses of the so-called public domain—federal lands that had not otherwise been withdrawn for uses such as national parks or

Part I) (statement of Elden Hughes) (stating that “[n]o one was staking out scenery” when the prospectors arrived in the 1850s, and Congress should “redress these oversights” by designating wilderness areas); BANHAM, *supra* note 40, at 3 (observing that the BLM did not have a management category for scenery).

⁴⁵ 1968 CALIFORNIA DESERT REP., *supra* note 9, at 12. For additional information on “visual pollution,” see John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 17–18 (2009), and John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 537 (2009).

⁴⁶ 1968 CALIFORNIA DESERT REP., *supra* note 9, at 12; *id.* at 207–08 (providing a detailed discussion of visual pollution); see also *California Desert Protection Act: Hearing on H.R. 780 and H.R. 3460 Before the Subcomm. on Nat’l Parks & Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 101st Cong., pt. I, at 154 (1989) [hereinafter *1989 House Hearing: Part I*] (statement of Rep. William E. Dannemeyer) (“In 1968 Californians first awakened to the need to protect the irreplaceable beauty of the California desert. The result of these concerns was the enactment of the . . . Federal Land Policy and Management Act of 1976.”).

⁴⁷ See H.R. 9661, 92d Cong. (1971). Mathias did not play a role in the subsequent congressional debates over the California desert because he lost his bid for reelection when the Democratic Party ousted many Republicans in the aftermath of Watergate in 1974.

⁴⁸ S. 63, 93d Cong. § (a)(4) (1973).

national forests and were under the jurisdiction of the BLM.⁴⁹ The only site-specific provision in all of the FLPMA called for a study of the Mojave Desert.⁵⁰ Congress found that “the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed.”⁵¹ The FLPMA thus established the California Desert Conservation Area and directed the BLM to prepare a management plan for the desert.⁵²

The BLM issued the required plan in 1980 after spending several years gathering information and soliciting public input. It reported that “[s]cenic values are often cited by the public as the Desert’s most important resource.”⁵³ One of the BLM plan’s goals was to manage the land “with emphasis on conserving desert resources that have special scenic . . . values.”⁵⁴ Toward that end, the plan established a “visual resources management program” that promised to evaluate proposed activities “to specify appropriate design or mitigation measures” using a “contrast rating process” that “serves as a guide for reducing visual impacts to acceptable levels.”⁵⁵ These scenic provisions, however, were just one part of the plan’s discussion of recreational opportunities, and the recreational element of the plan was just one of twelve elements that provided management guidance for the whole range of desert activities.⁵⁶ The plan’s overriding

⁴⁹ See 43 U.S.C. § 1712 (2006).

⁵⁰ See FRANK WHEAT, CALIFORNIA DESERT MIRACLE: THE FIGHT FOR DESERT PARKS AND WILDERNESS 15–16 (1999) (concluding that the “FLPMA would never have reached the President’s desk with provisions for a California Desert Plan had not each of [nine listed] events occurred”).

⁵¹ 43 U.S.C. § 1781(a)(2) (2006).

⁵² *Id.* § 1781(d).

⁵³ BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, THE CALIFORNIA DESERT: CONSERVATION AREA PLAN 82 (1980) [hereinafter 1980 BLM PLAN]; see also *id.* at 84 (noting that the desert “has a superb variety of scenic values” that “[t]he public considers . . . a significant resource”). The plan elaborated that

The California Desert attracts millions of visitors annually to its wide spectrum of recreational opportunities. Its diverse landscapes create a variety of physical and psychological settings which provide a “desert experience” of natural beauty, solitude, and freedom from the structure and regulations of the urban areas of southern California, where 85 percent of these visitors live.

Id. at 82.

⁵⁴ *Id.* at 82.

⁵⁵ *Id.* at 84–85.

⁵⁶ See *id.* at 21 (describing the plan elements to include cultural resources; Native American values; wildlife; vegetation; wild horses and burros; livestock grazing; motorized-vehicle access; geology, energy, and mineral resources; energy production and utility corridors; and land-tenure adjustments).

management principles included “[r]esponding to national priority needs for resource use and development, both today and in the future, including such paramount priorities as energy development and transmission, without compromising . . . magnificent desert scenery.”⁵⁷ The plan sought to accommodate the competing demands on the desert by classifying different areas for different uses, and it hoped to anticipate the desire for future changes by creating a procedure for the plan’s amendment.⁵⁸

The plan also recommended that the BLM create a “National Scenic Area,” and in December 1980 lame-duck Secretary of the Interior Cecil Andrus obliged by designating the East Mojave National Scenic Area, the first national scenic area in the United States.⁵⁹ Soon, though, the Reagan administration changed several aspects of the plan to reduce the promised environmental protections. Environmentalists also complained that the implementation of the BLM plan ignored their interests by acquiescing in the construction of several tall towers in the scenic area, agreeing to sell federal land to encourage development in Baker, and approving large open pit gold mines in “the Clark Mountain Area of Critical Environmental Concern.”⁶⁰

C. *The California Desert Protection Act*

The three perceptions of the Mojave Desert—a barren wasteland, a resource to be exploited, and a beautiful landscape—collided during the lengthy and contentious debate concerning the California Desert Protection Act (CDPA). As proposed by California’s Senator

⁵⁷ *Id.* at 6.

⁵⁸ See *California Desert Bill: Hearing on S. 2921 Before the S. Comm. on Energy & Natural Res.*, 111th Cong. 8 (2010) [hereinafter *California Desert Bill 2010 Hearing*] (statement of Robert V. Abbey, Director, Bureau of Land Management) (explaining that the plan “was vast in scale, ambitious in goals, and designed to accommodate many future uses”). The plan withstood a judicial challenge brought by recreational interests. See *Am. Motorcyclist Ass’n v. Watt*, 714 F.2d 962 (9th Cir. 1983).

⁵⁹ See WHEAT, *supra* note 50, at 54 (characterizing the scenic area as an afterthought and faulting the plan for neglecting to mention the proposal to create a Mojave National Park); see also NYSTROM, *supra* note 16, at 51–60 (describing the establishment of the national scenic area).

⁶⁰ NYSTROM, *supra* note 16, at 56–57; see also Annette Feldman, *The California Desert Protection Act*, 16 ENVIRONS ENVTL. L. & POL’Y J. 60, 63–64 (1992) (chronicling the environmental failures of the BLM’s implementation of the 1980 plan); HAMIN, *supra* note 4, at 37–38; WHEAT, *supra* note 50, at 100 (explaining why “conservation organizations large and small [concluded] that the Desert Plan under BLM management had failed”).

Cranston in 1986, the CPDA would have expanded environmental protections in the desert by establishing a new Mojave National Park between new Death Valley and Joshua Tree National Parks and by designating millions of acres of desert land as wilderness.⁶¹ Between 1986 and 1994, hundreds of witnesses testified at congressional hearings held both in Washington and in Mojave Desert cities such as Barstow and Las Vegas.⁶² The proposed Mojave National Park was especially controversial,⁶³ and the affected parties also disputed the appropriate management agency, the desert's biodiversity, the effects on property rights, and the economic future of the desert.⁶⁴ The primary narrative debated the conflicting perceptions of the Mojave Desert itself.

The supporters of the CDPA repeatedly emphasized the beauty of the desert. Senator Cranston emphasized the Mojave's beauty, as did many other witnesses.⁶⁵ "For many Americans," explained Secretary of the Interior, Bruce Babbitt,

⁶¹ See California Desert Protection Act of 1986, S. 2061, 99th Cong. (1986). The Mojave Desert encompasses most, but not all, of what the bill described as the "California desert."

⁶² See *California Desert Lands: Hearing on H.R. 518 and H.R. 880 Before the Subcomm. on Nat'l Parks, Forests & Pub. Lands of the H. Comm. on Natural Res.*, 103d Cong. 170 (1993) [hereinafter *1993 California Desert Lands House Hearing*] (statement of Debbie Sease, Legislative Director, Sierra Club) (explaining that nearly 1000 witnesses produced almost 10,000 pages of testimony about the proposed bill).

⁶³ H.R. REP. NO. 103-498 (1994) ("The proposed establishment of a National Park System unit in this portion of the Mojave Desert has been a particular focus of controversy in the Committee's consideration of California desert legislation."); see S. 21, 102d Cong. § 401(1) (1991) (stating that the proposed Mojave National Park rested on a congressional finding that "Death Valley and Joshua Tree National Parks, as established by this Act, protect unique and superlative desert resources, but do not embrace the particular ecosystems and transitional desert type found in the Mojave Desert area lying between them on public lands now afforded only impermanent administrative designation as a national scenic area"); *1993 Senate Hearing on CDPA, supra* note 42, at 94 (statement of Sen. Dianne Feinstein) (observing that "the proposed Mojave National Park has been called the centerpiece of the [CDPA]").

⁶⁴ See HAMILIN, *supra* note 4, at 76-78 (listing the seven major themes in the CDPA debate).

⁶⁵ See, e.g., *1992 Palm Desert Senate Hearing: Part 1, supra* note 44, at 194 (statement of Sen. Alan Cranston) (stating that "it is imperative to protect the beautiful unique California desert"); *California Desert Protection Act of 1989: Hearing on S. 11 Before the Subcomm. on Pub. Lands, Nat'l Parks & Forests of the S. Comm. on Energy & Natural Res.*, 101st Cong. 86 (1989) [hereinafter *1989 Senate Hearing*] (statement of Sen. Alan Cranston) ("The California Desert . . . contains land of immense beauty, rare and unique plants and animals, [and] opportunities for solitude."). Other witnesses also emphasized the beauty of the Mojave. See, e.g., *California Desert Protection Act and California Public Lands Wilderness Act: Hearing on H.R. 2929 and H.R. 3066 Before the Subcomm.*

their picture of the American West is the California desert. It is the mystique; the vast open space; the arid, impenetrable, and unforgiving landscape. It is stoic rock monuments, majestic sunsets, and rugged territory that makes heroes and villains, and where food and evil are offered up in black hats and white hats.⁶⁶

This view of the Mojave was offered in pointed contradiction to the initial perception of the desert as a wasteland.⁶⁷

The CDPA's supporters urged that the law was necessary because the desert's scenic beauty was threatened. Senator Cranston worried that the desert was "being scarred forever" by off-road vehicle users and development.⁶⁸ Secretary of the Interior Babbitt worried that "[t]he area is under siege and it is degrading."⁶⁹ In this view, the

on Gen. Oversight & Cal. Desert Lands of the H. Comm. on Interior & Insular Affairs, 102d Cong. 133 (1991) [hereinafter *1991 House Hearing*] (statement of Rep. Anthony C. Beilenson) ("[T]he California desert is one of the truly rich and scenic areas not only of our State but of our country."); *California Desert Protection Act: Hearing on H.R. 780 and H.R. 3460 Before the Subcomm. on Nat'l Parks & Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 101st Cong. 5 (1990) [hereinafter *1990 Beverly Hills Field Hearing*] (statement of Rep. Mel Levine) (describing the desert as "a place of extraordinary beauty that stands motionless in time").

⁶⁶ S. REP. NO. 103-165, at 45-46 (1993) (statement of Bruce Babbitt, Secretary of the Interior). Unfortunately, Babbitt got a bit carried away in his ode to the desert, suggesting that while all deserts are unique, "a mountain is a mountain." *1993 California Desert Lands House Hearing*, *supra* note 62, at 108 (statement of Bruce Babbitt, Secretary of the Interior).

⁶⁷ See, e.g., 140 CONG. REC. H3487 (daily ed. May 17, 1994) (statement of Rep. Lehman) ("The desert is not a wasteland . . ."); 140 CONG. REC. S4157 (daily ed. Apr. 12, 1994) (statement of Sen. Reid) ("People that think the desert is ugly because there is not a lot of wildlife or a lot of greenery do not appreciate nature.").

⁶⁸ RAE & MCKINNEY, *supra* note 1, at 80 (quoting Sen. Alan Cranston). Many other supporters of the CDPA invoked the image of the "scarring" of the desert. See *1992 Palm Desert Senate Hearing: Part I*, *supra* note 44, at 242 (statement of Scott Simons) (testifying that "[b]efore my eyes, I have watched that land grow more scarred and more abused" from recreational and mining activities); *id.* at 276 (statement of David M. Polcyn, Assistant Professor, Department of Biology, California State University) ("Man-made scars in the desert are not only visually disruptive, they are ecologically disruptive to the delicate, yet dynamic, balance of nature that exists—often tenuously—in the hot, arid regions unique to the American southwest . . ."); S. REP. NO. 103-165, at 46 (1993) (statement of Bruce Babbitt, Secretary of the Interior) ("Scars mark[] the mines that delivered fortunes to claim settlers who would not be turned away.").

⁶⁹ *1993 Senate Hearing on CDPA*, *supra* note 42, at 134 (statement of Bruce Babbitt, Secretary of the Interior); see also *1992 Palm Desert Senate Hearing: Part I*, *supra* note 44, at 366 (statement of Ellen Kindsvater) ("What will our children see? Their descendants see? . . . Will they see littered broken landscape, scarred, eroded land, or, will they see an untamed, unchanged desert of sweeping expanses with carpets of wildflowers?"); Feldman, *supra* note 60, at 61-62 (listing livestock grazing, off-road vehicles, mining, and military activities as threats to the Mojave).

CDPA was necessary to protect the desert from incompatible and harmful human activities.⁷⁰

The opponents of the CDPA alternately expressed all three views of the desert as a wasteland, a resource to be exploited, or a beautiful landscape. A few witnesses clung to the traditional view of the desert as a wasteland.⁷¹ A related claim insisted that a century of mining, grazing, railroads, and highways had destroyed whatever scenic value the Mojave once possessed.⁷² More frequently, the CDPA's opponents saw the Mojave as full of resources with great economic potential. As one Native American put it, "people, they look at the desert and what they see in it is money."⁷³ The opponents of the bill

⁷⁰ See *California Desert: Hearing on S. 21, H.R. 2929, and S. 2393 Before the Subcomm. on Pub. Lands, Nat'l Parks & Forests of the S. Comm. on Energy & Natural Res.*, 102d Cong., pt. 2, at 94 (1992) [hereinafter *1992 Palm Desert Senate Hearing: Part 2*] (statement of George T. Frampton, President, The Wilderness Society) (stating that the proposed legislation "ensures that the primitive nature of the area, its beauty, and its natural resources will not be diminished by unnecessary new roads or inappropriate hotel and restaurant development"); see also *1991 House Hearing, supra* note 65, at 129 (statement of Rep. Vic Fazio) ("We can no longer allow these lands to be left exposed to nonconforming developmental uses that are occurring, and will continue to occur over time, without a strong Federal management and control.").

⁷¹ See *1992 Palm Desert Senate Hearing: Part 1, supra* note 44, at 253 (statement of Dennis G. Casebier, Chairman, Friends of the Mojave Road) ("We oppose national park or monument status because . . . [the East Mojave] does not possess the required pristine scenic quality. . . . Everything is duplicated in existing parks or monuments. Heavy historic and ongoing impacts by man disqualify it."); *id.* at 260 ("The East Mojave is a beautiful place, but it has been heavily used by man for over a hundred years. The marks of man are everywhere. . . . The area is too cluttered with remains that cannot be removed and erased with any reasonable cost."); *1989 House Hearing: Part I, supra* note 46, at 105 ("The desert to most people is a barren, lifeless place, not useful for anything except cactus and rattlesnakes.").

⁷² See, e.g., *1993 Senate Hearing on CDPA, supra* note 42, at 101 (statement of Sen. Frank H. Murkowski) ("[T]he proposed land for the East Mojave National Park is marked by extensive systems of roads estimated at 2,500 miles, a transcontinental railroad stretching for 55 miles, several major high voltage transmissions lines, pipelines, as well as, 120 miles of telephone lines; not to mention the fact that a major interstate freeway cuts through a portion of the area."); 140 CONG. REC. H3489 (daily ed. May 17, 1994) (statement of Rep. Lewis) (arguing that the eastern Mojave "has almost none of the elements that justify designation as a national park" because "[i]t has endless thousands of miles of roadways," transmission lines, and a proposed radioactive waste site "just outside its borders").

⁷³ *1990 Beverly Hills Field Hearing, supra* note 65, at 143 (statement of Alvino Siva, a Moancohinia Indian). The same witness was even more colorful in describing his own view of the desert. See *id.* ("You know, a desert is like a woman. It is very beautiful, especially in the springtime. It caresses you with its beauty, but yet it can be harsh. It can kill you."); cf. WHEAT, *supra* note 50, at 145 (reporting that Senator Bumpers said he would be more disposed to support the bill if the actress Morgan Fairchild would "come

feared that it would prevent the development of those resources. “[It’s] the largest single bill to lock up Federal lands in the lower 48 States in the history of the United States of America,” protested Montana’s Representative Ron Marlenee.⁷⁴

Some of the opponents of the CDPA acknowledged the beauty of the Mojave Desert, but they objected to the law’s protections anyway. The CDPA’s proposal to establish a new national park prompted a debate about the relative scenic value of the eastern Mojave Desert. Senator Reid insisted that “[t]his is where a national park should be. I would compare the beauty of this area to Yellowstone, to Yosemite, to the Grand Canyon.”⁷⁵ A 1987 study, prepared by the western regional office of the National Park Service, reviewed the CDPA proposed by Senator Cranston the year before and found that “[t]he scenery of the east Mojave area is considered by many to be the finest in the California desert,” specifically praising the “highly scenic” New York Mountains and the “significant scenic . . . values” of Clark Mountain and identifying eight potential national natural landmarks.⁷⁶ One witness asserted that “[t]here simply is no question that the East Mojave is an incredible area which fully qualifies for National Park status,”⁷⁷ yet many parties, including the Park Service itself, questioned precisely that.⁷⁸ The BLM’s California state director doubted that the East Mojave was as spectacular as the Grand

back and lobby me”); *id.* at 245 (quoting Senator Bumpers saying that the hearings had been “a little more palatable for me” when “Morgan Fairchild sat in the front row”).

⁷⁴ *California Desert Protection Act: Hearing on H.R. 780 and H.R. 3460 Before the Subcomm. on Nat’l Parks & Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 101st Cong. pt. II, at 3 (1989) [hereinafter *1989 House Hearing: Part II*] (statement of Rep. Ron Marlenee); see also 140 CONG. REC. H3490 (daily ed. May 17, 1994) (statement of Rep. Hunter) (characterizing the CDPA as “the desert lockout bill”).

⁷⁵ 140 CONG. REC. 7117 (daily ed. Apr. 12, 1994) (statement of Sen. Reid).

⁷⁶ NAT’L PARK SERV., RESOURCE ASSESSMENT FOR FEATURES PROPOSED IN THE CALIFORNIA DESERT PROTECTION ACT 2–3 (1987), reprinted in *1989 House Hearing: Part I*, *supra* note 46, at 285, 291–92.

⁷⁷ *1992 Palm Desert Senate Hearing: Part 2*, *supra* note 70, at 94 (statement of George T. Frampton, President, The Wilderness Society); see also *1989 House Hearing: Part I*, *supra* note 46, at 191 (statement of Rep. Vic Fazio) (“We have the opportunity today to create one of the finest desert national parks in the United States, the Mojave National Park. This area is world renowned for its biological diversity and scenic beauty.”).

⁷⁸ See, e.g., *1989 Senate Hearing*, *supra* note 65, at 178–79 (statement of Cy Jamison, Director, Bureau of Land Management) (“The National Park Service concurred in the Scenic Area designation because the area did not have the qualities needed to designate it as a national park and also because it contained many uses incompatible with a national park, such as interstate pipelines, powerlines, and a railroad.”).

Canyon; however, an environmental advocate insisted that it was.⁷⁹ Another witness testified that “[t]he East Mojave is not national park quality [because] [i]t has no heart, no central unique unifying feature such as the Grand Canyon or Mount Rainier.”⁸⁰ On the other hand, a supporter of the CPDA admitted that the East Mojave Desert “is no Yosemite . . . [but] neither is Yosemite a Mojave National Park.”⁸¹ In the desert “beauty comes begrudgingly.”⁸² Representative Lehman offered the most perceptive statement, observing that “I guess when we talk about what should be wilderness or what should be park, we are talking about what is ultimately very subjective, and beauty is in the eye of the beholder.”⁸³

Even if the Mojave was sufficiently scenic, the CDPA was necessary only if that scenic beauty was threatened. Representative Jerry Lewis, whose district included a significant section of the Mojave, insisted that “the desert has done awfully well all by itself for a long, long time.”⁸⁴ Other opponents of the CDPA denied that the beauty of the Mojave was endangered by human development.⁸⁵ A

⁷⁹ Compare 1989 House Hearing: Part I, *supra* note 46, at 393 (statement of Ed Hastey, Bureau of Land Management) (“I don’t quite compare the East Mojave with the Grand Canyon.”), with *id.* at 506 (statement of Doug Scott, Conservation Director, The Sierra Club) (“I heard Mr. Hastey say it was no Grand Canyon. We think it is.”).

⁸⁰ 1990 Beverly Hills Field Hearing, *supra* note 65, at 194 (statement of Harold Linder); see also HAMIN, *supra* note 4, at 81 (quoting a local homeowner who supported national park status even though “[t]his park doesn’t have anything magnificent like Yellowstone or the Grand Canyon”).

⁸¹ California Desert Protection Act: Hearing on H.R. 780 and H.R. 3460 Before the Subcomm. on Nat’l Parks & Pub. Lands of the H. Comm. on Interior & Insular Affairs, 101st Cong., pt. III, at 407 [hereinafter 1989 House Hearing: Part III] (statement of Patrick Kelly).

⁸² *Id.*

⁸³ 1991 House Hearing, *supra* note 65, at 159 (statement of Rep. Richard H. Lehman). Elisabeth Hamin put it differently in her study of the Mojave Desert planning process when she described the area as both “beautiful enough to be in the national park system” and “plain desert.” HAMIN, *supra* note 4, at 4. For another example of a controversy regarding whether an area’s features are sufficiently scenic to qualify as a national park, see JOHN COPELAND NAGLE, LAW’S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 98–113 (2010) (describing the debate culminating in the creation of the Theodore Roosevelt National Park in western North Dakota).

⁸⁴ 140 CONG. REC. H3490 (daily ed. May 17, 1994) (statement of Rep. Lewis).

⁸⁵ See 1992 Palm Desert Senate Hearing: Part I, *supra* note 44, at 368 (statement of Marian Johns) (“I have had many opportunities to see the desert firsthand . . . I do not see people driving off-road, helter-skelter. I do not see cattle denuding the desert. I also do not see backpackers and hikers out there, because it just is not that much fun to walk in the hot sun for long hours and carry gallons of heavy water.”); *id.* at 370 (statement of Constance Pencall) (asserting that the desert “is not damaged” and instead “the desert is clean and beautiful”).

desert historian observed that human activities might even contribute to the scenic attractions of the Mojave Desert, explaining that the development of water sources by “long-term ranching has quite possibly been responsible for the creation of some of the Preserve’s most magnificent landscapes, the Joshua tree forests of Cima Dome and Lanfair Valley.”⁸⁶

Another objection to the CDPA turned the argument based on the Mojave’s scenic views on its head. What was the purpose of such scenic beauty, asked those opponents, if the law prevented people from gaining access to it? “We are cutting off America’s access to one of the most beautiful spots in the entire country,” complained Representative Lewis.⁸⁷ The BLM defended its management of the Mojave Desert by observing that it had located campgrounds “at spots of unusual scenic beauty . . . [while also providing] innumerable opportunities to ‘dry’ camp outside established campgrounds and in the midst of awe-inspiring scenery and silence.”⁸⁸ Denial of motorized access to scenic spots in the Mojave prompted much of the opposition to designated new wilderness areas, while some environmentalists worried that the Park Service would prescribe the “correct” viewpoints to enjoy scenery rather than allowing individuals to discover the desert’s beautiful spots for themselves.⁸⁹

The most common objection to the CDPA was that the desert’s scenic value needed to be balanced with the economic resources of

⁸⁶ NYSTROM, *supra* note 16, at 20.

⁸⁷ 140 CONG. REC. H10,609 (daily ed. May 17, 1994) (statement of Rep. Lewis); *see also* 1992 *Palm Desert Senate Hearing: Part 1*, *supra* note 44, at 372 (statement of Rick Curtis) (“I’m deeply offended by Senator Cranston’s continued efforts to deny access to California’s rich and beautiful deserts. Many of your colleagues probably look at the desert and think it is some God forsaken wasteland and [nobody] should give a hoot about if it were closed.”); 1991 *House Hearing*, *supra* note 65, at 131 (statement of Rep. Alfred A. McCandless) (“At stake are vast amounts of the most pristine and beautiful wildernesses to be found in California. Also at stake is the future of how these places will be seen and used by those who love the wilderness, not just from a distance, but up close.”); 1989 *House Hearing: Part III*, *supra* note 81, at 10 (statement of Marsha Turoci, Supervisor, San Bernardino County Board of Supervisors) (“A wilderness designation will restrict many beautiful parts of the territory from many who are here today, and for future generations. Those who cannot hike or backpack the many miles across this vast area should be given the opportunity to enjoy its unique beauty and resources.”); 1989 *Senate Hearing*, *supra* note 65, at 98 (statement of Sen. Pete Wilson) (“I believe that it is possible to preserve the beauty and the wonder of the desert ecosystem, but at the same time allow the people of California and the nation to see and to appreciate and enjoy that beauty.”).

⁸⁸ 1989 *House Hearing: Part III*, *supra* note 81, at 401–02 (statement of Francis M. Wheat).

⁸⁹ *See* BANHAM, *supra* note 40, at 198–99.

the desert. In 1992, California Senator John Seymour supported “protecting the beauty of the California desert,” and he agreed that “parts of the scenic area are incredibly beautiful,” but he rejected the claim that only a national park could accomplish that goal.⁹⁰ “No one wants to see [the desert’s] beauty destroyed,” agreed Seymour, but “we can protect the desert without locking out the people who live and work in it.”⁹¹ Seymour concluded “that park service management and resource use industry do not mix.”⁹²

The CDPA remained stalemated in Congress until 1992, when Bill Clinton defeated George H.W. Bush and California’s voters replaced their two Republican Senators with two Democratic Senators, Barbara Boxer and Dianne Feinstein. It still took two years and several compromises for the CDPA to become law.⁹³ Senator Feinstein received special credit for the bill’s passage,⁹⁴ but the bill would have failed until Senator Carol Moseley-Braun cast the decisive vote after she had been trapped at home by an uncooperative garage door opener.⁹⁵ The Senate approved the CDPA as its last act of the 103rd Congress, one month before the Republicans won control of Congress in the November 1994 election.

The approved CDPA recited the “unique scenic” values of California desert lands, and it agreed that those lands “are increasingly threatened by adverse pressures which would impair, dilute, and destroy their public and natural values.”⁹⁶ As enacted, the

⁹⁰ 1992 *Palm Desert Senate Hearing: Part 1*, *supra* note 44, at 3.

⁹¹ 1992 *Palm Desert Senate Hearing: Part 2*, *supra* note 70, at 8 (statement of Sen. John Seymour); *see also* 1991 *House Hearing*, *supra* note 65, at 137 (statement of Cy Jamison, Director, Bureau of Land Management) (“[The bill] fails to recognize the heritage aspects of the East Mojave. It will eliminate access by hunters, grazing, and limited, carefully controlled mining operations.”).

⁹² 1992 *Palm Desert Senate Hearing: Part 1*, *supra* note 44, at 4.

⁹³ The most notable compromises were the removal from the proposed Mojave National Preserve of the part of the Lanfair Valley that contained active mining and grazing and the removal of provisions that would have allowed the Catellus Corporation (the entity that owns the land the Santa Fe Railroad received from the government for building a transcontinental railroad through the area) to exchange its land for other public lands. *See* WHEAT, *supra* note 50, at 252–55. Both areas are now included in Senator Feinstein’s most recent proposal to enlarge the Mojave National Preserve and to establish new national monuments. *See infra* text accompanying notes 198–205.

⁹⁴ 140 CONG. REC. H3487–88 (daily ed. May 17, 1994) (statement of Rep. Lehman) (crediting Senator Feinstein with the imminent enactment of the CDPA).

⁹⁵ WHEAT, *supra* note 50, at 293 (reporting Senator Moseley-Braun’s misadventures).

⁹⁶ California Desert Protection Act of 1994, Pub. L. No. 103-433, § 2(a), 108 Stat. 4471, 4471 (codified at 16 U.S.C. 410aaa). The CDPA states that the desert possesses

CDPA transformed the Death Valley and Joshua Tree national monuments into national parks,⁹⁷ and the law designated sixty-nine parcels of land as wilderness.⁹⁸ But the modified version of the CDPA created a Mojave National *Preserve*,⁹⁹ rejecting national park status in what was regarded as one of the most contentious aspects of the bill. The new Mojave National Preserve contained more than 1.4 million acres of land on the eastern side of the Mojave.¹⁰⁰ Many existing activities were allowed to continue in the preserve, including hunting (thus distinguishing it from a national park), some mining, grazing by existing permit holders, military overflights, and utility corridors.¹⁰¹ The preserve contained 2000 parcels of private inholdings totaling nearly 220,000 acres, along with hundreds of mining claims, easements, rights-of-way, and water rights owned by private parties.¹⁰² Most of the balance of the land in the Mojave Desert outside the preserve remained under the jurisdiction of the BLM.

The coda to the CDPA occurred as a result of the 1994 election that produced a Republican congressional majority less than one month after the law's enactment. Representative Lewis continued his campaign for multiple-use management by proposing to give the Park Service only one dollar to manage the land and instead authorizing the BLM to manage it.¹⁰³ Lewis accused the Park Service of operating “in a single purpose fashion” even though the desert “is [a] unique area that for generations has a long and successful history of multiple use management.”¹⁰⁴ The appropriations rider was included in the legislation that President Clinton vetoed, leading to a shutdown

unique “scenic, historical, archaeological, environmental, ecological, wildlife, cultural, scientific, educational, and recreational values.” *Id.*

⁹⁷ *Id.* §§ 302, 402.

⁹⁸ *See id.* § 102.

⁹⁹ *See id.* § 502.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* §§ 508–11, 802; *see also* HAMILIN, *supra* note 4, at 2 (noting that “Congress required that most of the previous uses of the Mojave continue”).

¹⁰² NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, MOJAVE NATIONAL PRESERVE: GENERAL MANAGEMENT PLAN 28 (2002) [hereinafter MOJAVE NATIONAL PRESERVE MANAGEMENT PLAN].

¹⁰³ *See generally* NYSTROM, *supra* note 16, at 86–97.

¹⁰⁴ 141 CONG. REC. H14,811 (daily ed. Dec. 13, 1995) (statement of Rep. Lewis). By contrast, the supporters of the CDPA insisted that the appropriations rider “overturns the establishment of the new Mojave National Park Preserve.” 181 CONG. REC. H12,403 (daily ed. Nov. 15, 1995) (statement of Rep. Pelosi).

of the federal government.¹⁰⁵ The issue remained unresolved until April 1996, when Congress reluctantly gave the Park Service \$1.1 million to begin managing the new preserve.¹⁰⁶

The CDPA provided Congress's answer to the longstanding question of whether the Mojave Desert is scenic. Congress decided that some places in the Mojave Desert were especially scenic and gave the Park Service authority over them. That authority was qualified, though, by allowing all sorts of existing uses. The CDPA left the BLM in control of millions of other acres in the Mojave to manage according to the FLPMA's general multiple-use principles. Those BLM lands contained numerous scenic features as well, though not as spectacular as those included within the Mojave National Preserve. In sum, Congress addressed scenic areas by designating them as such and placing them under the control of a presumptively friendly agency. But while the CDPA identified and designated scenic areas, the law did not provide any targeted legal tools to preserve scenic values.

II

THE SIGHT OF SOLAR ENERGY IN THE MOJAVE DESERT

No large solar power facilities were planned for the Mojave Desert when Congress enacted the CDPA in 1994. The first solar projects on public lands were approved in the fall of 2010 for construction in the Mojave,¹⁰⁷ and there are more than one hundred more solar projects proposed for the Mojave and nearby areas.¹⁰⁸ It is easy to see why: the Obama administration has emphasized the need to develop new sources of renewable energy, and there is lots of sun and seemingly

¹⁰⁵ See Admin. of William J. Clinton, Message to the House of Representatives Returning Without Approval the Department of the Interior and Related Agencies Appropriations Act, 1996 (Dec. 18, 1995) (vetoing the Department of the Interior appropriations bill in part because it “undermines our designation of the Mojave National Preserve by cutting funding for the Preserve and shifting responsibility for its management from the National Park Service to the Bureau of Land Management”).

¹⁰⁶ See WHEAT, *supra* note 50, at 298–301.

¹⁰⁷ See Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 44 U.C. DAVIS L. REV. (forthcoming 2011) (manuscript at 27) (describing the approval of solar projects in 2010).

¹⁰⁸ *BLM Fact Sheet: Renewable Energy and the BLM*, BUREAU OF LAND MGMT. (Dec. 2010), http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/renewable_references.Par.95879.File.dat/2010%20Renewable%20Energy%20headed.pdf [hereinafter *BLM Fact Sheet*] (reporting that there were 147 solar applications pending on BLM land in December 2010).

little else in the desert. But once again, the law is struggling to adjudicate different perceptions of the Mojave Desert. On the one side, those who cherish the beauty of the Mojave landscape cannot believe that they are fighting against commercial exploitation of the desert after Congress enacted the CDPA less than two decades ago. Governor Arnold Schwarzenegger has voiced the contrary perception, complaining that “[i]f we cannot put solar power plants in the Mojave Desert, I don’t know where the hell we can put it.”¹⁰⁹ The solar proposals demand a decision about whether to add something to the desert landscapes, rather than simply revisiting the scenic values of those landscapes.

This Part examines the reaction to the proposals to build large solar energy facilities in the Mojave Desert, how the law treats the visual resources affected by those proposed facilities, and how to decide where such facilities should be located with the least impact on the desert’s scenery. It reveals that the law contains surprisingly few specific commands related to the preservation of scenic values. It also suggests that the experience with the CDPA supports a prospective effort to identify what places should be devoted to which uses—scenic value or solar energy. BLM’s administrative zoning effort may succeed in that effort, or Congress may need to intervene to insure that the often subjective values of scenic landscapes are properly protected.

A. Solar Energy

American reliance on oil, coal, and other fossil fuels shapes public policy and popular debate in ways ranging from the BP oil spill to the Iraq war. Solar energy is a form of renewable energy that promises to reduce the environmental and foreign policy consequences of dependence on fossil fuels.¹¹⁰ The federal Energy Policy Act of 2005 directs the Secretary of the Interior to approve 10,000 megawatts of electricity generated by renewable sources by 2015.¹¹¹ More

¹⁰⁹ Todd Woody, *It’s Green Against Green in Mojave Desert Solar Battle*, YALE ENV’T 360 (Feb. 1, 2010), <http://e360.yale.edu/content/print.msp?id=2236>.

¹¹⁰ See Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1223 (2009) (“The energy conservation and energy security rationales for solar rights go hand in hand and have been discussed for decades.”).

¹¹¹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 211, 119 Stat. 594, 660 (stating that the Secretary of the Interior should “seek to have approved non-hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts”).

recently, the American Recovery and Reinvestment Act—the stimulus law championed by the Obama administration—promised additional funding for solar energy projects that were authorized by the end of 2010.¹¹² California has adopted a state law goal of producing thirty-three percent of its energy from renewable sources by 2020 and eighty percent by 2050.¹¹³ These legislative efforts yielded a “rush to build huge solar energy facilities across the desert flatlands of Southern California.”¹¹⁴ The Mojave Desert is a logical place to achieve both the federal and state goals. It receives lots of sun, the land is generally undeveloped, and there are millions of acres of public land under the jurisdiction of the U.S. Department of the Interior. One recent report thus concluded that “the Mojave Desert has as much as or more potential for the siting of solar power plants than any other region in the country.”¹¹⁵

Two technologies may be employed by utilities to generate power from solar energy. Concentrating solar power (CSP) uses mirrors to concentrate the sun’s rays to heat fluids or solids, and the resulting heat is then used to produce power through steam turbines or other devices.¹¹⁶ Solar photovoltaic technologies use solar cells comprised of layers of semiconductor materials to convert sunlight directly into

¹¹² See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1102, 123 Stat. 115, 319.

¹¹³ Cal. Exec. Order No. S-14-08 (Nov. 17, 2008) (adopting the thirty-three percent goal by 2020 and the eighty percent goal by 2050); see also Util. Consumers’ Action Network v. Pub. Utils. Comm’n, 114 Cal. Rptr. 3d 475, 480–81 (2010) (describing California’s renewable energy goal). That will require the development of 100,000 acres and 350,000 acres of desert lands, respectively. *California Desert Bill 2010 Hearing*, supra note 58, at 49 (statement of V. John White, Director, Center for Energy Efficiency and Renewable Technologies).

¹¹⁴ See Louis Sahagun, *Judge Reinstates Attempt to Protect Flat-Tailed Horned Lizard*, L.A. TIMES, Nov. 7, 2009, <http://articles.latimes.com/2009/nov/07/local/me-lizard7>.

¹¹⁵ CAL. STATE AUDITOR, SOLAR ENERGY: AS THE COST OF THIS RESOURCE BECOMES MORE COMPETITIVE WITH OTHER RENEWABLE RESOURCES, APPLICATIONS TO CONSTRUCT NEW SOLAR POWER PLANTS SHOULD INCREASE 17 (2008); see also U.S. Dep’t of Energy & Bureau of Land Mgmt., *Public Scope Meeting: Solar Energy Development Programmatic Environmental Impact Statement (PEIS)*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, 49 (Feb. 22, 2011), http://solareis.anl.gov/documents/docs/transcripts/draft/Transcript_Sacramento_2-22-2011.pdf [hereinafter *Sacramento Public Scoping Meeting*] (statement of John White, Director, Center for Energy Efficiency and Renewable Technologies) (advising that “if you look on the global solar radiation map, there is no place in the world with the solar radiation in the west Mojave that’s within 100 miles or even 500 miles of a population center”).

¹¹⁶ *Concentrating Solar Power (CSP) Technologies*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, <http://solareis.anl.gov/guide/solar/csp/index.cfm> (last visited Mar. 6, 2011).

electricity.¹¹⁷ Most planned utility solar projects plan to employ CSP, including those in the Mojave.

The ability to capture the sun's energy also depends on the truism that the sun shines more in some places than in others. There are other constraints on building and operating facilities that capture large amounts of solar energy. Large amounts of solar collectors are needed to capture enough sunlight to generate large amounts of power, which in turn requires large amounts of land.¹¹⁸ Utility-size solar energy facilities also need a lot of water.¹¹⁹ And solar energy generates its own environmental concerns. Renewable energy projects have become the target of complaints of "energy sprawl," the term used to describe the increasing amount of land needed for energy development.¹²⁰ The land that is used for solar collectors may already be used by wildlife, including protected species.¹²¹ Native American historic sites occur throughout the land that is targeted for solar development.¹²² Solar projects have also produced concerns

¹¹⁷ *Solar Photovoltaic Technologies*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, <http://solareis.anl.gov/guide/solar/pv/index.cfm> (last visited Mar. 6, 2011).

¹¹⁸ Judith Lewis, *High Noon: As the Climate Warms, Environmentalists Square Off Over Big Solar's Claim to the Mojave Desert*, HIGH COUNTRY NEWS, May 4, 2009, <http://www.hcn.org/issues/41.8/high-noon> (noting that CSP needs "8.5 acres per megawatt, 17 times as much land as a nuclear plant needs to generate the same amount of electricity").

¹¹⁹ See generally Robert Glennon & Andrew M. Reeves, *Solar Energy's Cloudy Future*, 1 ARIZ. J. ENVTL. L. & POL'Y 91 (2010) (advising that the limited availability of water could constrain the development of solar energy in the southwest).

¹²⁰ See generally Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547 (2010); Robert I. McDonald et al., *Energy Sprawl or Energy Efficiency: Climate Policy Impacts on Natural Habitat for the United States of America*, PLOS ONE, Aug. 2009, at 1. In his Earth Day speech critiquing renewable energy sprawl, Senator Lamar Alexander noted that "[a] new solar thermal plant planned for California's Mojave Desert was to cover an area 3 miles by 3 miles square, until environmental objections stopped it." 156 CONG. REC. S2448 (daily ed. Apr. 20, 2010) (statement of Sen. Lamar Alexander); see also 156 CONG. REC. S4903 (daily ed. June 15, 2010) (statement of Sen. Lamar Alexander) ("[T]hink of the thousands of square miles of American landscape we're going to have to cover with windmills or solar collectors to get appreciable amounts of energy."); Lamar Alexander, *Energy 'Sprawl' and the Green Economy*, WALL ST. J., Sept. 17, 2009, at A21.

¹²¹ See, e.g., Louis Sahagun, *Environmental Concerns Delay Solar Projects in California Desert*, L.A. TIMES, Oct. 19, 2009, <http://articles.latimes.com/2009/oct/19/local/me-solar19> (describing how federal protection of rare plants and species could block a solar project planned near El Centro, California).

¹²² See *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, No. 10cv2241-LAB (CAB), 2010 U.S. Dist. LEXIS 132482, at *40–41, *49 (S.D. Cal. Dec. 15, 2010) (blocking the construction of a solar energy project because of failure to comply with the National Historic Preservation Act).

about the aesthetics of placing large, industrial facilities in previously open spaces where the view extends for many miles because of the flat terrain and the absence of vegetation.¹²³ With towers that could reach 800 feet in height, solar projects could overwhelm the views of existing landscapes.¹²⁴

B. Seeing Solar Farms in the Mojave Desert

The perception of solar farms in the Mojave Desert tracks the debate concerning the perception of the desert itself that preceded the enactment of the CDPA fewer than twenty years ago. For some, the desert is a wasteland. According to one desert activist, there are many “green-thinking people who think that the desert should be paved in solar” because “the desert is this annoying thing that you have to go through to get to Vegas.”¹²⁵ For others, the desert is a resource to be exploited, this time for the development of renewable energy. A third group sees the desert as a beautiful landscape to be conserved. Each perspective appears in the more recent debates about solar farms.¹²⁶

¹²³ See Robert Sullivan, *Visual Impact Assessment for Utility-Scale Solar Energy Development on BLM Lands*, BUREAU OF LAND MGMT. 3, http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION/_energy/presentations.Par.97460.File.dat/18-Sullivan.pdf (last visited Mar. 31, 2011) (noting that “[m]ost solar areas have very low relief, very little screening from vegetation”). The transmission lines needed to transfer electricity from remote solar projects to urban areas present a distinct aesthetic concern.

¹²⁴ See Glennon & Reeves, *supra* note 119, at 117 (describing a proposed project whose towers “could range anywhere from 400 to 800 feet in height”).

¹²⁵ Interview with Monica Argandoña, S. Cal. Conservation Dir., Cal. Wilderness Coal., in Victorville, Cal. (Aug. 2, 2010).

¹²⁶ See *Green Talk vs. Green Action: Sen. Feinstein’s Scuttling of Solar, Wind Projects a Baffling Mistake*, CLIMATE PROGRESS (Jan. 15, 2010), <http://climateprogress.org/2010/01/15/green-talk-vs-green-action-sen-feinstein%E2%80%99s-scuttling-of-solar-wind-projects-a-baffling-mistake/> [hereinafter *Green Talk v. Green Action*] (comment by Bob Wallace, Jan. 15, 2010, 11:19 AM) (“[S]ome parts of the desert are uniquely beautiful. Some parts could accurately be described as ‘wasteland.’”); *id.* (comment by Chad, Jan. 16, 2010, 11:36 PM) (“[H]ow could a solar plant in the middle of one of the most god-forsaken places on earth go wrong?”); *Mojave Solar 250 MW Plant Will Be 86 Miles from My Home*, GREEN TECH GAZETTE (Oct. 29, 2009), <http://www.greentechgazette.com/index.php/solar-energy/mojave-solar-250-mw-plant-will-be-86-miles-from-my-home/> (noting that some people call Barstow “the ‘armpit of California’ and what better place to put a large solar facility”); Neala Schwartzberg, *Mojave Desert: National Monument or Renewable Energy Site for Solar and Wind Power*, EXAMINER.COM (Dec. 24, 2009), <http://www.examiner.com/offbeat-places-in-national/mojave-desert-national-monument-or-renewable-energy-site-for-solar-and-wind-power> (“[F]or every gorgeous vista, there are countless miles of scrubby trees and brush”); Woody, *supra* note 109 (“For some, the desert is iconic and untouchable; for others it’s a vast resource to be tapped.”).

But solar farms present a new, more nuanced battle over the Mojave's aesthetics that divides the environmental community itself. In this context, some environmentalists see the same kind of shiny, metallic, commercial industrial structures that they fought so hard to keep out of the Mojave when they supported the CDPA. They fear that the desert will soon be transformed into "an industrialized renewable energy zone."¹²⁷ Solar facilities could be larger and more conspicuous than anything that was feared at the time of the CDPA's enactment. The fact that the industry is a green industry does not change the fact that industrial facilities will be located in the currently undisturbed desert.

The defenders of the Mojave's scenic landscapes have offered three alternatives to the sight of large solar energy facilities. First, they have proposed that solar facilities be located on less scenic land within the Mojave Desert itself. David Myers of The Wildlands Conservancy insists that it would be easy to identify "degraded land throughout the Mojave" that would be suitable for solar farms.¹²⁸ That approach recognizes that not all land is beautiful even in the eyes of desert supporters.

A second possibility is to locate solar projects in other suitable areas outside of the Mojave Desert. One answer is the San Joaquin Valley, a hundred or so miles north of the Mojave, where decades of intensive farming have eliminated many of the scenic and biological resources that environmentalists value in the Mojave.¹²⁹ Or solar projects could be located at abandoned mining sites, contaminated properties, or on Native American lands.¹³⁰ Alternatively, solar

¹²⁷ Lewis, *supra* note 118; see also David Myers, *Mother Road National Monument Proposal*, ROUTE 66 PULSE, July 7, 2009, http://www.route66pulse.com/pages/article_detailsM.asp?iss=20&artID=31&isd=Vol.%204%20-%20Issue%201&isdt=7/7/2009 (worrying that "the California Desert has become the focus of the most intense green energy development in the nation . . . that would alter vast landscapes in a manner America has never witnessed"); *Threatened Vistas*, MOJAVE DESERT BLOG (Apr. 27, 2010), <http://www.mojavedesertblog.com/2010/04/threatened-vistas.html> (citing the need to "preserve more Mojave treasures before they are bulldozed by improperly sited industrial-scale energy development").

¹²⁸ See Lewis, *supra* note 118.

¹²⁹ See Jason Dearen & Tracie Cone, *Accord Reached on San Joaquin Valley Solar Farm*, N. COUNTY TIMES, Mar. 21, 2010, http://www.nctimes.com/news/state-and-regional/article_cdd42108-a301-5252-8b9c-84f6022f06b4.html.

¹³⁰ See Glennon & Reeves, *supra* note 119, at 130–34 (proposing Native American lands for solar energy facilities); Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 ECOLOGY L.Q. 1041, 1075 (2010) (proposing abandoned mining sites and contaminated properties).

facilities could be placed outside of California altogether, though that would not help the state meet its statutory renewable energy goal.

The third option questions the premise of industrial-scale solar projects. It would look to urban areas where solar collectors can be placed on individual rooftops or in small community grids.¹³¹ Such individualized solar production would eliminate the need to transmit electricity from the desert to coastal urban areas, but it would also complicate the business model by which electric utilities work to remain profitable. The desert activists who supported the enactment of the CDPA view any of these alternatives as preferable to building large solar energy facilities within sight of the scenic areas of the Mojave Desert.

Other environmentalists are not troubled by—or at least they are accepting of—the presence of solar energy facilities in the Mojave Desert. The presence of a green industry makes a difference for them. From their perspective, the sight of solar farms is the sight of environmental progress.¹³² There are even some people who describe solar farms as beautiful.¹³³ They emphasize the need to develop new sources of renewable energy, especially as a means of avoiding the more serious environmental harms associated with climate change. A solar farm thus symbolizes environmental progress.

The environmental proponents of solar farms in the Mojave have criticized those who would block such solar farms. They insist that

¹³¹ See, e.g., 156 CONG. REC. S1611–12 (daily ed. Mar. 16, 2010) (statement of Sen. Mark Udall) (introducing legislation to encourage the development of neighborhood solar panels). But see Glennon & Reeves, *supra* note 119, at 125 (“[R]oof-top PV is not the cure-all solution to our energy needs. It will be very difficult for roof-top PV to reduce significantly our reliance on fossil-fuel based electricity”).

¹³² See 156 CONG. REC. E1248 (daily ed. June 30, 2010) (statement of Rep. John J. Hall) (“[S]olar panels . . . create awareness about renewable energy, sending a message that renewable energy is not some far away idealist dream.”); see also Energy Sec’y Samuel Bodman, Prepared Remarks at the Inauguration of Headquarters’ Solar Energy System (Sept. 9, 2008) (stating that the installation of a solar array “is a symbol of America’s commitment to using the best available new technologies to confront the energy challenges we face today and will face tomorrow”). But see 156 CONG. REC. S4900 (daily ed. June 15, 2010) (statement of Sen. Lamar Alexander) (arguing that “the better way to spend money is on research and development to reduce [the cost of solar energy], not to pretend that somehow solar panels have anything to do with cleaning up [oil spills] or reducing oil consumption”).

¹³³ Chuck Becker, *Climate Change Aesthetics: Not a Pretty Picture*, BECKER’S ENVTL. L. UPDATE (Dec. 28, 2009), <http://www.iowaenvironmentallawupdate.com/2009/12/articles/environmental-politics/climate-change-aesthetics-not-a-pretty-picture/> (noting that some people regard solar facilities and wind farms as “beautiful,” while acknowledging that “for others they are ugly”).

climate change will wreck the desert's biodiversity even as climate change creates more deserts, so solar energy is necessary to avoid such worse aesthetic changes to the landscape.¹³⁴ Or they acknowledge the aesthetic harm to the desert while insisting that those harms must be balanced against the greater good of preventing climate change. Most provocatively, one writer accused the proponents of the Mojave landscape of being "stealth agents of fossil fuel interests."¹³⁵

In short, the proponents of solar projects in the Mojave Desert echo all of the perceptions of the desert. The desert is a wasteland, so anything can be placed there. The desert is a resource to be exploited, so solar facilities should take advantage of the desert sun. The desert is beautiful, but the sight of solar facilities is an encouraging sign of environmental progress. As with the earlier debate over the CDPA, the defenders of the desert's landscape insist both that the desert is beautiful and that any noticeable human presence would destroy that beauty.

C. The Law Governing the Aesthetics of the Mojave Desert

It is not easy to license a solar energy facility in the Mojave Desert. Numerous federal, state, and local agencies have overlapping jurisdiction depending on the proposed location of a solar project, the technology it would employ, and its environmental impacts.¹³⁶ No large solar plants navigated this regulatory gauntlet from 1990¹³⁷ until BLM approved eight projects late in 2010.¹³⁸ It takes nearly two years for any kind of electric power plant to gain all of the necessary approvals in California.¹³⁹ The federal government is eager to speed up the permitting process for the development of renewable energy on

¹³⁴ See *Green Talk v. Green Action*, *supra* note 126 (asserting that "failing to take advantage of the massive solar resource in the California desert . . . will wipe out a large fraction of the species on this planet"); see also Lewis, *supra* note 118 (describing how solar energy can reduce the impact climate change will have on biodiversity); Schwartzberg, *supra* note 126 (arguing that land does not need to be protected from "being used to create clean, renewable energy").

¹³⁵ See *Green Talk v. Green Action*, *supra* note 126 (comment by Mike Roddy, Jan. 15, 2010, 11:46 AM); see also *id.* ("Most desert environmentalists appear to care little about action on climate change, and tend to be hysterical and poorly educated in general.").

¹³⁶ See CAL. STATE AUDITOR, *supra* note 115, at 21–24 (explaining which governmental agencies have jurisdiction over which projects).

¹³⁷ *Id.* at 2.

¹³⁸ See *BLM Fact Sheet*, *supra* note 108.

¹³⁹ See *id.*

public lands, too. This push for increased solar power strains the ability of governmental regulators to implement the law's environmental constraints, especially given that the relevance of scenic and aesthetic considerations varies depending on the law governing each agency, technology, and location. Not surprisingly, most of the recently approved solar projects have already been challenged in court.¹⁴⁰ The minor role that aesthetic concerns play in these claims demonstrates the gap between the desire for scenic landscapes and the legal tools to protect them.¹⁴¹

1. *The Park Service*

The Organic Act of 1916 established the Park Service and directed the agency to

conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the *scenery* and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.¹⁴²

Congress listed the conservation of scenery first, but that responsibility receives scant mention in the Park Service's most recent management guidelines.¹⁴³ Instead, the Park Service integrates scenic values into the management plans that it prepares for each individual national park, preserve, or other property.

The Park Service completed its management plan for the Mojave National Preserve in 2002.¹⁴⁴ One of the plan's management objectives is to "[p]erpetuate scenic and cultural landscapes. Landscapes should be free from activities and facilities that distract

¹⁴⁰ See Todd Woody, *Solar Energy Faces Tests on Greenness*, N.Y. TIMES, Feb. 23, 2011, <http://www.nytimes.com/2011/02/24/business/energy-environment/24solar.html> (describing the lawsuits).

¹⁴¹ See Joey Peters, *Will 'Dialogue' Rather than Lawsuits Determine the Fate of Large Desert Solar Projects?*, CLIMATEWIRE, Jan. 26, 2011, http://us.vocuspr.com/Publish/514296/Forward_514296_1383740.htm?Email=nlevin#43699031 (describing the lawsuits).

¹⁴² 16 U.S.C. § 1 (2006) (emphasis added).

¹⁴³ See NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES 2006: THE GUIDE TO MANAGING THE NATIONAL PARK SYSTEM (2006) [hereinafter 2006 NPS MANAGEMENT POLICIES], available at <http://www.nps.gov/policy/mp/policies.html>.

¹⁴⁴ See MOJAVE NATIONAL PRESERVE MANAGEMENT PLAN, *supra* note 102; see also NYSTROM, *supra* note 16, at 99–118 (describing the preparation of the management plan).

from the scenic beauty or the historic condition of the landscape.”¹⁴⁵ Several provisions of the plan seek to achieve that end. The plan promises to “prepare guidelines for the built environment to establish visual consistency and themes in facility development.”¹⁴⁶ The plan calls for a signage plan that ensures that signs are “unobtrusive, minimal, and blend with the natural environment.”¹⁴⁷ It also requires that “[a]ll above-ground communication equipment must not distract from the visual quality of the scenery.”¹⁴⁸ Finally, the plan acknowledges that “parks typically do not incorporate the entire ecosystem or scenic vista” of an area.¹⁴⁹ It thus speaks of the necessity of working with the communities immediately outside the preserve to ensure that their activities do not interfere with the preserve’s mission.¹⁵⁰

The Park Service also seeks to identify which evidence of human presence in the Mojave National Preserve is desirable and which evidence is not. The most popular sight is the Kelso Depot, an old Union Pacific station that the Park Service rescued from demolition and restored to serve as its visitor center. This time Congressman Lewis championed the Park Service, writing that “the beauty of [the East Mojave] is enhanced and enriched by such historical edifices and sites as the Kelso Train Depot.”¹⁵¹ But one aesthetic expert complained that the depot “seems as wildly out of place as any building could ever be.”¹⁵² Other cultural sights produce conflicting responses, too. The desert’s old abandoned mines are popular sights for visitors, though others insist that they scar the landscape.¹⁵³ The Park Service has been removing cattle even though some people prefer the sight of a working landscape or claim that the presence of cattle actually helps the natural landscape.¹⁵⁴ Roads are ubiquitous,

¹⁴⁵ MOJAVE NATIONAL PRESERVE MANAGEMENT PLAN, *supra* note 102, at 5.

¹⁴⁶ *Id.* at 32.

¹⁴⁷ *Id.* at 16.

¹⁴⁸ *Id.* at 32.

¹⁴⁹ *Id.* at 29.

¹⁵⁰ *See id.* at 29, 32.

¹⁵¹ WHEAT, *supra* note 50, at 129–30 (quoting a letter from Congressman Lewis to the Chairman of the Board of the Union Pacific Railroad) (alteration in original).

¹⁵² BANHAM, *supra* note 40, at 25.

¹⁵³ *See* NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, ENVIRONMENTAL ASSESSMENT: ABANDONED MINE LANDS SAFETY INSTALLATIONS, MULTIPLE MINE OPENINGS (2010).

¹⁵⁴ *See* DARLINGTON, *supra* note 13, at 114 (quoting a rancher who said that “[c]attle have run over this country for a hundred years, and it looks better now than it did then”);

but one rancher complains that they are ““an ugly eyesore, scarring up the country.””¹⁵⁵ A lonely phone booth was an iconic tourist attraction until the telephone company removed it ten years ago.¹⁵⁶ A cross that retired World War I veterans erected during the 1930s has elicited sharply contrasting perceptions and intervention by the Park Service, Congress, and the Supreme Court to adjudicate those perceptions.¹⁵⁷

Then there are those reminders of the human presence in the Mojave that no one wants to see. “The unofficial symbol of the desert is the abandoned automobile: overturned, covered with rust, riddled with holes made by bullets.”¹⁵⁸ Abandoned mining equipment is scattered throughout the desert, and in at least one instance it “may be a permanent monument to an egregiously sloppy instance of administration of federal law.”¹⁵⁹ Graffiti has become a significant problem with the arrival of gangs from Los Angeles.¹⁶⁰ The idea of the Mojave Desert as an unwanted wasteland persists in the frequent proposals to locate dumps—even nuclear waste sites—there, and in the illegal but persistent practice of dumping unwanted junk.¹⁶¹

There are lots of reminders of previous human activities in the Mojave National Preserve, but there are not any large solar energy facilities there. Nor would any of the many proposed solar facilities be located within the preserve. The CDPA anticipates that Southern California Edison could upgrade certain electrical transmission rights-

HAMIN, *supra* note 4, at 82 (quoting a former mayor of Barstow who believes that “the landscape is made more meaningful by having cattle visible on it” because they serve as a reminder “of our nation’s cowboy history”); RAE & MCKINNEY, *supra* note 1, at 70 (noting that visitors wonder ““What are [cows] doing out here?””).

¹⁵⁵ DARLINGTON, *supra* note 13, at 113.

¹⁵⁶ See NYSTROM, *supra* note 16, at 122–27; John M. Glionna, *Reaching Way Out*, L.A. TIMES, Sept. 18, 1999, at A1.

¹⁵⁷ See NYSTROM, *supra* note 16, at 127–30; see also Salazar v. Buono, 130 S. Ct. 1803 (2010) (showing Supreme Court intervention); John Copeland Nagle, *The Mojave Cross* (unpublished manuscript) (on file with author) (analyzing the contested understandings of the cross).

¹⁵⁸ DARLINGTON, *supra* note 13, at 35; see also *id.* at 35–36 (describing “the ancient, unwieldy station wagon” as “[t]he characteristic desert vehicle”).

¹⁵⁹ WHEAT, *supra* note 50, at 163.

¹⁶⁰ See NYSTROM, *supra* note 16, at 143; Interview with Dennis Schramm, Superintendent, Mojave Nat’l Preserve, in Barstow, Cal. (Aug. 2, 2010) (discussing the arrival of gangs from Los Angeles).

¹⁶¹ See DARLINGTON, *supra* note 13, at 117–49 (describing the Mojave Desert as “A Convenient Place for the Unwanted”).

of-way in the preserve.¹⁶² The greater problem facing the preserve, though, is that the Park Service lacks the authority to protect its scenic viewsheds from things done outside of the preserve's boundaries. The Park Service recognizes that activities occurring just outside many national parks and preserves can harm the scenic views from within the park or preserve.¹⁶³ The tools available for addressing those external threats rely upon voluntary collaboration, not regulatory authority.¹⁶⁴ And the effects of external activities on scenic values are especially acute. Dennis Schramm, the Superintendent of the Mojave National Preserve, explains that the preserve has struggled to prevent the aesthetic harms of solar facilities that are proposed just outside the preserve because "most things, there's a law behind them that helps you support your comments. The scenic quality, we've come up short. We've still tried to make a case out of it."¹⁶⁵

2. *The BLM*

The FLPMA directs the BLM to manage the land within its jurisdiction "in a manner that will protect the quality of . . . scenic . . . values."¹⁶⁶ The BLM seeks to fulfill that responsibility by employing a "visual resource management" (VRM) program that seeks to minimize the visual impacts of human activities while preserving scenic values.¹⁶⁷ The VRM categorizes land according to its scenic quality ("the visual appeal of a tract of land"), visual sensitivity

¹⁶² See California Desert Protection Act of 1994, Pub. L. No. 103-433, § 511(a)(2), 108 Stat. 4471, 4492 (codified at 16 U.S.C. § 410aaa-51).

¹⁶³ 2006 NPS MANAGEMENT POLICIES, *supra* note 143, at 30 (citing "the loss of scenic vistas" as demonstrating that "park units are increasingly subject to impacts from external sources").

¹⁶⁴ *Id.* ("To fulfill NPS protection responsibilities, strategies and actions beyond park boundaries may be employed. External threats may be addressed by using available tools—such as gateway community planning and partnership arrangements; NPS educational programs; and participation in the planning processes of federal agencies and tribal, state, and local governments.").

¹⁶⁵ Interview with Dennis Schramm, *supra* note 160.

¹⁶⁶ 43 U.S.C. § 1701(a)(8) (2006); *see also id.* § 1702(c) (including scenic values as a management resource); *id.* § 1711(a) (directing the Secretary of the Interior to include scenic values in an ongoing inventory of public land resources and values); *id.* § 1765(a) (providing that "[e]ach right-of-way shall contain . . . terms and conditions which will . . . minimize damage to scenic and esthetic values").

¹⁶⁷ *Visual Resource Management: What is VRM?*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., <http://www.blm.gov/nstc/VRM/whatis.html> (last visited Mar. 13, 2011).

(including the number and type of users), and relative visibility (as measured “from travel routes or observation points”).¹⁶⁸ The measurement of scenic quality is both the most important and the most subjective aspect of the VRM. The BLM determines scenic quality by employing an interdisciplinary team that considers the landform, vegetation, water color, adjacent scenery, scarcity, and cultural modifications.¹⁶⁹ The resulting calculation divides land into four visual resource classes ranging from Class I areas where the goal “is to preserve the existing character of the landscape” to Class IV areas “which require major modifications of the existing character of the landscape.”¹⁷⁰ The VRM then uses a “contrast rating system” that helps agency personnel “analyze potential visual impact of proposed projects and activities.”¹⁷¹ The contrast rating system uses visual simulations to evaluate how a proposed project would appear from selected key observation points. The VRM identifies numerous design techniques that could reduce the visual impacts of a project. “Choosing the proper location for a proposed project,” the BLM explains, “is one of the easiest design techniques to understand and apply, and one that will normally yield the most dramatic results.”¹⁷² The BLM cautions, though, that its visual resource management should not “be used as a method to preclude all other resource development.”¹⁷³

3. *California State and Local Law*

California’s scenic protections derive from the California Environmental Quality Act (CEQA), which announces a state policy

¹⁶⁸ *Manual H-8410-1-Visual Resource Inventory*, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., §§ II–IV, <http://www.blm.gov/nstc/VRM/8410.html> (last visited Mar. 13, 2011).

¹⁶⁹ *Id.* § II.

¹⁷⁰ *Id.* § V(B). An early study concluded that the VRM had succeeded in identifying the landscapes that professionals and the public alike regard as scenic. See Patrick A. Miller, *A Comparative Study of the BLM Scenic Quality Rating Procedure and Landscape Preference Dimensions*, 3 *LANDSCAPE J.* 123 (1984).

¹⁷¹ *Manual 8431-Visual Resource Contrast Rating*, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., § 1(A), <http://www.blm.gov/nstc/VRM/8431.html> (last visited Mar. 13, 2011).

¹⁷² *Visual Resource Management: Design Techniques*, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., <http://www.blm.gov/nstc/VRM/siting.html> (last visited Mar. 13, 2011).

¹⁷³ *Visual Resource Management (VRM) Policy Restatement: Information Bulletin No. 98-135*, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT. (May 22, 1998), <http://www.blm.gov/nstc/VRM/98135.html>.

to “[t]ake all action necessary to provide the people of this state with . . . enjoyment of aesthetic, natural, scenic, and historic environmental qualities.”¹⁷⁴ Like its federal counterpart NEPA, CEQA requires a study of any proposed state projects that will have a “significant effect on the environment,” including effects on “aesthetic significance.”¹⁷⁵ But unlike NEPA, CEQA contains a substantive provision that prohibits the state from pursuing a project that causes environmental harms that could be avoided.¹⁷⁶ Each state agency is responsible for complying with CEQA, which means that the California Energy Commission must consider scenic values when it reviews proposals for large solar energy facilities.

Local laws address aesthetics as well. San Bernardino County is the largest county in the continental United States, stretching from suburban Los Angeles to the Nevada border and encompassing much of the Mojave Desert. The county’s general plan states a vision of a “[c]ontinued ‘rural’ character in many areas” and “[c]onservation/preservation of the natural environment which defines

¹⁷⁴ CAL. PUB. RES. CODE § 21001(b) (West 2010).

¹⁷⁵ CAL. CODE REGS. tit. 14, § 15382 (2011) (defining “significant effect on the environment” for purposes of CEQA). An appendix to the CEQA regulations contains an environmental checklist form that asks whether a project will “[h]ave a significant adverse effect on a scenic vista,” “[s]ubstantially damage scenic resources,” “[s]ubstantially degrade the existing visual character or quality of the site and its surroundings,” or “[c]reate a new source of substantial light or glare.” *Appendix G: Environmental Checklist Form*, CAL. ENVTL. RESOURCES EVALUATION SYS., http://ceres.ca.gov/ceqa/guidelines/pdf/appendix_g-3.pdf (last visited Mar. 16, 2011).

¹⁷⁶ See CAL. PUB. RES. CODE § 21002 (West 2010). The California Supreme Court recently explained CEQA as follows:

CEQA generally provides that, before a public agency carries out or approves any discretionary project—i.e., any activity that requires the exercise of agency judgment or deliberation and foreseeably may cause physical damage to the environment—the agency must first assess the project’s potential environmental effects. If, after initial study, the agency determines that the project will have no significant environmental effect, the agency may file a “negative declaration” reciting this determination, and further compliance with CEQA is then excused. Otherwise, the agency must prepare or obtain, and consider, an EIR that assesses the potential environmental impacts of the project as proposed, sets forth any feasible, less harmful alternatives to the project, and identifies any feasible mitigation measures. The agency may not thereafter approve the project as proposed if there are feasible alternatives or mitigation measures that would avoid or substantially lessen the adverse environmental effects.

Stockton Citizens for Sensible Planning v. City of Stockton, 227 P.3d 416, 425 (Cal. 2010) (citations omitted).

and enhances our quality of life.”¹⁷⁷ In particular, the county’s plan observes:

San Bernardino County contains vast undeveloped tracts of land that offer significant scenic vistas. These locations are in danger of deteriorating under growing pressure from urban development and increased recreational activities occurring across the County. Actions have been taken by federal, state, county, and local jurisdictions to ensure that these resources are protected to preserve their aesthetic value.¹⁷⁸

The plan contains an open-space element that is designed to preserve the county’s “vast expanses of scenic vistas.”¹⁷⁹ The plan’s specific goal for the desert parts of the county is to “[r]equire future land development practices to be compatible with the existing topography and scenic vistas.”¹⁸⁰

D. Deciding Where to Locate Solar Facilities in the Mojave Desert

There are three ways in which solar can be located without compromising the beauty of the Mojave’s landscape: (1) federal agencies could decide prospectively where facilities may and may not be built; (2) Congress could prescribe the places to build solar projects; or (3) the law could react to the applications of individual solar producers.

1. BLM’s Administrative Zoning Approach

The prospective effort is seen in the BLM’s programmatic environmental impact statement (PEIS), which hopes to develop a map indicating the desirable and undesirable locations for solar energy facilities. The BLM is working to develop a map that would specify where solar facilities might be located on the public lands that it manages. Toward that end, in December 2010 the agency released a draft PEIS that seeks to identify and analyze the environmental issues that are common to the placement of solar facilities on BLM

¹⁷⁷ *County of San Bernardino: General Plan*, COUNTY OF SAN BERNARDINO, http://www.sbcounty.gov/sbcountygeneralplan/media/SB_County_GP_Vision.pdf (last visited Mar. 13, 2011).

¹⁷⁸ COUNTY OF SAN BERNARDINO, 2007 GENERAL PLAN, at III-6 (2007).

¹⁷⁹ *Id.* at VI-1.

¹⁸⁰ *Id.* at V-43; *see also id.* at II-6 (employing resource conservation zoning for “[a]reas with high scenic values”).

lands.¹⁸¹ The goal of the PEIS is “to respond in a more efficient and effective manner to the high interest in siting utility-scale solar energy development on public lands and to ensure consistent application of measures to avoid, minimize, or mitigate the adverse impacts of such development.”¹⁸² The draft PEIS “consists of about 11,000 pages, 16 chapters and 14 appendices.”¹⁸³

BLM has outlined two general approaches to zoning solar energy facilities on the land that it manages. Its preferred approach, dubbed “screening for success,” would seek to guide developers to those areas where solar projects are most suitable.¹⁸⁴ The alternative approach, favored by many environmental organizations, “would authorize such utility-scale solar energy development only in the” twenty-four solar energy zones (SEZs) that BLM establishes.¹⁸⁵ Thus while both alternatives employ a zoning approach, BLM’s preferred

¹⁸¹ See DRAFT SOLAR PEIS, *supra* note 7; see also *Why the Solar Energy Development Programmatic EIS Is Needed*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, <http://solareis.anl.gov/eis/why/index.cfm> (last visited Mar. 13, 2011) (“[The PEIS is] evaluating how environmentally responsible utility-scale solar energy projects can be facilitated through developing and implementing agency-specific programs that would establish environmental policies and mitigation strategies for solar energy development.”). The Department of Energy is working with the BLM on the PEIS. For a map showing the Mojave Desert’s central place as a leading location for solar production on BLM lands, see *Concentrating Collector Solar Resource on All BLM Administered Land*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, <http://solareis.anl.gov/documents/maps/sol010.pdf> (last visited Mar. 13, 2011).

¹⁸² DRAFT SOLAR PEIS, *supra* note 7, at ES-2.

¹⁸³ *Id.* at RG-1.

¹⁸⁴ *Id.* at ES-6. BLM elaborated:

[A]ll BLM-administered lands are not appropriate for solar energy development. Under the solar energy development program alternative, certain categories of land that are known or believed to be unsuitable for utility-scale solar development would be excluded from development to guide solar energy developers to areas where there are fewer resource conflicts and potential controversy. . . . Under this alternative, the lands that would be excluded from solar energy development include BLM-administered lands currently off-limits to solar energy development, including lands prohibited by law, regulation, Presidential proclamation, or Executive Order . . . along with lands that (1) have slopes greater than or equal to 5%, (2) have solar insolation levels (i.e., the amount of sunlight that strikes the earth’s surface) below 6.5 kWh/m²/day, and (3) have known resources, resource uses, or special designations identified in local land use plans that are incompatible with solar energy development On the basis of these exclusions, approximately 22 million acres (87,336 km²) of BLM-administered lands would be available for ROW application under this alternative.

Id. at ES-6 to ES-7.

¹⁸⁵ *Id.* at ES-10 to ES-11.

approach provides incentives to adhere to the zoning, while the alternative makes the zoning mandatory. During the public comment period on the draft PEIS, several environmental organizations expressed their support for the mandatory zoning approach because it would “ensure that solar projects are built faster, cheaper, and in a manner that’s better for the environment, developers and consumers.”¹⁸⁶

Only one of the twenty-two proposed SEZs is within the Mojave Desert. The proposed Pisgah SEZ would be located in the western Mojave about twenty-five miles east of Barstow and would be bisected by the National Trails Highway (also known as the historic U.S. Route 66).¹⁸⁷ The draft PEIS observes that “[t]he mountain slopes and peaks around the SEZ are generally visually pristine,” and the Mojave National Preserve’s Kelso Dunes, a wilderness area, and a wilderness study area are among the “other important scenic resources within the 25-mi . . . viewshed of the SEZ.”¹⁸⁸ An NRDC representative thus opposes the inclusion of the Pisgah SEZ.¹⁸⁹ By contrast, the public comments on the EIS recommended the inclusion of other SEZs in the Mojave.¹⁹⁰

Visual impacts are one of four general environmental issues that the PEIS has highlighted. According to the BLM, “being visible is not necessarily the same as being intrusive. Aesthetic issues are by their nature highly subjective. Proper siting decisions can help to

¹⁸⁶ U.S. Dep’t of Energy & Bureau of Land Mgmt., *Solar Energy Development Programmatic Environmental Impact Statement (PEIS): Public Scoping Meeting*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, 8 (Feb. 23, 2011), http://solareis.anl.gov/documents/docs/transcripts/draft/Transcript_Barstow_2-23-2011.pdf [hereinafter *Barstow Public Scoping Meeting*] (statement of Laura Crane, Director, The Nature Conservancy’s Renewable Energy and Desert Conservation Program in California); see also *id.* at 9 (statement of Linda Escalante, Natural Resources Defense Council) (asserting that “[i]dentifying appropriate zones for development is a much better way to approach solar energy than on a project-by-project basis”).

¹⁸⁷ See DRAFT SOLAR PEIS, *supra* note 7, at 9.3-1.

¹⁸⁸ *Id.* at 9.3-196.

¹⁸⁹ See *Barstow Public Scoping Meeting*, *supra* note 186, at 11 (statement of Linda Escalante, Natural Resources Defense Council).

¹⁹⁰ See *id.* at 11 (statement of Linda Escalante, Natural Resources Defense Council) (recommending “that BLM consider lands identified by the conservation community in the West Mojave and Chocolate Mountain areas for potential solar development”); *Sacramento Public Scoping Meeting*, *supra* note 115, at 49 (statement of John White, Director, Center for Energy Efficiency and Renewable Technologies) (asserting that “adding a zone in the west Mojave . . . is again agreed to by a broad cross section of people”).

avoid aesthetic impacts to the landscape.”¹⁹¹ Some of the people who have participated in the public comments on the PEIS are not so sure. One individual contended that “[d]esert tourism depends entirely on stark beauty, wildlife not found elsewhere, and wide open vistas. All of these will be marred if industrial-scale solar projects are built on pristine desert land.”¹⁹² Other commenters, though, sought to reconcile the Mojave’s beauty with the development of solar facilities. The National Parks Conservation Association (NPCA), for example, expressed its support for renewable energy production but cautioned that it “should not take place in such a way that harms our national park treasures.”¹⁹³ The NPCA emphasized that projects should not be sited in places that would compromise the areas preserved by the CDPA, and it identified several proposed sites on BLM land that would produce that undesirable result.¹⁹⁴ By contrast, one solar developer faulted the BLM for precluding development in “the area of highest solar insolation in California, the West Mojave Desert.”¹⁹⁵ And one member of Congress has accused the BLM of “block[ing] the construction of solar power facilities in America’s deserts.”¹⁹⁶

¹⁹¹ *Solar Energy Development Environmental Considerations*, SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CENTER, <http://solareis.anl.gov/guide/environment/index.cfm> (last visited Mar. 13, 2011).

¹⁹² SOLAR ENERGY DEVELOPMENT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT PUBLIC COMMENTS ON SOLAR ENERGY STUDY AREAS (2009) [hereinafter PEIS COMMENTS], available at http://solareis.anl.gov/documents/docs/SolarPEIS_SESAScoping_Comments_092509.pdf (comment by Austin Puglisi, ID SolarM60007, July 4, 2009, 18:53 PM); see also *id.* (comment by Austin Puglisi, ID SolarM60009, July 4, 2009, 19:27 PM) (“Destroying the Mojave Desert in order to save it, without giving a voice to those who know it best, is sheer folly.”); *id.* (comment by Steve M. Parker, ID SolarM60028, July 12, 2009, 10:35 AM) (“Keep these proposed power plants at least 100 miles away from anyone’s backyard.”); *id.* (comment by Helena Bongartz, ID SolarM60205, Sept. 13, 2009, 22:37 PM) (insisting that alternative means of energy production should be studied “[b]efore committing a beautiful and unique American landscape to the proposed energy development that will destroy it’s character forever”); see also *Barstow Public Scoping Meeting*, *supra* note 186, at 20 (statement of Carol Wiley, a self-described “43-year resident of the Mojave Desert”) (arguing that “[i]t would be tragic to see huge pieces of desert ruined for projects that were not viable, leaving ghost-town-like blight across the desert”).

¹⁹³ *Id.* (letter from Mike Cipra, Cal. Desert Program Manager, Nat’l Parks Conservation Ass’n, ID SolarM60219, Sept. 14, 2009).

¹⁹⁴ See *id.*

¹⁹⁵ *Id.* (letter from Rachel McMahon, Dir., Gov’t Affairs–Project Dev., Solar Millennium LLC, ID SolarM60227, Sept. 14, 2009).

¹⁹⁶ 156 CONG. REC. H1156 (daily ed. Mar. 4, 2010) (statement of Rep. Rohrabacher). According to Representative Rohrabacher

In addition to BLM's PEIS, California Governor Arnold Schwarzenegger directed the state's "Renewable Energy Action Team" to "identify and publish top priority areas" for the development of solar power and other types of renewable energy.¹⁹⁷

In both instances, the goal is to produce a map that identifies the appropriate locations for solar energy facilities.

2. *Congressional Specification of the Sites for Solar Facilities*

Senator Dianne Feinstein has championed a second prospective approach to locating solar facilities in the Mojave Desert. Feinstein was key to the enactment of the CDPA in 1994, and she has continued to take a special interest in the desert.¹⁹⁸ In December 2009, Feinstein introduced the proposed California Desert Protection Act of 2010,¹⁹⁹ which she reintroduced in January 2011 as the California Desert Protection Act of 2011.²⁰⁰ The bill would establish three new national monuments, including a Mojave Trails National Monument that encompasses the area immediately south of the Mojave National Preserve running along historic Route 66.²⁰¹ That monument would, among other purposes, preserve the area's scenic values and "secure

[t]his official obstructionism is aimed at protecting the habitat of some desert lizard or insect. . . . This has been the policy of our government, a policy pushed forward by radical environmentalists, the same ones who are probably influencing the Bureau of Land Management not even to let us have solar power plants in the desert because they care so much about lizards and insects.

Id.

¹⁹⁷ Cal. Exec. Order No. S-14-08 (Nov. 17, 2008).

¹⁹⁸ See 155 CONG. REC. S13,700 (daily ed. Dec. 21, 2009) (statement of Sen. Dianne Feinstein) (noting that the CDPA "remains one of [Feinstein's] proudest accomplishments since joining" the Senate). Feinstein has been particularly concerned about the possibility of solar development on lands in the Mojave that a private environmental organization purchased and then donated to the federal government for conservation purposes. See 157 CONG. REC. S206 (daily ed. Jan. 25, 2011) (statement of Sen. Dianne Feinstein).

¹⁹⁹ California Desert Protection Act of 2010, S. 2921, 111th Cong. (2010).

²⁰⁰ See California Desert Protection Act of 2011, S. 138, 112th Cong. (2011). The 2011 version omitted the more general support for renewable energy that was contained in the 2010 bill because Senator Feinstein plans to prepare "separate legislation to further expedite the development of wind and solar energy in California and the West." 157 CONG. REC. S207 (daily ed. Jan. 25, 2011) (statement of Sen. Dianne Feinstein). According to Senator Feinstein's former staffer, the 2010 bill responded to the omission of land that was left out of the CDPA in 1994 because there were plans to expand Fort Irwin into those areas. Once the Army decided not to expand Fort Irwin, Senator Feinstein reviewed those lands to see if they should be included in a new CDPA. Interview with Monica Argandoña, *supra* note 125.

²⁰¹ S. 2921, § 101(a).

the opportunity for present and future generations to experience and enjoy the magnificent vistas.”²⁰² Another section of the bill would add 29,221 acres of land where mining has recently ceased to the eastern side of the Mojave National Preserve.²⁰³ The bill would also designate 344,000 acres as wilderness areas.²⁰⁴ The shift of the land from the general public domain to the status of a national preserve, national monument, or wilderness area would prevent solar farms from being located there, which was one of Senator Feinstein’s primary goals in promoting the legislation. Senator Feinstein also explained that she “will push BLM to create a development zone in the West Mojave” in addition to the SEZs that BLM already proposed in its draft PEIS.²⁰⁵

Most affected parties expressed general support for the proposed bill during a hearing in May 2010.²⁰⁶ Numerous interests praised Senator Feinstein for involving them in discussions preceding the introduction of the bill.²⁰⁷ Feinstein emphasized that “the development of these new cleaner energy sources is vital to addressing climate change, yet we must be careful about selecting where these facilities are located.”²⁰⁸ But the bill elicited two contrasting objections to Congress prospectively prescribing the location of solar facilities in the Mojave Desert. The Natural Resources Defense Council (NRDC) testified that Congress should

²⁰² *Id.* (proposing to add § 1302(b)(2) to the CDPA); see also Scott Kirkwood, *California Desert Protection Act: The Sequel*, NAT’L PARKS MAG., Spring 2010, available at <http://www.npca.org/magazine/2010/spring/california-desert-protection.html> (describing the closure of the mine and describing the area to be added to the preserve as a “beautiful place”).

²⁰³ See S. 138, § 2(a) (proposing to add § 1702(a)(1) to the CDPA).

²⁰⁴ Kirkwood, *supra* note 202.

²⁰⁵ See 157 CONG. REC. S207 (daily ed. Jan. 25, 2011) (statement of Sen. Dianne Feinstein).

²⁰⁶ See *California Desert Bill 2010 Hearing*, *supra* note 58.

²⁰⁷ See *id.* at 37 (statement of Pedro Pizarro, Executive Vice President, Power Operations, Southern California Edison) (emphasizing “the extraordinary steps that Senator Feinstein has taken to build consensus for this legislation”); *id.* at 41 (statement of David P. Hubbard) (explaining on behalf of OHV users that “[r]ather than shove the bill down our throats, Senator Feinstein’s staff asked for our input early and often”). Representatives of renewable energy producers remarked that they were the only interested parties who were not at the table when the California desert legislation was considered by Congress during the 1990s. See *id.* at 47 (statement of V. John White, Director, Center for Energy Efficiency and Renewable Technologies).

²⁰⁸ Schwartzberg, *supra* note 126 (quoting Sen. Dianne Feinstein).

not legislate the location of solar projects.²⁰⁹ Instead, the NRDC would leave such decisions to the Secretary of the Interior.²¹⁰ “The Interior Department, the BLM and indeed the nation,” proclaimed the NRDC, “would benefit greatly from the ability to learn from and adapt to experience gained with the permitting and operation of these new projects.”²¹¹ The proponents of solar energy objected to the congressional role in siting facilities as well. Alaska Senator Lisa Murkowski criticized the bill as succumbing to not-in-my-back-yard (NIMBY) protests against solar farms.²¹² Outside the hearing, other writers echoed Murkowski’s complaint and accused Senator Feinstein of perpetrating the image of environmentalists as obstructionist and hypocritical. As one blogger complained, “[i]f aesthetics begin to control the debate on locating renewable energy facilities, the winners will be the climate change objectors. They’ll sit back and watch the environmental advocates shoot at each other.”²¹³ One supporter responded that “solar energy development could quickly overrun attempts by local, state and Federal agencies to balance industrial needs with conservation of wilderness and recreation space.”²¹⁴

3. *The Reactive Approach to Solar Energy Proposals*

The third approach to determining the location of solar facilities is to react to proposals submitted by solar producers. There are hundreds of such proposals pending in the Mojave Desert; three are

²⁰⁹ See *California Desert Bill 2010 Hearing*, *supra* note 58, at 53 (statement of Johanna Wald, Senior Attorney, NRDC).

²¹⁰ *Id.*

²¹¹ *Id.* Similarly, a footnote to its testimony described the NRDC as “very troubled” by legislative designation of areas for OHV recreation, again asserting that “land use decisions such as these are better left to land management agencies to make through their established planning processes.” *Id.* at 54 n.2.

²¹² Patrick Reis, *Senators Spar over Energy Implications of Desert Wilderness Bill*, ENV’T & ENERGY DAILY, May 21, 2010, <http://www.eenews.net/eed/2010/05/21> (quoting Sen. Murkowski’s assertion that “[i]nvestors are going to get gun-shy about investing in future projects in this country if every time a project is proposed, Congress, or the administration, or the courts, succumb to the not-in-my-back-yard protests”).

²¹³ Becker, *supra* note 133; see also *id.* (quoting Robert F. Kennedy Jr. as saying “[t]his is arguably the best solar land in the world, and Senator Feinstein shouldn’t be allowed to take this land off the table without a proper and scientific environmental review”); *Green Talk v. Green Action*, *supra* note 126 (worrying that Senator Feinstein had established “a disastrous precedent” that gives “de facto veto power over solar and wind power” to local representatives (quoting SAN DIEGO UNION-TRIB.)).

²¹⁴ Shaun G., *What Next for the California Desert Protection Act?*, MOJAVE DESERT BLOG (June 10, 2010, 5:46 PM), <http://www.mojavedesertblog.com/2010/06/what-next-for-california-desert.html>.

especially instructive. BrightSource plans to build a solar farm that would generate 370 megawatts of electricity on nearly 3500 acres in the Ivanpah Dry Lake just east of the border between California and Nevada and about forty-five miles southwest of Las Vegas.²¹⁵ The site “is a solar engineer’s dream” because it receives 300 days of sun shining through clear, dry air at a 3000-foot elevation with a 115-kilovolt transmission line nearby.²¹⁶ The area’s aesthetics have produced conflicting reactions. One writer who visited the Ivanpah site reported:

The surrounding desert landscape would not inspire Edward Abbey. Interstate 15, which connects Los Angeles to Las Vegas, slices through the area. A few miles from the BrightSource site, Buffalo Bill’s and Whiskey Pete’s—two hulking casinos connected by a monorail—rise from the desert like an apparition from a Mad Max movie. Adjacent to the solar site sits a 22-acre golf course that consumes a half-billion gallons of water a year. To the west are two mines and a pipeline that carries mining waste to an evaporation pond.²¹⁷

Another visitor agreed that “in the shadow of Primm, Nev., an unmitigated monstrosity of casinos, fast-food chains and amusement park rides, a few thousand acres of mirrors might actually look like a work of art.”²¹⁸ But that visitor also explained that if one approaches the Ivanpah Valley from the west by driving through the Mojave National Preserve, one sees a much different sight featuring vast open spaces, a dense Joshua Tree forest, and the remnants of the original Route 66 until one reaches “a swath of land stuck between segments of the Mojave Preserve that remains unexploited simply because no one has gotten around to exploiting it.”²¹⁹ That visitor concluded that “[t]here may be worse places to locate a solar plant than the Ivanpah Valley,” citing BrightSource’s proposal to build a plant in the

²¹⁵ See *Ivanpah Solar Electric Generating System (CACA-48668)*, BUREAU OF LAND MGMT., <http://www.blm.gov/ca/st/en/prog/energy/fasttrack/ivanpahsolar.html> (last visited Apr. 3, 2011).

²¹⁶ See Lewis, *supra* note 118.

²¹⁷ Woody, *supra* note 109.

²¹⁸ Lewis, *supra* note 118; see also Glennon & Reeves, *supra* note 119, at 117 (describing the site as “adjacent to Interstate 15, across the highway from a natural gas power plant, next to a thirty-six hole golf course, and five miles from a major casino and an outlet mall. The land itself has been used for decades for grazing and off-road vehicles, and a dozen eight- to twelve-foot wide trails criss-cross the site.”).

²¹⁹ Lewis, *supra* note 118.

Sleeping Beauty Mountains where wildlife travel between the Mojave National Preserve and Joshua Tree National Park.²²⁰

In October 2009, the BLM and the California Energy Commission prepared a draft EIS for the proposed Ivanpah solar project.²²¹ They concluded that the project “would result in a substantial adverse impact to existing scenic resource values as seen from several Key Observation Points” ranging from a nearby golf course to the adjacent Mojave National Preserve and Stateline Wilderness Area.²²² The draft EIS contained a section on “visual resources” that ran for fifty-one pages followed by sixteen figures that simulated the appearance of the project.²²³ The draft EIS considered twenty-three alternative locations or technologies but concluded that none of them were viable (except for not doing anything).²²⁴ The NPCA had suggested another

²²⁰ *Id.*

²²¹ U.S. BUREAU OF LAND MGMT. & CAL. ENERGY COMM’N, FINAL STAFF ASSESSMENT AND DRAFT ENVIRONMENTAL IMPACT STATEMENT AND DRAFT CALIFORNIA DESERT CONSERVATION AREA PLAN AMENDMENT, IVANPAH SOLAR ELECTRIC GENERATING SYSTEM: APPLICATION FOR CERTIFICATION (07-AFC-5), SAN BERNARDINO COUNTY (2009) [hereinafter IVANPAH DRAFT EIS].

²²² *Id.* at 1-30; *see also id.* at 4-6 (concluding that the “project would result in the installation of a large, industrial facility in a highly visible and scenic area of the Mojave Desert”). The draft EIS also faulted the project for its impact on desert tortoises and other wildlife. *See id.* at 1-17 to 1-20; *see also* Scott Streater, *Fast-Tracked Solar Project Could Speed Mojave Desert’s Demise*, N.Y. TIMES, Nov. 12, 2009, <http://www.nytimes.com/gwire/2009/11/12/12greenwire-fast-tracked-solar-project-could-speed-mojave-95100.html?emc=eta1> (quoting a representative of the Center for Biological Diversity’s assessment that “[i]t’s a good project in the wrong location”).

²²³ IVANPAH DRAFT EIS, *supra* note 221, at 6.12-1 to 6.12-51. Most notably, the visual resources section explained:

Panoramic elevated views of the valley would change from a relatively undisturbed desert floor landscape dominated by striking views of the Ivanpah dry lake bed, to an industrial, highly man-altered one dominated by roughly four square miles of mirror-arrays and 459-foot tall solar collector towers topped with brightly lit receiver units, a large graded area, as well as light rays reflected off of ambient atmospheric dust. . . . Reflected light rays, when present, would create striking, tent-like patterns, also with high visual unity, which some viewers might consider attractive or interesting. Nevertheless, since the existing intact natural landscape is considered one of the primary attractions for visitors to these mountains, the resulting dramatic alteration of landscape character, particularly as seen from high sensitivity recreational viewpoints in the Clark Mountains, is considered to represent a substantial adverse visual effect.

Id. at 6.12-15. Put differently, “[i]f you spread mirrors on the mall from the Capitol to the Lincoln Memorial including the Ellipse and the White House, you’d have to do that six times to create the BrightSource project.” Interview with Dennis Schramm, *supra* note 160.

²²⁴ IVANPAH DRAFT EIS, *supra* note 221, at 4-1.

site that the EIS dismissed because the land was either owned by the military, included in a wildlife protection zone, not suitable for solar collection, or already subject to pending solar application to BLM.²²⁵ Faced with such substantial adverse impacts, BrightSource submitted a revised proposal for a site that was located slightly further away from the sensitive viewing locations, reduced the number of towers from seven to three, and imposed a smaller footprint on the land. In July 2010, the BLM produced a final EIS that concluded that the magnitude of the revised project's adverse impacts on visual resources would be reduced but not completely eliminated as seen from the Mojave National Preserve or the wilderness area, while people driving along Interstate 15 would experience increased visual impacts.²²⁶

A second proposed solar project would not disturb the Mojave's scenic landscape. The Spanish renewable energy firm Abengoa hopes to build a solar facility about twenty miles northwest of Barstow in the western Mojave. The California Energy Commission found that this project presented little threat to visual resources because the project would be built on "previously disturbed and now mostly abandoned agricultural lands" in an area whose "old, abandoned structures" create "a somewhat blighted appearance."²²⁷ Nothing in the area is especially scenic. Indeed, the report suggested that some people might find it "interesting and educational" to see a real solar facility, though the report admitted that "such an opportunity may not be considered a visual benefit in the same sense as observing natural scenery."²²⁸ But apart from the impact on visual resources, the state commission found that Abengoa needed to acquire nearly 1600 acres of additional land to compensate for the farmland that would be used by the solar farm.²²⁹

A third proposed solar project illustrates how different reviewers can come to different conclusions regarding the effects on the

²²⁵ See *id.* at 4-10.

²²⁶ BUREAU OF LAND MGMT., CALIFORNIA DESERT CONSERVATION AREA PLAN AMENDMENT/FINAL ENVIRONMENTAL IMPACT STATEMENT FOR IVANPAH SOLAR ELECTRIC GENERATING SYSTEM (FEIS-10-31) 1-39 (2010).

²²⁷ CAL. ENERGY COMM'N, ABENGOA MOJAVE SOLAR SUPPLEMENTAL STAFF ASSESSMENT—PART A (09-AFC-5), at 5.12-4 (2010).

²²⁸ *Id.* at 5.12-33.

²²⁹ See Nuel Navarrete, *Abengoa's Mojave Solar Thermal Project Stymied by Farmland Policy*, ECOSEED (May 6, 2010), <http://www.ecoseed.org/en/solar-energy/concentrating-solar-power/article/53-concentrating-solar-power/7092-Abengoa%E2%80%99s-Mojave-solar-thermal-project-stymied-by-farmland-policy>.

Mojave's scenery. In August 2010, the California Energy Commission (CEC) approved the application of Beacon Solar LLC to build a 250-megawatt solar facility on the western edge of the Mojave Desert near California City.²³⁰ The facility includes 1244 acres of seventeen to twenty-foot-high parabolic mirrors located on 2012 acres of privately owned land that was once used to grow alfalfa.²³¹ Its surroundings include a state park, a BLM off-road vehicle area, and the asphalt oval track for a Honda Proving Center, but no designated scenic areas.²³² The CEC staff concluded that the project "may substantially degrade the existing visual character or quality of the site and its surroundings" because of "the moderately high overall visual sensitivity and the moderate overall visual change."²³³ The CEC itself, however, faulted its staff for several misperceptions of the site: failing to acknowledge the existing contrast between the abandoned alfalfa fields and the native desert foliage, suggesting that drivers along a state highway may have a moderate (instead of low) visual viewer concern, exaggerating the number of visitors who engaged in "passive" recreation (such as hiking or bird watching) as opposed to active recreation (such as ORV use), and failing to recognize how the sight of the solar facility would "be largely absorbed within the existing disturbed viewshed."²³⁴ The CEC also noted that Beacon Solar's expert witness described the project "as an 'appealing renewable energy resource . . . in an overall disturbed and deteriorating landscape.'"²³⁵ Accordingly, the CEC held that the Beacon Solar project would not cause any "significant direct, indirect, or cumulative impacts to visual resources."²³⁶

²³⁰ See CAL. ENERGY COMM'N, BEACON SOLAR ENERGY PROJECT: PRESIDING MEMBER'S PROPOSED DECISION (08-AFC-2) (2010) [hereinafter CEC BEACON SOLAR DECISION]; Carolyn Whetzel, *California Energy Commission Backs License for Solar Power Project in Mojave Desert*, STATE ENV'T DAILY (Aug. 30, 2010) ("The California Energy Commission Aug. 25 licensed the state's first solar power facility in 20 years, giving Beacon Solar LLC a green light to build its proposed 250-megawatt plant at a site on the western edge of the Mojave Desert.").

²³¹ CEC BEACON SOLAR DECISION, *supra* note 230, at 443–45.

²³² *Id.* at 443–44, 447.

²³³ CAL. ENERGY COMM'N, FINAL STAFF ASSESSMENT, BEACON SOLAR ENERGY PROJECT: APPLICATION FOR CERTIFICATION (08-AFC-2), KERN COUNTY 4.12 to 4.13 (2009).

²³⁴ CEC BEACON SOLAR DECISION, *supra* note 230, at 450–54.

²³⁵ *Id.* at 458.

²³⁶ *Id.* at 464.

The experience with the BrightSource, Abengoa, and Beacon Solar projects indicates that there are places in the Mojave Desert where solar energy facilities can be located without compromising the desert's scenic values, there are other places where such facilities cannot be located, and it may be difficult to tell the two apart. The reactive posture assumed by governmental regulators invites the contrasting views of a project illustrated by the Beacon Solar proposal. The prospective approach is preferable because it encourages a public discussion of the solar energy and scenic values of different areas before a developer invests its time and resources in a location of its own choosing. This prospective determination could result from either the BLM's ongoing effort to map the locations where solar facilities should—and should not—be permitted, or from Senator Feinstein's proposal to achieve the same result by legislation. BLM has also developed a hybrid approach that specifies screening criteria and pre-application procedural requirements that must be satisfied by solar energy project applications.²³⁷ So far, only the NRDC has expressed a preference between the administrative or the legislative approach, opting for the former.²³⁸ But the congressional enactment of the CDPA in 1994 shows that Congress is capable of soliciting extensive public input and making a representative judgment regarding both the scenic values of certain lands and the proper balance of those scenic values against other concerns. A congressional process also “recognizes that government by bureaucracy in a democratic society must be limited, and that the responsibility for wise management of the Desert's resources must be shared by all citizens,” as the BLM asserted early in the debates about the California deserts.²³⁹ Whatever the process, the scenic values and solar energy potential of the Mojave Desert are both likely to best be served by a prospective effort rather than a reactive one.

²³⁷ See Robert V. Abbey, *Instruction Memorandum No. 2011-061: Solar and Wind Energy Applications—Pre-Application and Screening* (Feb. 7, 2011), http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-061.html. The pre-application screening criteria prioritize projects that would be located in areas that are designated in a low Visual Resource Management Class.

²³⁸ See *supra* text accompanying note 209.

²³⁹ 1980 BLM PLAN, *supra* note 53, at 7.

III CONCLUSION

Congress thought that it had finally resolved the scenic status of the Mojave Desert when it enacted the CDPA in 1994. The attractiveness of the Mojave for the development of solar energy reveals that debates about the visual appearance of the desert persist. Similar controversies loom on the horizon. In 2000, Congress transferred 6000 acres of BLM land so that Clark County, Nevada, could build a new airport to serve commercial and international flights to Las Vegas.²⁴⁰ The site of the airport is next to the BrightSource solar project that may be constructed near the town of Primm. Nevada's congressional delegation enthused that the Ivanpah Valley was "a perfect location" because there are very few environmental concerns at the site.²⁴¹ The Park Service and a few environmental organizations protested about the proposed airport's proximity to "one of the most beautiful wilderness spots on earth."²⁴² But Senator Reid—who had proclaimed during the debate over the CDPA that "[t]here is no place on the Earth that has better scenery than" the Mojave Desert—led the push for the proposed airport.²⁴³

The experiences with identifying the scenic values of the Mojave Desert (that resulted in the enactment of the CDPA) and with balancing those values against other environmental values (as is occurring with the proposed solar energy facilities) confirms the importance of two related questions: what should the desert look like, and who should decide? Governor Schwarzenegger speaks for many

²⁴⁰ See Ivanpah Valley Airport Public Lands Transfer Act, Pub. L. No. 106-362, 114 Stat. 1404 (2000).

²⁴¹ A *Bill to Provide for the Sale of Certain Public Lands in the Ivanpah Valley, Nevada, to the Clark County Department of Aviation: Hearing on H.R. 3705 Before the Subcomm. on Nat'l Parks & Pub. Lands of the H. Comm. on Res.*, 105th Cong. 4 (1998) (statement of Rep. John E. Ensign).

²⁴² *Id.* at 26 (statement of Charlotte Innes); see also *id.* (statement of The Wilderness Society) (noting that the Mojave National Preserve "lies directly under the flight paths" for the airport); S. REP. NO. 106-394, at 8-11 (statement of John Reynolds, Regional Director, Pacific West Region, National Park Service) (objecting to the impact of the proposed airport on the preserve).

²⁴³ 140 CONG. REC. 7117 (daily ed. Apr. 12, 1994) (statement of Sen. Reid). Whether the Ivanpah Airport will actually be built remains uncertain. See Alan Choate, *Ivanpah Airport in a Holding Pattern*, LAS VEGAS REV. J., Jun. 11, 2010, at x, available at <http://www.lvrj.com/news/ivanpah-airport-in-a-holding-pattern-96126344.html>

("Development of the proposed Ivanpah Airport, considered crucial to Southern Nevada's future just a few years ago, has been suspended indefinitely because of lower passenger numbers and planned improvements at McCarran International Airport.").

when he expresses disbelief that the Mojave Desert may not be the ideal location for solar energy projects.²⁴⁴ It is certainly easy to fault those who seek to exclude solar projects from the Mojave as engaging in unadorned NIMBYism. But years of public debate concluded that there are scenic values in the Mojave worth preserving, so the law needs to find a way to identify and protect those scenic places.

So far, the law has worked to identify scenic places and then it has designated them accordingly. The law has been less helpful in instructing the BLM, state agencies, and especially the Park Service on how to maximize the visual experience of the Mojave's visitors. The amount of actual scenic regulation remains quite modest, especially when it is compared to the available regulation to protect biodiversity or to prevent pollution. But some of the Mojave's fiercest defenders question whether government regulation will actually transform the desert into something entirely different and unwanted.²⁴⁵ Mojave defenders also worry about removing the abundant evidence of past human activity in the Mojave.²⁴⁶ Or they promote an alternative approach to planning that emphasizes the many narratives that different communities bring to the Mojave.²⁴⁷ Perhaps the Mojave National Preserve could become a "sustainable rural landscape[]" that acts as a buffer from the urban encroachment from Los Angeles and Las Vegas.²⁴⁸ Any of these approaches would be tolerant of the remains of previous human activities in the Mojave.

Those visions of the Mojave Desert jump to the conclusion. First, the law needs to develop a better approach to deciding what sites belong where. The legislature has performed surprisingly well in making such decisions, even though its decision-making process is lengthy and often messy. Now the theory of scenic preservation needs to catch up with the actual efforts toward that end.

²⁴⁴ See *supra* text accompanying note 109.

²⁴⁵ See DARLINGTON, *supra* note 13, at 7 ("[I]t seemed that the area's ungoverned mystique would surely evaporate if it became part of a national park."); *id.* at 9 ("The desert has historically occupied the most antiregulatory place in the American imagination: its residents and adherents have been people who wanted, in one way or another, to be left alone."); BANHAM, *supra* note 40, at 196 (favoring "'benign neglect'" of the Mojave).

²⁴⁶ See DARLINGTON, *supra* note 13, at 82 (quoting Mojave expert Dennis Casebier's assertion that "[s]omething about the national-park mentality wants to remove all human vestiges and make it the way it was before").

²⁴⁷ See HAMIN, *supra* note 4, at 5–9.

²⁴⁸ *Id.* at 3.

