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11  
12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE DISTRICT OF ARIZONA**  
14

15 QUECHAN INDIAN TRIBE OF THE )  
16 FORT YUMA INDIAN RESERVATION, )  
17 a federally recognized Indian Tribe )

18 Plaintiff,

19 vs.

20 U.S. DEPARTMENT OF THE INTERIOR, )  
21 et al., )

22 Defendants. )  
23  
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No. CV-07-677-PHX-JAT

**PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
MEMORANDUM IN SUPPORT**

**ORAL ARGUMENT REQUESTED**

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1 Congressional enactment, the District and BOR jointly identified approximately 47,000  
2 acres of land for transfer. SF ¶ 8. 28,197 acres proposed for transfer underlie District  
3 facilities. SF ¶ 9. The remaining 19,341 acres are vacant open space and agricultural  
4 lands not necessary for District operations. SF ¶ 10.

5 On the morning of March 26, 2007, BOR issued its record of decision approving  
6 the transfer of 47,538 acres. SF ¶ 11. That same morning, before notice of BOR's  
7 decision was released to the public, BOR quickly transferred 39,142 acres of federal  
8 land to the District who then immediately (that same day) transferred 1,460 acres to  
9 Arizona Clean Fuels ("ACF") for development of a crude oil refinery. SF ¶ 12. The  
10 Tribe received the record of decision on March 28, 2007 and filed suit to enjoin any  
11 further transfers or development activities on March 30, 2007, alleging violations of  
12 NEPA, NHPA, and the APA. SF ¶ 13.

## 13 **II. STATEMENT OF FACTS**

14 Pursuant to LRCiv 56.1, the Tribe's Statement of Facts in support of its Motion  
15 for Summary Judgment is attached in a separate document and incorporated herein by  
16 reference.

## 17 **III. ARGUMENT AND AUTHORITY**

### 18 **A. BOR Violated NEPA By Failing To Conduct A Thorough Analysis** 19 **of Action Alternatives In Its Final EIS.**

20 Discussion of alternatives is "the heart" of the EIS. 40 C.F.R. § 1502.14. The  
21 agency must "rigorously explore and objectively evaluate all reasonable alternatives" in  
22 order to provide "a clear basis for choice among options by the decisionmaker." *Id.*  
23 The existence of viable, but unexamined alternatives renders an EIS legally inadequate.  
24 *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999);  
25 *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1068 (D. Ariz. 2001).

26 BOR considers only two alternatives in its Final EIS: (1) the preferred  
27 alternative of transferring all 47,626 acres of land to the District; and (2) the "no-  
28 action" alternative of not transferring any land to the District. SF ¶ 41. BOR violated

1 NEPA by failing to consider a third viable alternative: conveyance to the District of  
2 only those lands underlying District works and facilities (consisting of approximately  
3 28,000 acres). This viable, yet unexplored, alternative would allow BOR to convey all  
4 lands necessary for District operations, while allowing the 19,341 acres of vacant and  
5 open space lands to remain protected in federal ownership. Retention of the vacant  
6 lands in federal ownership would substantially reduce potential impacts to cultural and  
7 environmental resources associated with the transfer. The impact of future residential,  
8 commercial, and industrial development on those lands would be eliminated.

9 BOR's analysis improperly ignores the middle ground alternative and presents  
10 only a "take it or leave it" (transfer all lands or no lands) option. BOR's failure to  
11 analyze a reasonable, viable alternative that meets project objectives while reducing  
12 associated impacts violates NEPA. *Muckleshoot Indian Tribe*, 177 F.3d at 814 (holding  
13 that FEIS for land exchange violated NEPA by failing to consider viable alternatives,  
14 and stating that "a detailed consideration of a trade involving deed restrictions or other  
15 modifications to the acreage involved is in the public interest and should have been  
16 considered"); *Sierra Club v. Dombeck*, 161 F. Supp. 2d at 1068 (holding that FEIS in  
17 land exchange failed to examine many reasonable alternatives including consideration  
18 of "a modified land exchange alternative on a smaller scale," violating NEPA).

19 Officials from BOR and BLM recommended analysis of this third alternative,  
20 but BOR arbitrarily declined to evaluate it. *See* SF ¶ 42 (recommending analysis of  
21 third alternative that would include transfer of only those lands underlying District  
22 facilities). BOR's failure to examine a reasonable alternative, especially one that would  
23 eliminate environmental concerns while meeting agency objectives,<sup>1</sup> violates NEPA.

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25 <sup>1</sup> BOR has never suggested that its objectives would be met only by a complete  
26 transfer of all lands to the District. To the extent BOR asserts that position now, such a  
27 narrow statement of purpose would independently violate NEPA. *Muckleshoot Indian*  
28 *Tribe*, 177 F.3d at 812 (agency cannot limit its alternatives analysis by defining its  
objectives in unreasonably narrow terms); *City of Carmel By-The-Sea v. U.S. Dep't of*  
*Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

1           **B.     BOR Violated NEPA By Failing To Analyze Impacts of the Proposed**  
2           **Oil Refinery Development In Its Title Transfer EIS.**

3           1.     BOR Failed To Examine Significant Impacts In Its EIS.

4           In August 2003, BOR published a Draft Environmental Impact Statement  
5           (“DEIS”) for the Wellton-Mohawk Title Transfer. SF ¶ 16. The DEIS and subsequent  
6           FEIS focus (properly) on the indirect impacts of the land transfer, i.e., the potential  
7           changes in land use and associated impacts that could result from the transfer of title  
8           out of federal ownership. SF ¶ 18. However, neither the DEIS or FEIS analyze the  
9           potential impacts to environmental or cultural resources resulting from future industrial  
10          or heavy-industrial development, such as the ACF oil refinery proposal. SF ¶ 19.

11          In the DEIS, BOR suggests that future development of the Transfer Lands will  
12          be “minimal” and “not inconsistent with current land use.” SF ¶ 20. BOR states that  
13          “both the County and the District intend to guide the growth of the project area to  
14          preserve its agricultural and open space character.” SF ¶ 21. These misleading  
15          statements are repeated in the Final EIS, despite BOR’s knowledge that portions of  
16          agricultural and open space areas are planned for significant heavy-industrial  
17          development, including the first oil refinery to be developed at any location in the  
18          United States in more than thirty years. SF ¶ 22.

19          On November 17, 2003 (over three years before BOR published its FEIS), ACF  
20          notified BOR that it had identified certain Transfer Lands as one of two possible sites  
21          for development of its refinery project. SF ¶ 24. By mid-2004, ACF exclusively  
22          focused on the BOR Transfer Lands as the site for its proposed refinery. SF ¶ 25-31.  
23          In 2004, ACF (acting expressly as BOR’s agent) sought and ultimately obtained an  
24          amendment to Yuma County’s comprehensive plan, changing the land use designation  
25          for 3,300 acres of BOR Transfer Lands from agriculture to heavy-industrial.  
26          SF ¶ 25-26. With BOR’s consent, this comprehensive plan amendment accommodated  
27          the proposed refinery and other anticipated surrounding industrial developments. *Id.*  
28          By September 2004, the ACF refinery project was characterized as a “hard plan” in

1 BOR title transfer meetings. SF ¶ 27. To date, ACF has invested approximately  
2 \$35 million in the refinery project. SF ¶ 34.

3 In early 2005, ACF secured an air permit from Arizona Department of  
4 Environmental Quality that applies to the BOR lands. SF ¶ 29. The permit identifies  
5 only one location, the BOR lands, for the proposed facility. SF ¶ 30. ACF has not  
6 disclosed any location for its refinery other than the BOR lands. The air permit  
7 confirms that the refinery will be a significant source of air pollution. SF ¶ 32-33.

8 BOR published its FEIS for the title transfer in December 2006. SF ¶ 40. BOR  
9 knew as early as mid-2004 of ACF's specific proposal to develop transfer lands into a  
10 controversial, intensive industrial use upon transfer (a possibility not evaluated in the  
11 DEIS), and of the significant steps that ACF had taken to further that plan. SF ¶ 24-36.  
12 BOR took no action to supplement its DEIS to analyze this significant new information  
13 in the 40 months between release of the DEIS in August 2003 and release of the FEIS.

14 Although the FEIS was published more than three years after the DEIS, the  
15 FEIS is nearly identical, word for word, to the DEIS. The FEIS makes the same  
16 misleading representations regarding post-transfer development, with no analysis of  
17 possible impacts from future industrial uses. SF ¶ 44. The FEIS recognizes the  
18 potential for impacts to air, water, biological, and cultural resources resulting from the  
19 oil refinery development, but fails to provide any meaningful analysis of such impacts,  
20 resulting in a flawed and misleading EIS. SF ¶ 44-60. Instead, BOR disclaims any  
21 duty to analyze the refinery and defers analysis to other agencies at future dates. *Id.*

22 ACF intends to commence its oil refinery development prior to the completion  
23 of any other NEPA review by any other federal agency. SF ¶ 68. According to CEO  
24 Glenn McGinnis, ACF must commence construction of the refinery by October 20,  
25 2007 or risk expiration of its air permit. SF ¶ 67. To date, no federal agency has  
26 commenced any NEPA process related to the refinery. SF ¶ 65. BLM, the agency that  
27 BOR and ACF allege will perform the future NEPA review for the refinery, has stated  
28 that it has no authority to regulate ACF's now-private land or to prevent ACF from

1 commencing construction of the refinery. SF ¶ 66. Contrary to the defendants'  
2 representations in the FEIS (SF ¶ 63) and in prior briefing (SF ¶ 64), there will not be  
3 any review of the impacts to environmental and cultural resources associated with this  
4 intensive, unique, and controversial oil refinery project prior to its construction.  
5 SF ¶ 65-68. This violates the letter, spirit, and Congressional intent of NEPA.

6 2. BOR Has A Legal Duty Under NEPA To Analyze Impacts of  
7 the Proposed Oil Refinery.

8 Federal agencies must prepare an EIS for “all major Federal actions significantly  
9 affecting the . . . human environment.” 42 U.S.C. § 4332(2)(C). In the EIS, the federal  
10 agency must “take a ‘hard look’ that ‘[a]t the least . . . encompasses a thorough  
11 investigation into the environmental impacts of an agency’s action and a candid  
12 acknowledgement of the risks that those impacts entail.’” *Navajo Nation v. United*  
13 *States Forest Service*, 479 F.3d 1024, 1053 (9th Cir. 2007). The agency’s “hard look”  
14 in the EIS must include consideration of all foreseeable direct and indirect impacts.  
15 *Earth Island Institute v. United States Forest Service*, 442 F.3d 1147, 1159 (9th Cir.  
16 2006); *see also* 40 C.F.R. § 1508.8(b) (requiring agency to evaluate future changes in  
17 land use, and associated impacts, resulting from agency action).

18 BOR’s EIS properly (but, incompletely) focuses on the indirect impacts of the  
19 title transfer, which consist of post-transfer changes in land use (i.e., post-transfer  
20 development of agricultural and open space lands) and the associated impacts.  
21 SF ¶ 18-23; 43-60. BOR properly focused its attention on the indirect impacts of post-  
22 transfer development, but acted arbitrarily and capriciously and violated NEPA by  
23 failing to analyze environmental impacts associated with ACF’s specific proposal to  
24 develop the first oil refinery located anywhere in the United States in over thirty years  
25 on BOR lands. This omission renders the EIS incomplete and misleading under NEPA.

26 3. BOR Must Analyze Reasonably Foreseeable Environmental  
27 Impacts Associated With The Title Transfer.

28 Despite focusing its NEPA review entirely on potential impacts of post-transfer  
development, BOR disputes any obligation to review impacts associated with the

1 specific, reasonably foreseeable, refinery proposal. BOR incorrectly argues that “the oil  
2 refinery effects do not need to be evaluated [in the FEIS] because Reclamation does not  
3 know if the refinery will be built (too speculative).” SF ¶ 60.

4 Whether the refinery will *actually* be built in the future does not determine the  
5 proper scope of BOR’s NEPA analysis. *Idaho Sporting Congress v. Thomas*, 137 F.3d  
6 1146, 1149-50 (9th Cir. 1998) (holding plaintiff need not show that significant effects  
7 will in fact occur to prevail in NEPA claim). The relevant question is whether the  
8 refinery development was sufficiently foreseeable to warrant analysis in the EIS. *Kern*  
9 *v. United States Bureau of Land Management*, 284 F.3d 1062, 1072-73 (9th Cir. 2002)  
10 (agency may not avoid analysis of foreseeable environmental impacts “by saying that  
11 the consequences are unclear or will be analyzed later [in a future environmental  
12 document]”); *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (holding that  
13 agency must evaluate impacts of future development [induced by construction of new  
14 highway interchange] “in light of current and contemplated plans . . . to produce an  
15 informed estimate of the environmental consequences”); *see also Sierra Club v. Marsh*,  
16 769 F.2d 868, 878 (1st Cir. 1985) (requiring agency to consider reasonably foreseeable  
17 effects of its decision to permit cargo port construction, which included “secondary”  
18 effects resulting from proposed surrounding industrial developments); *Conservation*  
19 *Law Foundation of New England, Inc. v. General Services Administration*, 707 F.2d  
20 626, 634 (1st Cir. 1983) (requiring GSA, in land transfer case, to “specify the  
21 environmental effects of such probable reuses [of the land] with particular attention  
22 paid to those with the most significant adverse environmental effects”); *Greer*  
23 *Coalition, Inc., v. United States Forest Service*, CV 06-0368-PHX-MHM, Slip. Op.,  
24 at p. 11 (D. Ariz. Feb. 28, 2007)<sup>2</sup> (rejecting agency argument that impacts associated  
25 with foreseeable post-transfer development scenarios were too speculative to analyze  
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27 <sup>2</sup> The *Greer Coalition* slip opinion, with page numbers cited herein, is available  
28 at no charge at the District Court of Arizona website: <http://ecf.azd.uscourts.gov/cgi-bin/ShowIndex.pl>. The opinion is also available via Westlaw at 2007 WL 675954.

1 under NEPA); *Anacostia Watershed Society v. Babbitt*, 871 F. Supp. 475, 481-83  
2 (D.D.C. 1994) (requiring agency to analyze foreseeable effects of transferring land out  
3 of federal control prior to the transfer, even though development proposals would  
4 become more specific (or be rejected altogether) at later dates).<sup>3</sup>

5 The refinery was sufficiently foreseeable and definite for years prior to BOR's  
6 final decision. SF ¶ 24-37. The efforts made to date by ACF also show that the refinery  
7 project is not too speculative or indefinite for analysis. ACF's CEO Glenn McGinnis  
8 declared in this litigation that ACF has invested \$35 million in securing permits and  
9 land for the project. SF ¶ 34. Mr. McGinnis also made public statements that the  
10 primary obstacle holding back construction of the refinery was delay in securing title to  
11 BOR's land. SF ¶ 35. BOR's determination that the refinery project was too  
12 speculative to analyze in its EIS was arbitrary and capricious and in violation of NEPA.

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15 <sup>3</sup> The Council for Environmental Quality (CEQ) publication *Forty Most Asked*  
16 *Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed.  
17 Reg. 18026 (1981), § 18, is also instructive. In response to the question "How should  
18 uncertainties about indirect effects of a proposal be addressed, for example, in cases of  
disposal of federal lands, when the identity or plans of future landowners is uncertain?"  
CEQ states in response:

19 "The EIS must identify all the indirect effects that are known, and make a good  
20 faith effort to explain the effects that are not known but are 'reasonably foreseeable.'  
21 40 C.F.R. § 1508.8(b). In the example, if there is total uncertainty about the identity of  
22 future land owners or the nature of future land uses, then of course, the agency is not  
23 required to engage in speculation or contemplation about their future plans. But, in the  
24 ordinary course of business, people do make judgments based upon reasonably  
25 foreseeable occurrences. It will often be possible to consider likely purchasers and the  
26 development trends in that area or similar areas in recent years, or the likelihood that  
27 the land will be used for an energy project, shopping center, subdivision, farm, or  
28 factory. The agency has the responsibility to make an informed judgment, and to  
estimate future impacts on that basis, especially if trends are ascertainable, or potential  
purchasers have made themselves known. The agency cannot ignore these uncertain,  
but probable, effects of its decision." *See also Kern*, 284 F.3d at 1072 (9th Cir. 2002)  
(noting that reasonable forecasting and speculation is implicit in NEPA and that courts  
must reject agency attempts to shirk NEPA responsibilities by labeling discussion of  
foreseeable environmental impacts as "crystal ball inquiry").

1           **C.     BOR Violated NEPA By Failing To Supplement Its DEIS To**  
2           **Analyze The Proposed Oil Refinery.**

3           BOR violated NEPA by failing to supplement its DEIS upon learning that the  
4           District's transferee, ACF, intends to develop specific transfer lands into an oil refinery.  
5           BOR published its DEIS in August 2003, more than three years prior to publication of  
6           its FEIS in December 2006. ACF first notified BOR of the possible oil refinery  
7           development on transfer lands in November 2003. SF ¶ 24. By late 2004, the project  
8           (according to BOR meeting minutes) had ripened into a "hard plan." SF ¶ 27.  
9           Although BOR focused exclusively on impacts of post-transfer land use changes in its  
10          DEIS, BOR failed to supplement the DEIS with any information about future industrial  
11          developments such as the oil refinery. Instead, BOR sought to limit public knowledge  
12          of the relationship between BOR and the refinery. SF ¶ 61. This violates NEPA.

13          NEPA and its implementing regulations require that an agency "shall prepare  
14          supplements to either draft or final environmental impact statements if: . . . there are  
15          significant new circumstances or information relevant to environmental concerns and  
16          bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii); *Marsh v.*  
17          *Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) ("ONRC") (stating that  
18          supplemental EIS is required if new information shows that the action will affect  
19          environment "in a significant manner or to a significant extent not already considered");  
20          *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000) (agencies  
21          have "a 'continuing duty to gather and evaluate new information relevant to the  
22          environmental impact of its actions,' even after release of an EIS."). In *ONRC*, the  
23          Supreme Court added: "if the new information is sufficient to show that the remaining  
24          action will 'affect the quality of the human environment' in a significant manner or to  
25          a significant extent not already considered, a supplemental EIS *must be prepared*."  
26          490 U.S. at 374 (emphasis added).

27          Here, BOR's knowledge that certain lands proposed for transfer would be used  
28          for an oil refinery development – the first ever in the State of Arizona, and the first at

1 any location in the United States in over thirty years – constitutes significant new  
2 information requiring supplementation. Development of an oil refinery will result in  
3 significant impacts to air, water,<sup>4</sup> and cultural resources that BOR has not analyzed.

4 **D. BOR Violated NEPA By Failing To Take A “Hard Look” At**  
5 **The Refinery Impacts In Its FEIS.**

6 An EIS is more than a mere disclosure document. *Oregon Natural Resources*  
7 *Fund v. Brong*, 492 F.3d 1120, 1132 (9th Cir. 2007) (citing 40 C.F.R. § 1502.1).<sup>5</sup> In  
8 preparing an EIS, the federal agency must “take a ‘hard look’ that ‘[a]t the least . . .  
9 encompasses a thorough investigation into the environmental impacts of an agency’s  
10 action and a candid acknowledgement of the risks that those impacts entail.’” *Navajo*  
11 *Nation*, 479 F.3d at 1053 (9th Cir. 2007) . General and conclusory statements about a  
12 potential impact devoid of specific, reasoned analysis and conclusions do not constitute  
13 a “hard look.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 868  
14 (9th Cir. 2005) (holding general statements about possible effects and some risk do not  
15 constitute a hard look absent a justification regarding why more definitive information  
16 could not be provided); *Muckleshoot Indian Tribe*, 177 F.3d at 810-12 (9th Cir. 1999)  
17 (finding NEPA violation in land transfer case where EIS merely provides “very broad  
18 and general statements devoid of specific, reasoned conclusions” and fails to “analyze”  
19 foreseeable impacts); *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774  
20 (9th Cir. 1980) (finding NEPA violation based on general and conclusory assertions  
21 about growth effects of highway project).

22 BOR failed to provide a “hard look” at the consequences associated with the oil  
23 refinery development. Although the FEIS references the refinery, it provides no

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24 <sup>4</sup> The Tribe’s concern with the refinery is not limited to cultural resources.  
25 The Tribe has federally decreed water rights in the Colorado River. *See Arizona v.*  
26 *California*, 126 S. Ct. 1543 (2006). Neither the DEIS or FEIS adequately explains how  
27 much water the refinery will require, how the refinery will obtain the water necessary  
28 for its industrial operations, or how the project will affect water quality.

<sup>5</sup> BOR failed to understand the purpose of an EIS when conducting its NEPA  
review. SF ¶ 62(d) (stating “The EIS is just an informational document”).

1 substantive analysis or “candid acknowledgement” of impacts, alternatives, or  
2 mitigation. In Chapter 3 of the FEIS, BOR purports to analyze the environmental  
3 impacts of the transfer and acknowledges that impacts could result from post-transfer  
4 changes in land use. SF ¶ 46. Although BOR focuses its analysis on impacts  
5 associated with future changes in land use in Chapter 3, BOR mentions the specific  
6 refinery proposal only twice in that 66-page chapter. SF ¶ 47. On page 3-4, BOR  
7 briefly states that any “noise impacts” from the “potential gasoline refinery would be  
8 subject to independent analysis under NEPA.” SF ¶ 47. On page 3-54, BOR discloses  
9 that the refinery “may have the potential for localized air quality impacts.” SF ¶ 47.  
10 BOR fails to elaborate, noting only that any impacts would be addressed in ACF’s air  
11 permit and in a future EIS by a different agency at some unidentified time in the future.  
12 SF ¶ 47.<sup>6</sup> Chapter 3 also covers such topics as impacts to water and biological  
13 resources, water quality, cultural resources, public health and safety, but BOR wholly  
14 fails to address whether or how the refinery may impact these resources. SF ¶ 48.  
15 This is not the hard look or candid acknowledgement required by NEPA.

16 Other key parts of the FEIS are similarly non-informative regarding refinery  
17 impacts. Appendix E (the “Land Use Evaluation”) mentions, in one brief sentence, the  
18 possible development of the refinery, without any discussion of impacts associated with  
19 the refinery. SF ¶ 49. Section 1.6.6 and Chapter 4 (regarding cumulative impacts)  
20 contain the most extensive discussions of the refinery, but those sections also contain  
21

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22  
23 <sup>6</sup> NEPA prohibits a federal agency from passing its own NEPA obligations off  
24 to a different agency at a future date. *Idaho v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994)  
25 (finding NEPA violation where ICC failed to prepare EIS and deferred environmental  
26 analysis of impacts to other federal and state agencies), *citing Calvert Cliffs’*  
27 *Coordinating Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)  
28 (reliance by action agency on environmental judgments of other agencies was “in  
fundamental conflict with the basic purpose of NEPA”); *Anacostia*, 871 F. Supp. at 484  
(rejecting contention that future NEPA analysis by different agency could cure the  
National Park Service’s failure to comply with NEPA). Moreover, no federal agency  
in this case has initiated any NEPA process to analyze the proposed refinery.

1 nothing more than general statements about possible impacts and a deferral of  
2 substantive environmental review to other federal agencies at later dates. SF ¶ 50.

3 BOR acknowledges in Chapter 4 that “the proposed gasoline refinery would  
4 represent a major change in land use, from open and undeveloped land . . . to a complex  
5 industrial site with associated impacts on visual resources, air quality, noise, etc., which  
6 may cause an impact on adjacent land uses.” SF ¶ 51. In sum, BOR acknowledges that  
7 the refinery would result in impacts, but fails to analyze them. This violates NEPA.

8 Other portions of the FEIS are outright misleading. BOR states in the “summary  
9 of impacts” section that “there are no foreseeable changes in operation resulting directly  
10 from the transfer of title that would significantly change the air quality from current  
11 agricultural practices, foreseeable economic development, or other sources.” SF ¶ 57.  
12 ACF’s air permit confirms that the refinery will be a “major source” of pollutant  
13 emissions. The two-page cover letter that precedes the 497 page ACF air permit, dated  
14 April 13, 2005, states that the project will be a major emissions source with potential to  
15 emit more than 100 tons per year of each of the following pollutants: particulate matter,  
16 nitrogen oxides, carbon monoxide, and volatile organic compounds. SF ¶ 32-33. BOR’s  
17 determination that construction of a crude oil refinery in an undeveloped rural area will  
18 not “significantly change the air quality” exemplifies BOR’s arbitrary and capricious  
19 conduct, which resulted in a misleading and incomplete EIS in violation of NEPA.

20 The administrative record suggests that the BOR and the District never intended  
21 to take the required good faith “hard look” at environmental impacts associated with  
22 the transfer.<sup>7</sup> Instead, their goal was to minimize the time and cost of NEPA  
23 compliance, which they viewed as a needless and burdensome impediment. SF ¶ 62.

24 <sup>7</sup> The District was not a passive third party in the NEPA process. In addition to  
25 sharing all costs of NEPA and NHPA compliance, the District and the BOR shared  
26 responsibility on an “oversight committee” that administered the title transfer process.  
27 SF ¶ 6. The District was also designated a “cooperating agency” under NEPA. SF ¶ 7.  
28 The District, which stood to receive significant financial gain from the transfer, was  
involved in all key decisions regarding NEPA and NHPA compliance, as shown by a  
review of meeting minutes, correspondence, and reports in the administrative record.

1 In October 2000, District Manager Clyde Gould suggested that a sufficient EIS could  
2 be developed by using “boilerplate” from previous documents. SF ¶ 62(b). Describing  
3 the future title-transfer EIS, Gould stated: “I don’t think it will be a lot of substance.”  
4 *Id.* In September 2001, Gould asked BOR officials in a title transfer meeting “How do  
5 you minimize the cost of an EIS?” SF ¶ 62(c). BOR responded: “It is minimized by  
6 the scale of effort to be done on the analysis.” *Id.* In response to the District’s cost  
7 concerns, BOR’s NEPA compliance leader Andrea Campbell suggested “development  
8 of a [NEPA] document that is comprehensive but does not go overboard in the  
9 analysis . . .” *Id.* “It would be an EIS, but really an EA with time periods built in for  
10 public review.” *Id.* Campbell suggests that “all controversial topics can be dismissed  
11 through the NEPA document.” *Id.* From the beginning of the NEPA process, BOR  
12 and the District simply went through the motions of preparing an EIS, rather than  
13 conducting a good faith analysis of the impacts associated with the title transfer.

14 BOR, and especially the District, had conflicting interests that provided an  
15 incentive to speed up the title transfer process and to limit the costs of the NEPA and  
16 NHPA process. *Earth Island v. United States Forest Service*, 351 F.3d 1291, 1309  
17 (9th Cir. 2003) (Noonan, J., concurring) (noting financial interest of Forest Service  
18 in timber sales could result in impermissible bias in NEPA and NFMA evaluations).  
19 BOR received over \$8 million from the District from the sale of the surplus public lands  
20 not underlying District works and facilities. SF ¶ 14. The District then sold a fraction  
21 of that land (1,460 acres) to ACF for more than \$14 million, receiving an immediate  
22 windfall of over \$6 million. SF ¶ 15. *See also* SF ¶ 28 (reporting in Dec. 2004 that the  
23 District “has pushed to speed up the deal before archaeological studies are complete so  
24 that it can sell the land for the refinery”).

25 Any contention that BOR took a “hard look” at the impacts of the refinery in the  
26 title transfer EIS is also belied by BOR’s own admission that it was not even trying to  
27 analyze the refinery in the EIS. In prior briefing, BOR argued: “In the FEIS, [BOR]  
28 takes the position that the oil refinery effects did not have to be evaluated.” SF ¶ 60.

1 It seems unlikely that BOR met its legal obligation to take a “hard look” at the refinery  
2 impacts purely by accident, without making any attempt to do so. The vague, general,  
3 and misleading statements about the refinery in the FEIS do not constitute the “hard  
4 look” or “candid acknowledgement” of impacts required by NEPA.

5 **E. BOR Violated NEPA By Failing To Take A “Hard Look” At**  
6 **Potential Impacts Of Future Industrial Development Scenarios.**

7 Even if the Court were to find that BOR had no legal duty to evaluate impacts  
8 associated with the specific ACF refinery proposal, BOR independently violated NEPA  
9 by failing to take a “hard look” at the possible impacts of future industrial development  
10 scenarios on the transfer lands. BOR knew that the refinery project would lead to  
11 surrounding industrial developments, resulting in additional impacts. SF ¶ 36-37.

12 BOR does not dispute its general legal obligation to analyze impacts associated  
13 with post-transfer changes in land use. SF ¶ 43. However, BOR arbitrarily, and in  
14 violation of NEPA, failed to analyze the reasonably foreseeable development scenarios  
15 with the most harmful ecological impacts – industrial and heavy industrial  
16 development. *City of Davis*, 521 F.2d at 676 (9th Cir. 1975) (holding that agency must  
17 evaluate impacts of future development [induced by construction of highway  
18 interchange] “in light of current and contemplated plans . . . to produce an informed  
19 estimate of the environmental consequences”); *Conservation Law Foundation of New*  
20 *England, Inc.*, 707 F.2d at 634 (1st Cir. 1983) (remanding FEIS to agency in land  
21 exchange case, and requiring agency to “specify the environmental effects of such  
22 probable [post-exchange] reuses with particular attention to those with the most  
23 significant adverse environmental effects”); *Greer Coalition, Inc.*, slip op., at p. 11  
24 (D. Ariz., Feb. 28, 2007) (holding, in land exchange case, that Forest Service must  
25 evaluate all “reasonably foreseeable [post-transfer development] scenarios with  
26 potentially differing environmental impacts”). BOR knew the potential for post-  
27 transfer industrial development (SF ¶ 36-37), but it failed to analyze, or even discuss,  
28 impacts to water, air, biological and cultural resources that would result from such

1 intensive development. This violates NEPA. *Kern*, 284 F.3d at 1072-73 (9th Cir.  
2 2002) (finding NEPA violation where agency had information regarding potential  
3 impacts, yet failed to analyze those impacts in the EIS and improperly deferred analysis  
4 to future dates).

5 **F. BOR's Cumulative Impact Analysis Violates NEPA.**

6 An EIS must analyze the cumulative impact of an agency proposal. *Muckleshoot*  
7 *Indian Tribe*, 177 F.3d at 809 (9th Cir. 1999) (finding NEPA violation due in part to  
8 agency's failure to adequately analyze cumulative effects in EIS); 40 C.F.R. § 1508.7.  
9 BOR's cumulative impact section provides inadequate and conclusory analysis and  
10 improperly defers consideration of environmental impacts. *Klamath Siskiyou Wildlands*  
11 *Center v. BLM*, 387 F.3d 989 (9th Cir. 2004) (conclusory statements regarding  
12 cumulative impacts violates NEPA).

13 BOR's cumulative impact analysis mentions the oil refinery but speculates that  
14 impacts to cultural resources "would be relatively slight" despite admitting that "there is  
15 a possibility of cultural resources being present." SF ¶ 52. Similarly, the cumulative  
16 impact analysis notes that the refinery would likely have impacts on water resources, air  
17 quality, and biological resources, but dismisses each of these impacts in a few short  
18 sentences, contending that other regulations, permits, or environmental reviews would  
19 address these concerns.<sup>8</sup> SF ¶ 53. This cursory, conclusory review violates NEPA.  
20 *Kern*, 284 F.3d at 1075 (9th Cir. 2002) (cumulative analysis must be more than  
21

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22 <sup>8</sup> For example, the FEIS states that water quality impacts resulting from the refinery  
23 would be "minimized" through applicable federal, state, and local regulations. SF ¶ 54.  
24 The fact that an industrial development may discharge wastewater into wells or surface  
25 streams in anticipated compliance with a state or local permit does not lessen BOR's  
26 obligation to thoroughly discuss and inform the public that post-transfer industrial  
27 development will be a new source of wastewater and to analyze how such discharges  
28 (regulated or otherwise) would impact water quality. Similarly, the fact that ACF has  
obtained a state air quality permit that regulates (but does not preclude) pollutant  
emissions does not alter the fact that the refinery is a new and significant source of  
emissions, presenting environmental impacts that must be fully addressed in the EIS.

1 perfunctory; it must provide a useful analysis of the cumulative impacts of past, present,  
2 and future projects); *Muckleshoot Indian Tribe*, 177 F.3d at 809 (9th Cir. 1999).

3 The FEIS also fails to consider that development of the oil refinery on transfer  
4 lands will likely result in the cumulative impact of enticing other industrial  
5 development to locate near BOR's lands. BOR knew that approval of the land transfer  
6 and development of the ACF refinery would likely trigger development of a new  
7 industrial corridor on and adjacent to BOR's lands, but failed to analyze impacts of this  
8 development on environmental and cultural resources. SF ¶ 36-37.

9 BOR also briefly states that transmission line upgrades may occur on transfer  
10 lands, and that "portions of the potential transmission line upgrades may follow . . .  
11 historic trails." SF ¶ 55. BOR discounts the potential impacts to cultural resources as  
12 insignificant, but fails to disclose that recent transmission line upgrades by WAPA  
13 resulted in disastrous consequences to the Tribe's cultural resources. SF ¶ 56. In sum,  
14 the cumulative impacts analysis is filled with conclusory statements that fail to provide  
15 sufficient information regarding the implications of the land transfer.

16 **G. BOR Violated NHPA By Failing To Make A Reasonable And**  
17 **Good Faith Effort To Identify Affected Cultural Resources.**

18 Federal law requires BOR to make a reasonable and good faith effort to identify  
19 historic properties, including properties of cultural significance, which could be  
20 affected by a federal undertaking. 36 C.F.R. § 800.4(b)(1). BOR concedes in its EIS  
21 that the "general project area has a long and rich history of use by Native American  
22 groups." SF ¶ 70. In addition, the literature reviews and limited field surveys  
23 conducted by BOR identified the presence of numerous cultural resources, many of  
24 which were eligible for listing on the National Register. SF ¶ 72. Despite this fact, and  
25 despite comments from tribal and other government agencies, such as BLM, that BOR  
26 survey procedures were inadequate, BOR surveyed only 17% of the lands proposed for  
27 transfer (only 8,277 out of 47,626 acres were inventoried). SF ¶ 73.

1 BOR did not act reasonably or in good faith in its effort to identify cultural  
2 resources within the transfer lands. Instead of conducting necessary Class III field  
3 surveys, BOR was more concerned with reducing the scope and costs of the cultural  
4 resource evaluation primarily due to the District's complaints that compliance with  
5 Section 106 and the NHPA would be too expensive and time-consuming. SF ¶ 74-82.

6 In 1998, the District and BOR agreed to share all costs associated with NEPA  
7 and NHPA compliance. SF ¶ 5. The District's concerns with minimizing its costs and  
8 expediting the transfer infected the NEPA and NHPA (Section 106) process from the  
9 very beginning. In 2001, the District raised objections to the level of field surveys and  
10 associated cost proposed by BOR's consultant, Statistical Research, Inc., for cultural  
11 resources analysis. See SF ¶ 74 (stating, in November 8, 2001 meeting, that "an issue  
12 has arisen with regard to the estimated cost (high) and level of effort proposed by  
13 Statistical Research Inc., for cultural resource analysis" and discussing "the outstanding  
14 concern with regard to . . . the cost and level of effort for the cultural resource impact  
15 analysis"). The District's desire to avoid the necessary Class III surveys of transfer  
16 lands appears in the minutes again at lines 64-67 (see SF ¶ 76):

17 The ideal situation from the District's perspective would be to execute  
18 an agreement with the SHPO whereby the transfer can be accomplished  
19 without widespread Class III surveys, but with the provision that Section  
20 106 compliance is required prior to an action that would disturb any of  
21 the lands transferred.

22 Meeting minutes also confirm that BOR's project leaders were ignorant of the  
23 requirements for Section 106 compliance. BOR's NEPA manager Andrea Campbell  
24 stated she had "no knowledge of the relationship between the lands action and the  
25 Section 106 process." SF ¶ 77. In the same meeting, Campbell suggested proceeding  
26 with "a minimum of field surveys." SF ¶ 74. Another official queried whether "quit-  
27 claim deeds could be signed without having a Class III [survey] performed." SF ¶ 77.

28 In 2002, BOR continued to mishandle the cultural resources review process.  
Meeting minutes from July 2002 show BOR and District officials debating (1) whether

1 they could limit the comment period available to tribes, and (2) how to limit impacts of  
2 tribal comments. SF ¶ 78. BOR project leader Rick Strahan noted that “the tribes are  
3 upset about the MOU. There is a fear that if we don’t incorporate their comments they  
4 may get upset.” *Id.* Mr. Strahan was “unsure of [the Indians] status and how to invite  
5 them.” *Id.* BOR archaeologist Pat Hicks responded that “we need to make the Indians  
6 feel good and reduce the number of lands.” *Id.* The minutes show that BOR had little  
7 to no understanding of its legal obligations under NHPA.

8 The District continued to pressure BOR regarding the cost of NEPA and NHPA  
9 compliance. In September 2002, the District Manager wrote to BOR “concerned about  
10 the cost of completing the NEPA process and the Native American consultation  
11 process.” SF ¶ 79. BOR responded with a “share[d]” feeling of “frustration over the  
12 time and expense involved in this project.” *Id.* BOR and the District continued to view  
13 the obligations under NEPA and NHPA as burdens to be minimized.

14 In 2003, BOR received comments from its sister land managing agency, BLM,  
15 that BOR’s cultural resources surveys were insufficient. BLM informed BOR that:

16 the project area is rich in cultural resources, some of what are significant  
17 resources. Significant cultural resources would be better protected if they  
18 remained in federal ownership . . . . The survey methodology is not  
19 adequate for this action. A Class III survey for all transferred lands  
would seem more appropriate.

20 SF ¶ 80. BLM also commented that “the normal requirement on BLM lands is to do a  
21 Class III survey of any land leaving Federal ownership.” *Id.* See BLM Manual  
22 Section 8110.21 (12/03/04) (noting that “the most frequently employed method of  
23 inventory is class III survey carried out for specific projects to enable BLM to comply  
24 with section 106 of the NHPA”); *id.* at Section 8110.23A (stating that “in a previously  
25 unsurveyed area of potential effect, a class III (intensive) survey is generally required  
26 when a proposed undertaking would . . . transfer land out of Federal ownership”).<sup>9</sup>  
27 BOR did not act on BLM’s comments and surveyed only 17% of the lands. BLM

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<sup>9</sup> The BLM Manual is available at: <http://www.blm.gov/nhp/efoia/wo/manual/8110.pdf>.

1 lands, originally included within the transfer, were ultimately removed due to BLM's  
2 position that a complete Class III survey was legally required prior to transfer. SF ¶ 81.

3 BOR acted unreasonably by surveying only 17% of the lands transferred, in light  
4 of the evidence of significant resources within the project area. The reasonableness of a  
5 given survey effort will depend, in part, on the likelihood that such properties may be  
6 present. *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 861 (10th Cir. 1995). The original  
7 Class I literature review performed by BOR determined that only 6% of the project area  
8 had previously been surveyed in a manner consistent with modern standards, but that  
9 many cultural sites had been documented in those past surveys. SF ¶ 84, 89. BOR's  
10 initial Class III field survey identified 74 new sites not previously discovered. SF ¶ 85.  
11 An additional Class III survey in 2005 yielded 33 more sites. SF ¶ 86. BOR continued  
12 to find more eligible sites each time it performed additional surveys. Despite these  
13 findings, and comments from tribes and BLM that the survey was inadequate under the  
14 circumstances, BOR failed to undertake additional field surveys due to its concerns of  
15 timing and cost minimization.<sup>10</sup> BOR and the District were also concerned that  
16 additional surveys might uncover additional eligible resources, resulting in even more  
17 cost and effort to comply with their legal obligations. *See* SF ¶ 82.

18 The determination of whether an agency conducted a reasonable and good faith  
19 investigation is fact specific. *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 861 (10th Cir.  
20 1995). There are few published decisions on the subject, but those cases suggest that  
21 a survey of 17% of an affected area, which is known to be an area of significant  
22 traditional tribal use, and where limited surveys uncover the presence of cultural  
23 resources, is unreasonable. *Romero-Barcelo v. Brown*, 643 F.2d 835, 860 (1st Cir.  
24 1981) (ordering additional survey work under NHPA where Navy's initial survey  
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26 <sup>10</sup> BOR refused to perform additional surveys on lands affected by past  
27 agricultural operations, despite repeated requests by tribes and other stakeholders such  
28 as BLM and despite the conclusion of its own consultant that there is a "high potential  
for buried cultural deposits" in the general area. SF ¶ 87. *See also* SF ¶ 88 (noting that  
subsurface archaeological sites are prevalent in the region).

1 identified numerous properties eligible for National Register and suggested the  
2 probable existence of other eligible sites not specifically located); *Aluli v. Brown*, 437  
3 F. Supp. 602, 610 (D. Hawaii 1977) (questioning whether 34% survey of island was  
4 sufficient under NHPA where partial survey identified numerous archaeological sites).

5 The administrative record confirms that BOR did not perform its Section 106  
6 obligations reasonably or in good faith. *Pueblo of Sandia*, 50 F.3d at 862 (finding that  
7 Forest Service failed to conduct Section 106 process in good faith and noting District  
8 Court's finding that "the Forest Service does not appear to have taken the requirements  
9 of [NHPA] very seriously"). Here, BOR knew from affected tribes, its own consultant,  
10 and comments from BLM that the project area had a significant history of Native  
11 American use. SF ¶ 70, 72, 84. BOR knew that standard procedure of BLM, its sister  
12 agency within the Department of Interior, is to perform Class III surveys in such areas.  
13 SF ¶ 80-81. The limited field surveys that it did perform confirmed the presence of  
14 significant cultural resources. SF ¶ 85-86. BOR acted in bad faith by putting cost and  
15 timing concerns above cultural resource identification and protection, and acted  
16 arbitrarily and unreasonably by surveying only 17% of the lands subject to transfer.<sup>11</sup>

17 **H. BOR Violated NHPA By Approving The Undertaking And**  
18 **Transferring Lands Prior To Completion of the Section 106 Process.**

19 BOR has not executed a final memorandum of agreement (MOA) with the  
20 Advisory Council of Historic Preservation (ACHP). SF ¶ 96. Thus, BOR approved and  
21 commenced an undertaking prior to conclusion of the Section 106 process in violation  
22 of federal law. 36 C.F.R. §800.6(b)(2).

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23 <sup>11</sup> Additional evidence of BOR's flawed cultural resource analysis surfaced after  
24 completion of the title transfer. In April 2007, BOR acknowledged that it incorrectly  
25 identified four cultural resource sites as outside the transfer lands. SF ¶ 94. The sites  
26 were discovered during a federal powerline project. A contractor engaged by the  
27 federal agency, Western Area Power Administration (WAPA), recommended that the  
28 four sites are eligible for listing and protection under the NHPA, even though BOR's  
contractor came to a contrary conclusion in the title transfer review process. SF ¶ 95.  
This incident raises additional questions about the validity of BOR's cultural resources  
identification process and its determinations of eligibility.

1 Federal law prohibits BOR from approving an undertaking, such as the title  
2 transfer, prior to conclusion of the Section 106 process required by NHPA. 36 C.F.R.  
3 § 800.1(c). Execution of a valid memorandum of agreement evidences conclusion of  
4 the Section 106 process. 36 C.F.R. § 800.6(c). A memorandum of agreement for an  
5 undertaking governs the undertaking “and all of its parts.” 16 U.S.C. § 470h-2(l). An  
6 undertaking must be carried out in accordance with the terms of the memorandum of  
7 agreement. It is unlawful to approve an undertaking prior to execution of an MOA  
8 under NHPA. *Mid-States Coalition for Progress v. Surface Transportation Board*,  
9 345 F.3d 520, 554-55 (8th Cir. 2003) (finding NHPA violation where agency approved  
10 undertaking prior to completing Section 106 process); *see also* SF ¶ 97.

11 On January 22, 2007, the ACHP advised BOR that it could not lawfully segment  
12 the title transfer undertaking into smaller components. SF ¶ 99. BOR disregarded the  
13 ACHP letter, transferring lands prior to conclusion of the Section 106 process. BOR  
14 failed to adequately document or explain why it rejected ACHP’s comments prior to  
15 executing the transfer, in violation of 36 C.F.R. § 800.7(c)(4). SF ¶ 100.

16 **I. BOR Violated NHPA By Failing To Meaningfully Consult With**  
17 **The Tribe Throughout The Entirety of The Section 106 Process.**

18 BOR must consult with Indian tribes pursuant to Section 106 of the NHPA when  
19 a federal undertaking may affect cultural resources of significance to Indian tribes. The  
20 ACHP regulations implementing NHPA require ongoing and continuous consultation  
21 with affected Indian tribes at each stage in the Section 106 process. *See* 36 C.F.R.  
22 §§ 800.2(a)(4); 800.2(c)(2)(ii)(C); 800.4(a)(4); 800.4(d)(2); 800.5(a); 800.6(a);  
23 800.6(b)(1)(i); 800.6(c)(2)(ii). BOR failed to comply with these regulations.

24 1. BOR Failed To Engage in Government-to-Government  
25 Consultations With The Tribe Regarding Cultural Resources.

26 BOR failed to consult in a manner sensitive to the concerns and needs of the  
27 Tribe in violation of 36 C.F.R. § 800.2(c)(2)(ii)(C). Instead of engaging in meaningful  
28 government to government consultation with the Tribe regarding the potential impacts  
of the land transfer and potential mitigation measures, BOR held “informational

1 sessions” open to the general public in which BOR would relay the current status of the  
2 land transfer and solicit general public comments about the Section 106 proceedings.  
3 SF ¶ 102. The Tribe and other affected tribes objected to this procedure of  
4 “consultation” via general public “informational session.” SF ¶ 103.

5 As recognized in the ACHP regulations, tribal members are often “reluctant to  
6 divulge specific information regarding the location, nature, and activities associated  
7 with” properties of traditional, religious, and cultural significance to the Tribe and  
8 tribal members. 36 C.F.R. § 800.4(a)(4). BOR’s procedure of “consulting” via open  
9 public “informational meetings” failed to recognize the reluctance of Quechan tribal  
10 members to publicly discuss cultural resources of significance to the Tribe and its  
11 members, and directly resulted in inadequate identification and protection of cultural  
12 resources. *Pueblo of Sandia*, 50 F.3d at 860 (holding that Forest Service failed to make  
13 reasonable effort to obtain information from affected Indian tribes, especially in light of  
14 regulations “warning that tribes might be hesitant to divulge the type of information  
15 sought”). BOR’s failure to formally consult with the Tribe, outside of these public  
16 meetings, discouraged the Tribe and its members from expressing concerns with the  
17 transfer and from identifying cultural resources of significance. See SF ¶ 104.

18 2. BOR Failed To Adequately Consult With The Tribe In  
19 Identifying Affected Cultural Properties.

20 Prior to commencing its effort to identify potentially eligible historic properties,  
21 ACHP regulations require BOR to identify Indian tribes that might attach religious and  
22 cultural significance to historic properties in the area of potential effects “and invite  
23 them to be consulting parties.” 36 C.F.R. § 800.3(f)(2). In this case, BOR failed to  
24 engage affected tribes prior to commencing its Class I investigation. BOR’s consultant  
25 noted that the absence of tribal input in preparation of the Class I study was unusual:

26 [A]n integral part of a Class I survey often includes contacting designated  
27 Native American groups in the region regarding information about sacred  
28 sites, traditional cultural properties (TCPs), and traditional use areas (TUAs).  
Reclamation has decided to gather these data independently of this study.

1 SF ¶ 105. BOR's failure to include tribal input in the identification of historic  
2 properties is not only unusual; it also violates 36 C.F.R. § 800.3(f)(2) and § 800.4(a)(4)  
3 (requiring agency to gather information from tribes in site-identification process).

4 On March 15, 2002, BOR sent a letter to the Tribe requesting "input" regarding  
5 the title transfer and its potential effect on Tribal resources. SF ¶ 106. Nothing in the  
6 letter asks the Tribe to participate in the Section 106 process as a consulting party or  
7 advises the Tribe of its legal right to do so. *Id.* It does not appear that BOR ever  
8 invited any of the affected Indian tribes to participate as consulting parties in the  
9 identification of historic and cultural resources. This violates 36 C.F.R. § 800.3(f)(2).

10 3. BOR Failed To Consult With The Tribe In Developing The  
11 MOA or Appropriate Mitigation Measures.

12 BOR also failed to consult with the Tribe "to develop and evaluate alternatives  
13 or modifications to the undertaking that could avoid, minimize, or mitigate adverse  
14 effects on historic properties" in violation of 36 C.F.R. § 800.6(a) and 36 C.F.R.  
15 § 800.6(b)(1)(i). Specifically, BOR failed to consult with the Tribe regarding  
16 mitigation of the cultural resources of significance to the Tribe, including but not  
17 limited to sites deemed eligible for listing on the NHPA. SF ¶ 107.

18 BOR prepared a memorandum of agreement, the document that will establish  
19 mitigation measures for NHPA-eligible cultural resources without consulting the Tribe.  
20 The Tribe had no role (including no consultation role) in preparing the draft MOA.  
21 SF ¶ 108. BOR's failure to consult with the Tribe in preparing the MOA and  
22 appropriate mitigation measures violates 36 C.F.R. § 800.6(a).<sup>12</sup>

23  
24  
25 <sup>12</sup> The District's cost and timing concerns also negatively influenced BOR's  
26 consultation efforts. For example, on April 29, 2004, the District and BOR discussed a  
27 request by certain tribes to engage in government to government consultations. The  
28 meeting minutes state: "The District wants these consultations to not halt any progress  
with the title transfer." AR 6:3414. The District's legal counsel, Wade Noble, advised  
that "no steps be made right now to schedule a meeting with the tribes." AR 6:3415.

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1 The future private development of transfer lands, including but not limited to the  
2 proposed oil refinery and surrounding developments, will place new pressures and  
3 impacts on all resources in the region, including those located adjacent to, but not  
4 within, transfer lands. The failure to include non-transfer lands within the area of  
5 potential effects means that resources located just outside transfer lands (yet impacted  
6 by increased development) will not be considered in BOR's mitigation plan. BOR  
7 violated NHPA by arbitrarily ignoring impacts to resources located outside the transfer.

8 **K. BOR Arbitrarily, And Without Justification, Failed To Protect Sites**  
9 **As Archaeological Districts.**

10 BOR identified the presence of numerous prehistoric sites scattered throughout  
11 the transfer lands and on other lands within the general project area. SF ¶ 90-91. BOR  
12 failed to evaluate designating broad groups of sites as protected archaeological districts.  
13 Establishment of an archaeological district is appropriate where the agency identifies a  
14 grouping of individual resources that are similar in character and location. *See*  
15 *National Park Service Bulletins 12 and 21, Defining Boundaries for National Register*  
16 *Properties* (1995, rev. 1997).<sup>14</sup> Although tribes commented that designation of a  
17 district would be appropriate and consistent with NPS guidance, BOR failed to  
18 evaluate that possibility or provide a justification for not designating protected districts.  
19 SF ¶ 110. This failure is arbitrary and capricious, violating NHPA and APA.

20 **IV. CONCLUSION**

21 BOR's evaluation of impacts to environmental and cultural resources violated  
22 NEPA, NHPA, and APA. The Tribe is entitled to judgment as a matter of law.

23 DATED this 15th day of October, 2007.

24 MORISSET, SCHLOSSER, JOZWIAK & MCGAW

25 By s/Frank R. Jozwiak  
26 Frank R. Jozwiak, WSBA No. 9482  
27 Thane D. Somerville, WSBA No. 31468  
28 Attorneys for the Quechan Indian Tribe

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<sup>14</sup> This bulletin can be found at <http://www.cr.nps.gov/nr/publications/bulletins/boundaries/>.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

QUECHAN INDIAN TRIBE OF THE	)	No. CV-07-677-PHX-JAT
FORT YUMA INDIAN RESERVATION,	)	
a federally recognized Indian Tribe	)	
	)	
Plaintiff,	)	ORDER
vs.	)	
	)	
U.S. DEPARTMENT OF THE INTERIOR,	)	
et al.,	)	
	)	
Defendants.	)	

Having reviewed Plaintiff's Motion for Summary Judgment, Memorandum in Support, and Statement of Facts in Support, and good cause appearing therefore, the Court finds that there are no material facts in dispute and that Plaintiff is entitled to judgment as a matter of law;

IT IS ORDERED Plaintiff's Motion for Summary Judgment is GRANTED.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

QUECHAN INDIAN TRIBE OF THE ) No. CV-07-677-PHX-JAT  
FORT YUMA INDIAN RESERVATION, )  
a federally recognized Indian Tribe )

Plaintiff, )

vs. )

U.S. DEPARTMENT OF THE INTERIOR, )  
et al., )

Defendants. )

**STATEMENT OF FACTS IN  
SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

Pursuant to Local Rule 56.1(a), the Quechan Indian Tribe ("Tribe") hereby submits this statement of facts in support of its Motion and Memorandum for Summary Judgment filed herewith.

**A. The Wellton-Mohawk Title Transfer**

1. On July 10, 1998, BOR entered into a Memorandum of Agreement ("MOA") with the District that outlined "methods and principles" by which BOR could transfer title to certain irrigation facilities and other adjacent (and, at that time, unidentified) federal lands to the District. AR 1:56-66.<sup>1</sup>

<sup>1</sup> This citation refers to volume number (1) and pages (56 through 66) of the BOR administrative record ("AR"). Citations to the AR herein will follow this format.

1           2.       Prior to approving any such transfer, the MOA required BOR to comply  
2 with “NEPA, NHPA, CERCLA, and other applicable Federal laws as required for  
3 the transfer of ownership of Division works, facilities, and lands.” AR 1:59 (MOA  
4 at §2(b)).

5           3.       In 1998, BOR Commissioner Eluid Martinez testified before Congress in  
6 opposition to a proposed bill that would have required BOR to transfer the BOR lands  
7 to the District by a date certain. Martinez testified:

8           The [proposed] legislation directs rather than authorizes the Secretary to  
9 convey the facilities of the project. This mandate directing the Secretary  
10 to transfer title makes any action under the National Environmental  
11 Policy Act (NEPA) moot because the outcome is predetermined. The  
12 Administration firmly believes that the completion of activities under  
13 NEPA must occur prior to title transfer to allow the Department, the  
Congress, and the public to fully understand the impacts of the proposed  
transfer.

14 AR 1:86-88. Congress did not pass the legislation that Martinez objected to.

15           4.       On June 20, 2000, Congress passed legislation that “authorized” (but  
16 did not require) the Secretary of the Interior to carry out the transfer of title upon  
17 compliance with the requirements of the MOA (which included compliance with  
18 NEPA and NHPA). Public Law 106-221, 114 Stat. 351 (June 20, 2000). *See*  
19 AR 1:223-224. The language objected to by Commissioner Martinez that would have  
20 mandated transfer to the District was not included in the legislation. AR 1:86-88; *id.*

21           5.       BOR and the District agreed to share all costs associated with NEPA and  
22 NHPA compliance. AR 1:62 (MOA at § 8(b)).

23           6.       The District and BOR jointly administered the title transfer project via an  
24 “oversight committee” made up of District and BOR representatives. AR 1:58, 64.

25           7.       The District also participated in the NEPA and NHPA process for the title  
26 transfer as a “cooperating agency.” AR 1:284.

27           8.       Subsequent to the Congressional enactment in 2000, the District and  
28 BOR jointly identified approximately 47,000 acres of land for transfer. AR 1:227-230

1 (noting that the Congressional enactment required the District and BOR to jointly  
2 identify the lands to be transferred); AR 11:6603 (FEIS p. 1-3, Section 1.3.2)<sup>2</sup>  
3 (identifying 47,626 acres of land subject to transfer).

4 9. 28,197 acres proposed for transfer underlie District facilities.  
5 AR 11:6603 (FEIS p. 1-3, Section 1.3.2).

6 10. The remaining 19,341 acres are vacant open space and agricultural lands  
7 not necessary for District operations. AR 6:3717-18 (noting that approximately 30,000  
8 acres of transfer lands are necessary for District facilities, with the remaining vacant  
9 land being subject to possible development); AR 11:6603 (FEIS p. 1-3, Section 1.3.2).

10 11. On the morning of March 26, 2007, BOR issued its record of decision  
11 approving the transfer of all 47,538 acres. AR 12:7398-7409.

12 12. That same morning, before notice of BOR's decision was released to the  
13 public, BOR transferred 39,142 acres of federal land to the District who then  
14 immediately (that same day) transferred 1,460 acres to Arizona Clean Fuels ("ACF")  
15 for development of a crude oil refinery. Declaration of Charles Slocum (Doc. #36,  
16 ¶ 14)<sup>3</sup> (stating that BOR conveyed 39,142 acres to District on March 26); Declaration  
17 of Glenn McGinnis (Doc. #43-2, ¶ 11) (stating ACF received 1,460 acres of land from  
18 District on March 26); Declaration of Thane D. Somerville (Doc. #60, ¶ 5) (stating that  
19 Tribe did not receive copy of record of decision until March 28).

20 13. The Tribe received the record of decision on March 28, 2007 and filed  
21 suit to enjoin any further transfers or development activities on March 30, 2007.  
22 Declaration of Thane D. Somerville (Doc. #60, ¶ 5).

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24 <sup>2</sup> Citations to the Draft and Final EIS will cite to both the relevant page of the  
25 administrative record, and also to the page, section, and/or chapter numbers of the EIS  
26 documents. The Draft EIS is included in the BOR administrative record at Vol 4,  
27 page 2517 through Vol 5, page 2905. The Final EIS is included in the administrative  
28 record at Vol 11, pages 6575-7133.

<sup>3</sup> Documents, such as pleadings, exhibits, and declarations, previously filed in  
this proceeding, but not included within the BOR administrative record, shall be cited  
by reference to their docket document number and relevant page or paragraph number.

1           14.     The District paid BOR \$8,289,792.55 for the surplus lands not underlying  
2 District works and facilities. AR 12:7273-7274; AR 12:7397.

3           15.     ACF contracted to pay the District \$14,681,100 for the 1,460 acres  
4 of land transferred for refinery development. Declaration of Glenn McGinnis  
5 (Doc. #43-2, ¶ 11).

6           **B.     BOR's Environmental Analysis Focuses on Post-Transfer Land Use.**

7           16.     In August 2003, BOR published a Draft Environmental Impact Statement  
8 ("DEIS") for the Wellton-Mohawk Title Transfer. AR 4:2517 through AR 5:2905.

9           17.     The public comment period for the Draft EIS closed on November 4,  
10 2003. AR 5:3264.

11          18.     The DEIS and subsequent Final Environmental Impact Statement  
12 ("FEIS") focus (properly) on the indirect impacts of the land transfer, i.e., the potential  
13 changes in land use and associated impacts that could result from the transfer of title  
14 out of federal ownership. AR 4:2568/AR 11:6635 (DEIS at p. 3-1/FEIS at p. 3-1).

15          19.     Neither the DEIS or FEIS analyze the potential impacts to environmental  
16 or cultural resources resulting from future industrial or heavy-industrial development,  
17 such as the specific ACF oil refinery proposal. AR 4:2517-AR 5:2905 (DEIS does not  
18 analyze potential impacts associated with post-transfer industrial development);  
19 AR 11:6575-7133 (FEIS does not analyze potential impacts associated with post-  
20 transfer industrial development).

21          20.     In the DEIS, BOR suggests that future development of the Transfer  
22 Lands will be "minimal" and "not inconsistent with current land use." AR 5:2723  
23 (DEIS at E-2).

24          21.     BOR also states in the DEIS that "both the County and the District intend  
25 to guide the growth of the project area to preserve its agricultural and open space  
26 character." *Id*; see also AR 5:2733 (DEIS at p. E-10).

27          22.     BOR repeats these statements in its FEIS, despite knowledge that  
28 portions of agricultural and open space areas are planned for significant heavy-

1 industrial development, including the first oil refinery to be developed at any location  
2 in the United States in more than thirty years. AR 11:6875-6889 (FEIS, Appendix E  
3 at pp. E-1 through E-12).

4 23. Internal agency comments on the DEIS advised that BOR inadequately  
5 evaluated the impacts of post-transfer land uses. *See* AR 3:1949 (commenting that  
6 “this assumption that there will be no difference in future development, other than a  
7 timing difference, under both alternatives is not supported by any factual information  
8 . . . an interested third party could easily put forth the contention that this is here only  
9 as a justification for what the proponent [District] wants”); AR 3:1950 (commenting  
10 that BOR must evaluate air quality impacts of the power plant proposed for transfer  
11 lands and that the power plant would likely not occur if not for the transfer).<sup>4</sup>

12 **C. ACF Proposes An Oil Refinery On BOR Transfer Lands.**

13 24. On November 17, 2003 (over three years before BOR published its  
14 FEIS), ACF notified BOR that it had identified certain Transfer Lands as one of two  
15 possible sites for development of an oil refinery project. AR 5:3259.

16 25. In 2004, ACF (acting expressly as BOR’s agent) sought and ultimately  
17 obtained an amendment to Yuma County’s comprehensive plan that changed the land  
18 use designation for 3,300 acres of BOR Transfer Lands from agriculture to heavy-  
19 industrial. AR 11:6701 (FEIS at p. 4-4) (noting that Yuma County granted major plan  
20 amendment on December 13, 2004 to permit re-zoning of the proposed refinery site for  
21 heavy industrial use); AR 6:3475-3480 (July 15, 2004 letter from BOR to Yuma  
22 County regarding ACF application for comprehensive plan amendment); *see also*  
23 Doc. #61-2, pp. 9-27 (ACF application for comprehensive plan amendment).

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24  
25  
26 <sup>4</sup> This comment does not refer to the ACF oil refinery, but to a separate power  
27 plant previously proposed for the west end of the project area. The comment does  
28 show that BOR was on notice that it had an obligation to analyze reasonably  
foreseeable, specific, projects that were planned for post-transfer development on  
transfer lands.

1           26.     With BOR's consent, this comprehensive plan amendment  
2 accommodated the proposed refinery and other anticipated surrounding industrial  
3 developments. AR 6:3475-3480; *see also* Doc. #61-2, p. 13.

4           27.     By September 2004, the ACF refinery project was characterized as a  
5 "hard plan" in BOR title transfer meetings. AR 6:3720.

6           28.     In December 2004, an article in Nature magazine reported that the  
7 District "has pushed to speed up the deal before archaeological studies are complete  
8 so that it can sell the land for the refinery." AR 6:3936.

9           29.     In early 2005, ACF obtained an air permit (permit #1001205) from  
10 Arizona Department of Environmental Quality ("ADEQ") that specifically applies  
11 to the BOR Transfer Lands. The ADEQ permit is a public document available at:  
12 <http://www.azdeq.gov/envIRON/air/permits/download/40140/permit.pdf>. *See also*  
13 Declaration of Bridget Nash-Chrabasz (Doc. #8, Exhibits 19-22).

14           30.     The permit identifies only one location, the BOR lands, for its proposed  
15 facility. *See* ADEQ Permit 1001205 (p. 1 of 499) (stating "the permitted facility will  
16 be located on an approximately 1,450 acre site approximately 40 miles east of Yuma,  
17 near the town of Tacna, in Yuma County).

18           31.     The ACF permit does not identify any location for the refinery other than  
19 the BOR Transfer Lands. *See* ADEQ Permit 1001205. *Id.*

20           32.     The cover letter for the 497-page air permit, dated April 13, 2005,  
21 confirms that the refinery will be a significant source of air pollution. *See* ADEQ  
22 Permit 1001205 (pp. 1-2 of 499); *see also* Declaration of Bridget Nash-Chrabasz  
23 (Doc. #8, Exhibits 19-22).

24           33.     The April 13, 2005 cover letter states that the refinery will be a major  
25 emissions source with the potential to emit more than 100 tons per year of each of the  
26 following pollutants: particulate matter, nitrogen oxides, carbon monoxide, and  
27 volatile organic compounds. *See* ADEQ Permit 1001205 (pp. 1-2 of 499); *See also*  
28 Declaration of Bridget Nash-Chrabasz (Doc. #8, Exhibits 19-22).

1           34. According to ACF CEO Glenn McGinnis, ACF has invested \$35 million  
2 in securing permits and land for the refinery project as of March 2007. Declaration of  
3 Glenn McGinnis (Doc. #43-2, ¶ 24).

4           35. According to ACF CEO Glenn McGinnis, a primary obstacle holding  
5 back construction of the refinery was delay in securing title to the BOR land.  
6 Declaration of Bridget Nash-Chrabascz (Doc. #8, Exhibits 10-11).

7           36. BOR knew as early as mid-2004 of ACF's specific proposal to develop  
8 certain transfer lands into a controversial, intensive industrial use upon transfer (a  
9 possibility not evaluated in the DEIS), and of the significant steps that ACF had taken  
10 to further that plan. AR 5:3259 (ACF letter to BOR); AR 6:3475-3480 (BOR letter  
11 supporting ACF comprehensive plan amendment), AR 6:3720 (referring to refinery in  
12 title transfer meetings as a "hard plan").

13           37. BOR also knew that other industrial development would likely occur in  
14 areas surrounding the refinery as early as mid-2004. AR 3:1778 (acknowledging  
15 District's desire to own lands that may be developed for commercial, residential, and  
16 industrial uses); AR 6:3719 (9/29/04 minutes, noting that industrial development will  
17 be focused near the refinery site); AR 6:3815 (10/29/04 minutes, acknowledging that  
18 the refinery "may be surrounded by heavy industrial development").

19           38. On April 29, 2004, BOR Project leader Strahan acknowledged in a title  
20 transfer meeting that "NEPA requires Reclamation to review environmental documents  
21 and analyze the data, potential effects, etc., for the refinery." AR 6:3414.

22           39. BOR took no action to supplement its DEIS to analyze the significant  
23 new information regarding the refinery in the 40 months between release of the DEIS  
24 in August 2003 and release of the FEIS.

25           **D. BOR Releases Its Final EIS in December 2006.**

26           40. BOR published its Final EIS for the title transfer in December 2006.  
27 AR 11:6575-7133.

1           41.     The FEIS considers only two action alternatives: (1) the preferred  
2 alternative of transferring all 47,626 acres of land to the District; and (2) the  
3 “no-action” alternative of not transferring any land to the District. AR 11:6620  
4 (FEIS at p. 2-1).

5           42.     Officials from BOR and BLM recommended that BOR develop and  
6 consider a third alternative that would result in transfer of only those lands underlying  
7 District works and facilities. *See* AR 3:1870 (BOR, Robert Jolley, comments on EIS)  
8 (“I would suggest that a third alternative be developed that consists of transfer of lands  
9 directly supporting current [District] activities, while keeping the remainder of the land  
10 under federal control.”); *see also* AR 5:3238 (BLM comments on DEIS) (“the public  
11 might best be served if vacant [BOR lands], those without project works or facilities  
12 that are situated adjacent to existing public land, remain in federal ownership”), and  
13 AR 5:3207 (noting deficiency in alternatives analysis).

14           43.     In the FEIS, BOR acknowledges its legal duty to analyze impacts  
15 associated with post-transfer changes in land use. *See* AR 11:6635 (FEIS at p 3-1,  
16 Section 3.1), (stating “ . . . the potential impact of the [title transfer] has been assessed  
17 primarily on the basis of potential land use changes.”).

18           44.     The FEIS makes the same representations regarding post-transfer  
19 development as in the DEIS, with no analysis of possible impacts from future industrial  
20 uses. AR 11:6875-6889 (FEIS, Appendix E at pp. E-1 through E-12).

21           45.     The FEIS notes the potential for impacts to air, water, other  
22 environmental, and cultural resources resulting from the oil refinery development, but  
23 does not provide analysis of such impacts. AR 11:6634-6711 (FEIS, Chapters 3 and 4).

24           46.     In Chapter 3 of the FEIS, BOR purports to analyze the environmental  
25 impacts of the transfer and acknowledges that impacts could result from post-transfer  
26 changes in land use. AR 11:6634-6696 (FEIS, Chapter 3).

27           47.     Although BOR focuses its analysis on impacts associated with future  
28 changes in land use in Chapter 3, BOR mentions the specific ACF refinery proposal

1 only twice in that 66-page chapter. On page 3-4, BOR briefly states that any “noise  
2 impacts” from the “potential gasoline refinery would be subject to independent analysis  
3 under NEPA.” AR 11:6638. On page 3-54, BOR discloses that the refinery “may have  
4 the potential for localized air quality impacts.” AR 11:6690. BOR fails to elaborate,  
5 noting only that any impacts would be addressed in ACF’s air permit and in a future  
6 EIS by a different agency at some unidentified time in the future. *Id.*

7 48. Chapter 3 also covers such topics as impacts to water and biological  
8 resources, water quality, cultural resources, public health and safety, but BOR does not  
9 address whether or how the refinery may impact these resources. AR 11:6634-6696  
10 (FEIS, Chapter 3).

11 49. Appendix E (the “Land Use Evaluation”) mentions, in one brief sentence,  
12 the possible development of the refinery, without any discussion of potential impacts  
13 associated with the refinery. AR 11:6875-6889 (FEIS, Appendix E).

14 50. Section 1.6.6 and Chapter 4 (regarding cumulative impacts) contain the  
15 most extensive discussions of the refinery, but those sections also contain only general  
16 statements about possible impacts and a deferral of substantive environmental review  
17 to other federal agencies at later dates. AR 11:6612 and AR 11:6697-6711 (FEIS at  
18 p. 1-11, and Chapter 4).

19 51. BOR acknowledges in Chapter 4 that “the proposed gasoline refinery  
20 would represent a major change in land use, from open and undeveloped land . . . to a  
21 complex industrial site with associated impacts on visual resources, air quality, noise,  
22 etc., which may cause an impact on adjacent land uses.” AR 11:6701 (FEIS at p. 4-4).

23 52. In Chapter 4, BOR admits the possibility of cultural resources being  
24 present on refinery lands, but speculates that impacts to cultural resources from refinery  
25 development “would be relatively slight.” AR 11:6705-6707 (FEIS at pp. 4-8 to 4-10).

26 53. The cumulative effects analysis notes that the refinery would likely have  
27 impacts on water resources, air quality, and biological resources, but dismisses each of  
28 these impacts in a few short sentences, contending that other regulations, permits, or

1 environmental reviews would address these concerns. AR 11:6697-6711 (FEIS,  
2 Chapter 4).

3 54. BOR notes potential impacts to water quality resulting from the refinery.  
4 Instead of analyzing those impacts in the FEIS, BOR simply states that those impacts  
5 would be minimized through regulation by other agencies. AR 11:6702 (FEIS, at 4-5).

6 55. BOR states that transmission line upgrades may occur on transfer lands,  
7 and that “portions of the potential transmission line upgrades may follow . . . historic  
8 trails.” AR 11:6706 (FEIS at p. 4-9).

9 56. BOR does not disclose that recent transmission line upgrades in the area  
10 resulted in irreparable damage to tribal cultural resources. *See Quechan Indian Tribe v.*  
11 *Western Area Power Administration*, Case No. 02-CV-1096 (S.D. Cal., filed June 7,  
12 2002) (involving transmission line upgrade in which federal agents drove heavy  
13 equipment over, and caused irreparable damage to, cultural resources).

14 57. BOR states in the “summary of impacts” section of the FEIS that “there  
15 are no foreseeable changes in operation resulting directly from the transfer of title that  
16 would significantly change the air quality from current agricultural practices,  
17 foreseeable economic development, or other sources.” AR 11:6592 (FEIS at p. ES-5).

18 58. BOR knew of potential air quality impacts resulting from the refinery, as  
19 it cited to technical documents from ACF’s air permit application in the FEIS  
20 “references” section. AR 11:6740 (FEIS, at RL-1).

21 59. BOR disclaims any duty to analyze the refinery and defers analysis to  
22 other agencies at future, unidentified dates. AR 11:6638 (FEIS at p. 3-4) (declining to  
23 evaluate noise impacts of refinery); AR 11:6690 (FEIS at p. 3-54) (deferring analysis of  
24 air impacts to future EIS process); AR 11:6706 (FEIS at p. 4-9) (noting potential for  
25 impacts to cultural resources, but deferring analysis to future EIS process).

26 60. BOR has admitted in prior briefing that it was not trying to analyze the  
27 refinery impacts in the EIS. *See* Doc. #40 at p. 7 (stating “In the FEIS, [BOR] takes  
28

1 the position that the oil refinery effects did not have to be evaluated because  
2 (1) Reclamation does not know if the refinery will be built (too speculative . . .”).

3 61. BOR expressed concern about information regarding the proposed  
4 refinery and power plant entering the public domain. AR 5:3330 (January 21, 2004  
5 meeting minutes) (expressing concern that “leaking additional information like the  
6 potential for a reservoir and power plant may affect the EIS timing and signing of the  
7 ROD. We need to be cautious of potential projects. We run a risk of an adverse group  
8 coming forward and requesting we redo the EIS to include ‘potential projects’”).; *see*  
9 *also* AR 6:3414 (April 29, 2004 meeting minutes) (explaining that “the more the  
10 refinery is discussed the more the public will request environmental documents and  
11 what affects this will have on the area. Public and environmental pressure will point  
12 to Reclamation”).

13 62. The administrative record suggests that the District and BOR never  
14 intended to take a good faith “hard look” at environmental impacts associated with the  
15 title transfer. For example:

16 a. An October 2000 BOR memorandum regarding “team  
17 designations, roles, and functions for the [title transfer]” states that Andrea Campbell  
18 will be responsible for NEPA compliance and “the Finding of No Significant Impact.”  
19 AR 1:239-240. This indicates that BOR had pre-judged the ultimate outcome of the  
20 NEPA process; i.e., that the title transfer would not result in significant impacts.

21 b. In October 2000, District Manager Clyde Gould suggested that a  
22 sufficient EIS could be developed by using “boilerplate” from previous documents.  
23 AR 1:250. Describing the future title-transfer EIS, Gould stated: “I don’t think it will  
24 be a lot of substance.” AR 1:268. *See also* AR 1:234 (noting Gould’s suggestion to  
25 “take excerpts from existing documents” in preparation of the title transfer EIS).

26 c. In September 2001, Gould asked BOR officials in a title transfer  
27 meeting “How do you minimize the cost of an EIS?” AR 2:715. BOR responded: “It  
28 is minimized by the scale of effort to be done on the analysis.” *Id.* In response to the

1 District's cost concerns, BOR's NEPA Compliance leader Andrea Campbell suggested  
2 "development of a [NEPA] document that is comprehensive but does not go overboard  
3 in the analysis . . . ." *Id.* "It would be an EIS, but really an EA with time periods built in  
4 for public review." *Id.* Campbell suggests that "all controversial topics can be  
5 dismissed through the NEPA document." *Id.*

6 d. In 2003, BOR officials stated that "[t]he EIS is just an  
7 informational document." AR 3:1790 (3/18/2003 minutes).

8 **E. ACF Intends To Commence Refinery Construction Prior To**  
9 **Completion of Any NEPA Review of Refinery Impacts.**

10 63. BOR states in its FEIS that "construction of the refinery could not  
11 occur until the NEPA review of the Arizona Clean Fuels proposal is completed and a  
12 favorable ROD issued. Arizona Clean Fuels would only be able to construct the  
13 project pending the outcome of the NEPA review by BLM." AR 11:6613 (FEIS at  
14 p. 1-12); *see also* AR 9:5847-48 (October 11, 2005 letter from BOR Commissioner  
15 Johnson to Senator Charles Grassley asserting that construction of the refinery would  
16 not occur until after future environmental review by BLM).

17 64. ACF also represented in prior briefing to this Court that construction of  
18 the refinery would not begin until completion of future NEPA review by BLM or some  
19 other federal agency. Doc. #43 at p. 15 ("construction of the refinery cannot occur  
20 until the NEPA and NHPA process is completed . . . . Prior to construction, the refinery  
21 is subject to the NEPA process").

22 65. As of October 15, 2007, no federal agency has issued any scoping notice  
23 (the document that commences NEPA review) for the ACF refinery or any of its  
24 component parts.

25 66. BLM has stated that it has no authority to stop construction of the  
26 refinery on the ACF lands, now that those lands have been transferred out of federal  
27 control. Doc. #98-2 (confirming that BLM has not commenced any NEPA process and  
28

1 asserting that it has no authority to prevent ACF construction activities on the transfer  
2 lands).

3 67. According to ACF CEO Glenn McGinnis, ACF must commence  
4 construction of the refinery by October 20, 2007 or risk expiration of its air permit.  
5 Doc #43-2, ¶ 23.

6 68. ACF plans to commence its oil refinery development prior to the  
7 completion of any other NEPA review by any other federal agency. Doc. #43-2, ¶ 23.

8 **F. BOR Failed To Adequately Identify Cultural Resources**  
9 **Under NHPA.**

10 69. The Transfer Lands are located within the adjudicated traditional territory  
11 of the Quechan Tribe. AR 10:6516-6523.

12 70. The “general project area has a long and rich history of use by Native  
13 American groups.” AR 11:6670 (FEIS at p. 3-34).

14 71. BOR performed cultural resource surveys on only 8,277 of the 47,626  
15 acres proposed for transfer. AR 11:6675 (FEIS at p. 3-39).

16 72. The literature reviews and limited field surveys conducted by BOR  
17 identified the presence of numerous cultural resources, many of which were eligible for  
18 listing on the National Register. AR 11:6676 (FEIS at p. 3-40).

19 73. Nearly 40,000 acres remain unsurveyed for historic and cultural resources  
20 at the time of transfer. AR 11:6675 (FEIS at p. 3-39).

21 74. In 2001, the District raised objections to the level of field surveys and  
22 associated cost proposed by Statistical Research, Inc. for cultural resources analysis.  
23 *See* AR 2:732, lines 22-24, and 39-41 (stating that “an issue has arisen with regard to  
24 the estimated cost (high) and level of effort proposed by Statistical Research Inc., for  
25 cultural resource analysis” and discussing “the outstanding concern with regard to . . .  
26 the cost and level of effort for the cultural resource impact analysis”). *See also*  
27 AR 2:732, lines 43-44 (noting the recommendation of BOR NEPA manager Andrea  
28 Campbell that BOR “proceed with a minimum of field surveys”).

1           75.     On December 6, 2001, the District and BOR met with the Arizona SHPO  
2 and “suggested that field surveys be deferred until after the title transfer and until any  
3 proposals are made to change the uses of tracts of transferred lands.” AR 2:773-774.

4           76.     The District wanted to avoid any Class III surveys of transfer lands prior  
5 to transfer. AR 2:732, lines 64-67 (stating “The ideal situation from the District’s  
6 perspective would be to execute an agreement with the SHPO whereby the transfer can  
7 be accomplished without widespread Class III surveys, but with the provision that  
8 Section 106 compliance is required prior to an action that would disturb any of the  
9 lands transferred.”).

10          77.     BOR project leaders were unaware of the requirements for Section 106  
11 compliance. *See* AR 2:732, lines 55-56 (11/8/2001 meeting minutes). (BOR’s NEPA  
12 manager Andrea Campbell stating that she had “no knowledge of the relationship  
13 between the lands action and the Section 106 process”). *See also* AR 2:732, lines 54-55  
14 (asking if the quit-claim deeds could be signed without having a Class III [survey]  
15 completed); *see also* AR 2:1311-1312.

16          78.     Meeting minutes from July 2002 show BOR and District officials  
17 debating (1) whether they could limit the comment period available to tribes, and  
18 (2) how to limit impacts of tribal comments. AR 2:1310-1312. BOR project leader  
19 Rick Strahan noted that “the tribes are upset about the MOU. There is a fear that if we  
20 don’t incorporate their comments they may get upset.” *Id.* Mr. Strahan was “unsure of  
21 [the Indians] status and how to invite them.” *Id.* BOR archaeologist Pat Hicks  
22 responded that “we need to make the Indians feel good and reduce the number of  
23 lands.” *Id.*

24          79.     The District continued to pressure BOR regarding the cost of NEPA and  
25 NHPA compliance. *See* AR 3:1547 (September 2002 letter from the District to BOR,  
26 expressing concern “about the cost of completing the NEPA process and the Native  
27 American consultation process”); *see also* AR 3:1612 (BOR response letter, expressing  
28 a “share[d]” feeling of “frustration over the time and expense involved in this project”);

1 AR 3:1620-21 (noting, in January 8, 2003 meeting minutes, the District's request that  
2 BOR transfer the power plant land to the District prior to completion of NEPA process  
3 for title transfer).

4 80. In 2003, BLM informed BOR that its cultural resource surveys were  
5 inadequate. AR 5:3241 (stating "the project area is rich in cultural resources, some  
6 of what are significant resources. Significant cultural resources would be better  
7 protected if they remained in federal ownership . . . . The survey methodology is not  
8 adequate for this action. A Class III survey for all transferred lands would seem more  
9 appropriate."); *see also* AR 3:1627 (noting in 1/24/03 title transfer meeting that  
10 "100 percent survey is standard procedure"); AR 3:1994 (BLM commenting that  
11 "the normal requirement on BLM lands is to do a Class III survey of any land leaving  
12 Federal ownership.").

13 81. BLM lands, originally contained within the transfer lands, were removed  
14 due to BLM's request for a complete Class III survey prior to transfer. *See* AR 3:1914  
15 (stating, in April 9, 2003, scope of work that all BLM lands within transfer would be  
16 subject to 100% pedestrian survey); AR 4:2196 (May 19, 2003 letter from District  
17 Manager Slocum to BLM requesting removal of BLM lands from transfer due to  
18 BLM's requests for additional [cultural resource] investigations on its lands);  
19 AR 5:3038-3039 (noting, on September 16, 2003, the removal of BLM lands from  
20 transfer and corresponding reduction of budget). Removal of the BLM lands from the  
21 transfer reduced the costs of cultural resource evaluation by approximately \$75,000.  
22 *Id.*

23 82. In 2003, the Fort Mojave Tribe requested that BOR use more stringent  
24 site definition criteria than required by the Arizona SHPO. BOR declined the request,  
25 responding that:

26 Reclamation determined use of more stringent site designation criteria  
27 could result in a significant increase the number of sites that would have  
28 to be documented and reported on. Were the number of anticipated sites  
to increase significantly, the contractor would be forced to increase the  
amount of time allocated to the field work and reporting phases of the

1 project and/or increase the number of personnel assigned to work on the  
2 project, in order to meet scheduled deadlines. Using the more stringent  
3 criteria for site designation you recommend could thus lead to a  
substantial increase in the cost of the inventory.

4 AR 4:2249.

5 83. On April 29, 2004, the District and BOR discussed a request by tribes to  
6 engage in government to government consultations. The minutes state: "The District  
7 wants these consultations to not halt any progress with the title transfer." AR 6:3414.  
8 The District's legal counsel, Wade Noble, advised that "no steps be made right now to  
9 schedule a meeting with the tribes." AR 6:3415.

10 84. BOR's cultural resource consultant determined that only 6% of the  
11 project area had previously been surveyed in a manner consistent with modern  
12 standards, but that many cultural sites were documented in those past surveys.  
13 AR 3:1432.

14 85. BOR's initial Class III field survey identified 74 new sites not previously  
15 discovered. AR 5:3293.

16 86. A subsequent Class III survey yielded 33 more sites. AR 11:6676  
17 (FEIS at p. 3-40).

18 87. BOR did not perform additional surveys on lands affected by past  
19 agricultural operations, despite repeated requests by tribes and other stakeholders such  
20 as BLM and despite the conclusion of its own consultant that there is a "high potential  
21 for buried cultural deposits" in the general area. AR 5:3133.

22 88. The Arizona SHPO objected to BOR's decision not to survey for sites in  
23 agricultural fields, stating: "Evidence indicating subsurface archaeological sites found  
24 during pedestrian survey in agricultural fields is the rule rather than the exception in  
25 both the Salt River Valley and the Middle Gila River Valley, even when fields have  
26 been laser leveled." AR 5:3341-42.

27 89. BOR's consultant also acknowledged that "no previous studies in the  
28 project area have produced geological maps in sufficient detail to map and date

1 Holocene deposits where archaeological deposits of different ages may exist.”  
2 AR 5:3133.

3 90. BOR’s cultural resource contractor discovered numerous cultural  
4 properties located just outside of transfer lands, yet BOR failed to analyze impacts to  
5 those resources or include them within the area of potential effects. AR 4:2602-2603  
6 (DEIS, at 3-33/34) (noting that literature review uncovered 202 cultural sites in the  
7 “study area” (which was broader than the project lands proposed for transfer), of which  
8 54 sites were located on lands proposed for transfer).

9 91. BOR’s 2005 “Archaeological Investigations” report also identified many  
10 cultural sites located nearby, but not within, transfer lands. AR 7:4450.

11 92. BOR defined its area of potential effects as “the land included in the  
12 transfer of title to the [District].” AR 9:5962.

13 93. BOR did not include resources located adjacent to transfer lands within  
14 its “area of potential effects” and did not evaluate potential impacts to those resources.  
15 *See* AR 9:5962; *see also* AR 10:6326 (letter from Quechan Tribe to BOR commenting  
16 that BOR must consider impacts to cultural resources outside of transfer lands)

17 94. In April 2007, BOR acknowledged that it had improperly marked four  
18 cultural resource sites as outside the transfer lands, when the resources were actually  
19 located within transfer lands. AR 12:7420-21.

20 95. A contractor engaged by the Western Area Power Administration  
21 recommended that the four sites, determined to be ineligible by BOR’s contractor, are  
22 eligible for listing and protection under the NHPA. AR 12:7420-21.

23 96. BOR did not execute a final memorandum of agreement (MOA) with the  
24 Advisory Council of Historic Preservation (ACHP) pursuant to the NHPA prior to  
25 approving and executing the transfer.

26 97. Renee Kolvet, BOR archaeologist, prepared a briefing paper on June 7,  
27 2005 in response to tribal concerns that concluded: “The MOA must be completed and  
28

1 signed by Reclamation, SHPO, and WMIDD for inclusion in the final Environmental  
2 Impact Statement (EIS) prior to signing the Record of Decision.” AR 9:5598.

3 98. In November 2006, BOR’s Joe Liebhauser reported to BOR  
4 Commissioner Johnson that “the District and Reclamation have agreed to move  
5 forward with final publication of the Environmental Impact Statement (EIS) prior to  
6 final resolution of all cultural resource issues.” Liebhauser noted in the report that:  
7 “The District is concerned about the cultural process and the time and funds expended,  
8 and are anxious to complete the transfer.” AR 10:6559.

9 99. On January 22, 2007, the ACHP advised BOR that it could not lawfully  
10 segment the title transfer undertaking into smaller components. AR 12:7146; 7157.

11 100. BOR failed to adequately document or explain why it rejected ACHP’s  
12 comments prior to executing the transfer. *See* Doc. #91-2 (p. 3 of 14).

13 **G. BOR Did Not Comply With Its Consultation Obligation.**

14 101. BOR failed to engage in meaningful government to government  
15 consultation with the Tribe regarding the potential impacts of the land transfer and  
16 potential mitigation measures.

17 102. Instead, BOR held “informational sessions” open to the general public in  
18 which BOR would relay the current status of the land transfer and solicit general public  
19 comments about the Section 106 proceedings. *See, e.g.*, AR 10:6172; AR 10:6177.

20 103. The Tribe and other affected tribes objected to this procedure of  
21 “consultation” via general public “informational session.” AR 10:6172; AR 10:6177.

22 104. BOR’s failure to formally consult with the Tribe, outside of these public  
23 meetings, prevented and discouraged the Tribe and its members from expressing  
24 concerns with the transfer and from identifying cultural resources of significance. *See*  
25 AR 8:4820 (noting Quechan member’s reluctance to discuss cultural resource issues).

26 105. BOR failed to include affected Indian tribes in preparation of the Class I  
27 cultural resource studies. AR 3:1346 (noting absence of tribal input in preparation of  
28 the Class I study), and stating:

1 [A]n integral part of a Class I survey often includes contacting designated  
2 Native American groups in the region regarding information about sacred  
3 sites, traditional cultural properties (TCPs), and traditional use areas  
4 (TUAs). Reclamation has decided to gather these data independently of  
5 this study.

6 106. BOR failed to invite the Tribe to participate in the Class I study and  
7 failed to advise the Tribe of its legal right to participate as a formal consulting party in  
8 the Section 106 process. AR 2:870 (letter from BOR to Tribe requesting “input”  
9 regarding the title transfer and its potential effect on Tribal resources, but failing to ask  
10 the Tribe to participate in the Section 106 process as a consulting party or advising the  
11 Tribe of its legal right to do so).

12 107. BOR did not consult with the Tribe regarding mitigation of the cultural  
13 resources of significance to the Tribe, including but not limited to sites deemed eligible  
14 for listing on the NHPA. *See, i.e.,* AR 12:7564-65.

15 108. BOR did not consult with the Tribe in preparing the draft memorandum  
16 of agreement for the affected cultural resources. *See, i.e.,* AR 12:7564-65.

17 109. BOR did not invite the Tribe to be a signatory to the MOA, despite the  
18 Tribe’s request to be included as a signatory. AR 12:7566; *see also* AR 12:7269  
19 (noting ACHP position that BOR should invite tribes as signatories to the MOA).

20 110. BOR did not evaluate possible designation of broad groups of sites as  
21 protected archaeological districts despite tribal comments that such district designation  
22 would be appropriate under the circumstances of this proceeding and consistent with  
23 National Park Service guidance. AR 10:6326.

24 DATED this 15th day of October, 2007.

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

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