FENNEMORE CRAIG, P.C.
Norman D. James (No. 006901)
Todd Wiley (No. 015358)
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913
Telephone: (602) 916-5000
Email: njames@fclaw.com
Attorneys for Defendants Wellton-Mohawk Irrigation and Drainage District and Charles W. Slocum

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

QUECHAN INDIAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally recognized Indian Tribe,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, as Secretary of the Interior; U.S. BUREAU OF RECLAMATION; ROBERT W. JOHNSON, as Commissioner, Bureau of Reclamation, U.S. Department of Interior; LARRY WALKOVIAK, as Acting Regional Director, Lower Colorado Region, Bureau of Reclamation, U.S. Department of Interior; JAYNE HARKINS, as Acting Regional Director, Lower Colorado Region, Bureau of Reclamation; JIM CHERRY, as Area Manager, Yuma Area Office, Bureau of Reclamation; WELLTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT; CHARLES W. SLOCUM, as General Manager, Wellton-Mohawk Irrigation and Drainage District; ARIZONA CLEAN FUELS YUMA, LLC; GLENN McGINNIS, as Chief Executive Officer, Arizona Clean Fuels Yuma, LLC,

Defendants.

No. CV 07-0677-PHX-JAT

WELLTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

1985813.5

MOTION FOR SUMMARY JUDGMENT

Defendants Wellton-Mohawk Irrigation and Drainage District and Charles W. Slocum, its General Manager, (collectively, "District") move for a summary judgment in their favor pursuant to F.R.Civ.P. 56, dismissing with prejudice all claims alleged in the First Amended Complaint for Declaratory and Injunctive Relief ("Complaint") filed by plaintiff Quechan Indian Tribe of the Fort Yuma Indian Reservation ("Tribe").

This motion is supported by the District's separate statement of facts ("DSOF") filed with this motion, the administrative record relating to the challenged agency action, and the pleadings and other filings in the record of this case. The District incorporates by reference and joins in the respective motions for summary judgment filed by the U.S. Department of the Interior, *et al.* ("Federal Defendants"), and defendants Arizona Clean Fuels Yuma, LLC and Glen McGinnis ("ACF").

I. BRIEF STATEMENT OF THE MOTION

In its Complaint, the Tribe alleges that the U.S. Bureau of Reclamation ("BOR"), the primary defendant in this case, violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332, *et seq.*, and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470, *et seq.*, in connection with transferring certain land (including rights-of-way and easements) containing various canals, pumping plants, wells, laterals, drains, power lines, buildings, flood control structures and other improvements to the District, which is a political subdivision of the State of Arizona and operates these facilities under contract with the United States. DSOF ¶¶ 8-10. The transfer of these lands and facilities was made under the Wellton-Mohawk Transfer Act, Pub. L. No. 106-221, 114 Stat. 351, enacted in 2000 ("Transfer Act"). *Id.* at ¶¶ 13-14.

Prior to transferring any land and facilities to the District, BOR completed an environmental impact statement that evaluated the impacts of the transfer on cultural and other resources. *Final Environmental Impact Statement for Transfer of Title to Facilities,*

Works and Lands of the Gila Project, Wellton-Mohawk Division to Wellton-Mohawk Irrigation and Drainage District (December 2006) ("FEIS"). DSOF ¶ 38. On March 26, 2007, the BOR issued its the *Record of Decision for the Wellton-Mohawk Title Transfer* ("ROD"), and, on that same day, conveyed approximately 39,000 acres of land to the District. The District then conveyed 1,460 acres of land to ACF. *Id.* at ¶ 39. Approximately 8,000 acres of land have not been transferred. *Id.* at ¶¶ 39, 86.

The Tribe's Complaint contains four claims for relief against BOR. The Tribe claims that BOR violated NEPA and the NHPA by failing to properly analyze the impacts of the land Title Transfer. In addition, the Tribe alleges that BOR violated the Transfer Act and a section of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, in authorizing the land transfer. The Tribe named the District and ACF as defendants, but does not allege that they have violated any laws, regulations or other legal requirements.

This Court previously addressed the primary NEPA and NHPA arguments asserted by the Tribe in denying the Tribe's request for a preliminary injunction. *See* Findings of Fact and Conclusions of Law dated June 29, 2007 ("Order") (Doc. #85). The Tribe's Complaint is premised on the same legal arguments and factual allegations relating to the NEPA and NHPA issues as its prior injunction request. Thus, the findings of fact and conclusions of law contained in the Order support granting this motion on the merits.[1]

This motion focuses on the Tribe's NEPA claims, which are the focal point of the Complaint. The administrative record establishes that BOR followed the procedures required by NEPA, and appropriately evaluated the impacts on the environment caused by the transfer of the facilities and related land to the District. The BOR has no regulatory

[1] The District recognizes that "the findings of fact and conclusions of law made by a Court granting a preliminary injunction are not binding at trial on the merits". *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). *See also Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004). Even so, the Tribe's Complaint is based on the same factual record and legal arguments as the Tribe's motion for temporary injunction, which was denied by this Court in the June 29 Order. The administrative record does not contain any facts that would alter the Court's prior ruling.

authority over ACF's proposed refinery, and the transfer of land pursuant to the Transfer Act did not cause the refinery to be proposed. As explained below, under *Department of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004), BOR was not required to evaluate the effects of this proposed (and speculative) refinery project because it is not an effect of the action (the land transfer), nor is the refinery project a connected action. Moreover, BOR *did* address the refinery project in the FEIS and, again, in the ROD in response to the Tribe's comments on the FEIS. DSOF ¶¶ 48-49. The administrative record also shows that BOR made a reasonable and good faith effort to locate eligible cultural sites, conducting an inventory of all undisturbed land and a geomorphologic study of the Gila River floodplain and adjacent areas in the District, and that the BOR properly considered the impacts on the limited cultural resources in the area caused by the Title Transfer in its NEPA documents. *Id.* at ¶¶ 57-83.

As a matter of law, the Tribe cannot demonstrate that BOR's decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See also Public Citizen*, 541 U.S. at 763. Therefore, the Tribe's claims should be dismissed with prejudice.

II. SUMMARY OF MATERIAL FACTS

The District has submitted a separate statement of material facts in accordance with Local Rule (Civil) 56.1, which is incorporated herein by reference. For the Court's convenience, the District provides the following factual summary.

A. The District and the Wellton-Mohawk Transfer Act

The District was created by the Arizona legislature on July 23, 1951, and is a political subdivision of the State of Arizona. DSOF ¶ 1. The District was formed to operate the Wellton-Mohawk Division of the Gila Project, a federal water reclamation project authorized on June 21, 1937, and to deliver Colorado River water to member lands for agricultural irrigation. *Id.* at ¶ 2. The District utilizes the Project's works and facilities

to deliver Colorado River water for irrigating crops and domestic uses, and to provide electric power, flood control and other essential services to land and residents in the Wellton-Mohawk Valley, east of Yuma. *Id.* The District was provided a certificate of discharge of its repayment obligations by the United States in 1991. *Id.* at ¶ 5.

On July 10, 1998, the District and BOR entered into a Memorandum of Agreement governing the transfer of title to the works and facilities of the Wellton-Mohawk Division to the District ("MOA"). *Id.* at ¶¶ 7-9. Under the MOA, BOR agreed to transfer "the works and facilities of the [Wellton-Mohawk] Division, or portions thereof, constructed by the United States for the District" and associated land (including easements and rights-of-way). MOA at 4. BOR also agreed to transfer certain "Withdrawn Lands," which are "those lands within and adjacent to the District that have been withdrawn from public use for Reclamation purposes" (MOA at 3-4), and certain "Acquired Lands," which are "those lands within or adjacent to the [Wellton-Mohawk] Division acquired by the United States pursuant to Public Law 93-320 or Public Law 100-512" (MOA at 2).[2]

The MOA does not restrict future uses of the Withdrawn Lands and the Acquired Lands. Rather, the MOA provides only that "[t]he District will ensure that the works, facilities, and lands to be transferred will be operated in accordance with authorized purposes. No change in project purpose, operation, or use is contemplated or intended by the District or the United States as a result of this transfer." MOA at 4, DSOF ¶ 11. It is undisputed that the proposed land transfer does ***not*** result in any change in the operation of the project's works and facilities, which continue to be used by the District to provide water for irrigation and other essential services. DSOF ¶¶ 12, 41.

On June 20, 2000, Congress enacted the Transfer Act, which provides:

[2] The MOA also includes "Public Lands, which are "public lands within and adjacent to the Division that the Secretary of the Interior, at his discretion, is authorized to sell to the District at fair market value." MOA at 3, DSOF ¶ 9. No Public Lands were transferred to the District.

> The Secretary of the Interior (Secretary) is authorized to carry out the terms of the Memorandum of Agreement No. 8-AA-34-WA014 (Agreement) dated July 10, 1998 between the Secretary and the Wellton-Mohawk Irrigation and Drainage District (District) providing for the transfer of works, facilities and lands to the District, including conveyances of Acquired Lands, Public Lands and Withdrawn Lands, as defined in the Agreement.

Pub. L. No. 106-221, § 2, 114 Stat. 351. The Transfer Act's preamble states that its purpose is to "authorize the Secretary of the Interior to convey certain works, facilities and titles of the Gila Project, and designated lands within or adjacent to the Gila Project, to the Wellton-Mohawk Irrigation and Drainage District, and for other purposes." *Id.*

In connection with transferring the land and facilities to the District ("the Title Transfer"), the BOR was required to comply with certain federal laws, including NEPA the NHPA. MOA at 2.[3] The District was required to pay the appraised fair market value for the Acquired Lands and the Withdrawn Lands. MOA at 4; DSOF ¶¶ 9-10. Other costs and expenses related to the Title Transfer were allocated between the parties. *See, e.g.,* MOA at 7-8. Notably, the District and BOR were jointly responsible for determining the land, works and facilities that would be transferred to the District ("the Transfer Lands"). MOA at 9. Neither the MOA nor the Transfer Act provided BOR with authority to approve or otherwise control the future use of the Transfer Lands. *See* Transfer Act, § 2; DSOF ¶¶ 11-15.

B. BOR's NEPA Process for the Title Transfer

1. BOR's DEIS

In August 2003, BOR circulated a draft environmental impact statement on the Title Transfer ("DEIS") for public comment. DSOF ¶¶ 17-20. In the DEIS, the District

[3] The House Committee that considered the Transfer Act noted that NEPA should not be used "as a means to stall, or halt a project from transferring to a local entity. If environmental documentation is need to facilitate a transfer, it is the intent of the Committee to have it done in a timely manner." *See* H.R. Rep. No. 106-257, at 4 (2001) (attached as exhibit A).

identified 9,800 acres of land eligible to be to transferred as candidate land for commercial and industrial development in accordance with Yuma County's existing development plan. *Id.* at ¶ 20. The DEIS contains multiple references to possible "industrial" development on Transfer Lands. *Id.* at ¶ 21. Consequently, from the outset, BOR recognized that some of the Transfer Lands would be sold by the District or used for other purposes, including commercial and industrial uses.[4] *Id.* at ¶¶ 15, 21. Notably, the Tribe did not provide written or oral comments to BOR on the DEIS. *Id.* at ¶¶ 23-25.[5]

2. BOR's FEIS and Record of Decision

BOR issued its FEIS in December 2006. The FEIS contains an extensive analysis of the potential environmental impacts resulting from the title transfer. *Id.* at ¶¶ 39-57. The FEIS contains an extensive analysis of cumulative impacts on pages 4-1 to 4-14, and Appendices D and E, including land resources and use (§4.2.2.1), water resources (§4.2.2.2), air quality (§4.2.2.3), biological resources (§4.2.2.4), cultural resources (§4.2.2.5), transportation (§4.2.2.6), visual resources (§4.2.2.7) and noise (§4.2.2.8). DSOF at ¶¶ 43-44. The FEIS also contains an extensive Land Use Evaluation in Appendix E. DSOF ¶ 44.

3. BOR's Analysis of the Refinery Project

ACF announced its plans to locate an oil refinery in Yuma County in November 2003, after the DEIS was issued. *Id.* at ¶ 45. ACF identified two potential sites for the refinery, one located on land eligible to be transferred to the District and other on private land. *Id.* Representatives of the Quechans attended project meetings on August 27, 2004,

[4] In the DEIS, for example, BOR discussed the planned construction of a power generation facility (which was ultimately canceled) on a portion of the land to be transferred to the District. DSOF ¶ 22. That power plant also is referenced on page 1-11 of the FEIS. *Id.*

[5] The Tribe subsequently provided NEPA comments on January 30, 2007, by a letter from the Tribe's attorneys, after issuance of the FEIS. DSOF ¶¶ 23-24 . BOR considered and responded to those comments in the ROD issued on March 26, 2007. *Id.* at ¶¶ 25-26.

September 29, 2004, and October 29, 2004, during which BOR, the Tribe and the District discussed the proposed refinery and other potential industrial projects. *Id.* at ¶¶ 48-50.

BOR discussed the refinery in the FEIS, and provided a detailed discussion of potential impacts of the refinery (as well as other, future land uses) in Chapter 4, which addresses other NEPA considerations, including cumulative effects. *See* FEIS at 4-1 to 4-13. BOR also provided a list of various federal permits and approvals required for construction of the refinery project in the FEIS, which would trigger compliance with NEPA and the NHPA. *Id.* at 1-12. Consequently, construction of the refinery cannot occur until the NEPA and NHPA processes are completed by the Bureau of Land Management ("BLM") and other federal agencies with involvement in the refinery project. *Id.* BOR also addressed the refinery in the ROD, and provided detailed responses to comments submitted by the Tribe on the FEIS in January 2007. ROD at 8-10.

C. BOR's Cultural Resources Surveys and NHPA Process

1. BOR Conducted the Most Comprehensive Cultural Resource Inventory Yet Undertaken in the Project Area

"In consultation with the Arizona State Historic Preservation Office ("SHPO") and Tribes, BOR designed and implemented a cultural resources program to determine the nature and extent of cultural resources on lands proposed for transfer, in accordance with 36 C.F.R. § 800.4." DSOF ¶ 60. *See also id.* at ¶¶ 61-73.

As ultimately configured, the title transfer involved 47,538 acres with 19 eligible cultural sites. *Id.* at ¶ 69. SHPO concurred with BOR's eligibility determinations by letters dated November 28, 2005 and May 1, 2006. *Id.* The Advisory Council on Historic Preservation ("ACHP") approved BOR's cultural resource investigation, and specifically determined "that BOR has made a reasonable and good faith effort to identify archaeological properties listed on or eligible for the national register. A 100 percent survey of affected lands, locating all historic properties within the area of potential affects,

is not a requirement of the ACHP's regulations." *Id.* at ¶ 71. BOR determined that "the surveys conducted for this project constitute the most comprehensive cultural resource inventory conducted in this region to date." *Id.* at ¶ 72.

2. The Tribe Failed to Identify Any Undiscovered Cultural Sites on the Transfer Lands

In connection with the NHPA process (which began in 2002), BOR consulted various interested Indian Tribes, including the Quechans, concerning the Title Transfer, and conducted site visits and tribal information exchange meetings conducted on a monthly since 2004. *Id.* at ¶¶ 77-86. More than 30 informational and government-to-government meetings were held with various Indian Tribes, including the Quechans, and numerous concessions were made as a result of tribal concerns and comments. *Id.* at ¶ 35. BOR held numerous meetings with the Tribe's representatives and responded to all of the Tribe's comments. *Id.* at ¶¶ 77-86.

Throughout this process, BOR and the District consulted the Tribe and requested identification of eligible sites from the Quechans. On October 13, 2005, for example, BOR specifically requested information from all Tribes (including the Quechans) concerning the "location of Traditional Cultural Properties in [the] Project Area." *Id.* at ¶ 75. Despite numerous opportunities for comment, "the Quechan Tribe has not identified any specific TCPs or other eligible sites in the Title Transfer Area that Reclamation failed to investigate or consider." ROD at 11.

D. <u>The March 26, 2007 Title Transfer and the Tribe's Complaint.</u>

Ultimately, on March 26, 2007, BOR issued the ROD, approving the title transfer as required under the MOA. DSOF ¶ 39. BOR conveyed the project works and facilities to the District, along with portions of the Acquired Lands and Withdrawn Lands. *Id.* at ¶ 87. This land contained a total of 39,142.21 acres, including the project works, facilities and associated land (28,197 acres). *Id.* at ¶ 86-88. The District, in turn, conveyed 1,460

acres of that land to ACF. *Id.* at ¶ 86.

The Transfer Lands that have been conveyed to the District do not contain any known cultural resources or eligible sites. The 19 known eligible sites occur on land that has not been conveyed by BOR to the District, and that land will remain in federal ownership until the NHPA process is completed with respect to those lands. *Id.* at ¶¶ 83-86. As confirmed in the FEIS, the Title Transfer has not changed the purpose of the project's works and facilities, which will continue to be operated and maintained by the District just as they have been for over 50 years. *Id.* at ¶¶ 12, 44.

On March 30, 2007 Plaintiff filed a complaint for injunctive relief against the Federal Defendants, the District and ACF (Doc. # 1). The Tribe filed its First Amended Complaint on September 18, 2007 (Doc. #125). In its prayer for relief, the Tribe seeks declaratory relief and an injunction against BOR prohibiting the transfer of land and facilities to the District, and an order voiding the March 26, 2007 conveyances. *See* Compl. pp. 36-38 (prayer for relief).

III. STANDARD OF REVIEW

The APA, 5 U.S.C. § 701, *et seq.*, governs judicial review of agency decisions under NEPA and NHPA. *Anderson v. Evans,* 371 F.3d 475, 486 (9th Cir. 2004). In order to prevail on the merits of its claims, the Tribe must demonstrate that BOR's actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court must apply a narrow and deferential standard of review:

> [I]n making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one."

Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989).

This Court is "not empowered to substitute its judgment for that of the agency."

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Rather, the Court must affirm if BOR "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. V. U.S. Dep't of Agr.*, 2007 WL 2421423 at *4 (9th Cir. Aug. 28, 2007), *citing City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004). "This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Id.* at *4, *citing Ind. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000).

Summary judgment is mandated "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Voss v. U.S.*, 2007 WL 2274772 at * 4 (D. Ariz. Aug. 7, 2007), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment should be granted when there are not any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c) Under the APA, "[t]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng. Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985).

IV. LEGAL ARGUMENT

A. The Basic Obligations Imposed by NEPA

It is well established that "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring federal agencies to undertake analyses of the environmental impact of their proposals and actions." *Public Citizen*, 541 U.S. at 756-757. NEPA does not dictate substantive results or expand an agency's regulatory authority, as suggested in the Tribe's Complaint:

> [I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are

> adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. … Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-351 (1989) (citations and footnote omitted). *See also Cold Mtn. v. Garber*, 375 F.3d 884, 892 (9th Cir. 2004) (NEPA "does not mandate particular substantive results, but instead imposes only procedural requirements"). Consequently, in *Robertson*, the Supreme Court explained that NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include a fully-developed mitigation plan in an EIS. NEPA requires adequate disclosure and discussion of the environmental consequences of the proposed federal action, but does not mandate a particular result or require that all environmental impacts be mitigated. 490 U.S. at 353. *See also City of Carmel-By-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1153 - 1154 (9th Cir. 1997); *Inland Empire Pub. Lands Council v. U.S. Forest Service*, 88 F.3d 754, 758 (9th Cir. 1996).[6]

B. BOR's Evaluation of the Effects of the Title Transfer Complied with NEPA

1. Overview of the Tribe's Principal NEPA Claim

The Tribe's primary claim under NEPA is that BOR failed to adequately analyze the effects of the proposed oil refinery project. *See* Compl. ¶¶ 66-138. Included in that claim are several related arguments, such as BOR's alleged failure to supplement the DEIS and FEIS to discuss the refinery project (Compl. ¶¶ 72-102, ¶¶ 103-111), BOR's

[6] Like NEPA, the NHPA imposes certain procedural obligations on federal agencies. "Although the obligations imposed by NHPA are 'separate and independent from those mandated by NEPA,' ... the two statutory schemes are closely related." *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir. 1994). "Both Acts create obligations that are chiefly procedural in nature; both have the goal of generating information about the impact of federal actions on the environment; and both require that the relevant federal agency carefully consider the information produced." *San Carlos Apache Tribe. v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005).

improper "segmentation" of the Title Transfer and the refinery project. (Compl. ¶¶ 136-138), and BOR's failure to allow the Tribe to meaningfully comment on the refinery project and other future uses of the Transfer Lands (Compl. ¶¶ 139-142). All of these arguments turn on the Tribe's contention that the scope of analysis employed by BOR in the FEIS was too narrow and should have included the proposed refinery and, presumably, other future (and unknown) uses of the Transfer Lands.

NEPA requires agencies to consider "all foreseeable direct and indirect impacts" of their proposed actions. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002), *citing City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). Under the Council of Environmental Quality's ("CEQ") regulations, the "effects" (or impacts) of a proposed action include both "direct effects" and "indirect effects." 40 C.F.R. § 1508.8. "Direct effects" are "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). "Indirect effects" are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Both definitions include a causation requirement, i.e., the effect must have a causal relationship to the proposed federal action (here, the Title Transfer).

The key issue, therefore, is whether the refinery (or other land development) is caused by the Title Transfer. In a simplistic sense, the refinery project would not be proceeding at its proposed location on Transfer Lands if the Title Transfer had not taken place. In other words, but for the conveyance of land to the District, the District would not have conveyed the 1,460 acres of land currently owned by ACF, and the proposed refinery would not be sited there. However, this type of attenuated "but for" causal relationship is insufficient to make BOR responsible for the future environmental effects of the refinery, assuming that it is actually permitted by other agencies and built. The seminal decision on this point is *Public Citizen*, decided by the Supreme Court in 2004. In that case, the Court, in reversing the Ninth Circuit, rejected the use of "but for"

causation in determining the scope of analysis required under NEPA, and held that the scope of analysis is limited by a rule of reason that ensures an agency's evaluation of effects is useful to its decision-making process. 541 U.S. at 767.

2. *Public Citizen* and the Proper Scope of Analysis Under NEPA

In *Public Citizen*, the Federal Motor Carrier Safety Administration ("FMCSA") adopted rules imposing registration and safety requirements on Mexican-domiciled motor carriers operating in the United States. To comply with NEPA, FMCSA prepared an environmental assessment, determining that the rules would not have a significant impact on the environment. The agency did not evaluate the overall environmental impacts caused by Mexican trucks operating in the United States. Although implementation of the rules was a statutory prerequisite for the entry of Mexican trucks into the United States, FMCSA reasoned that the impacts resulting from Mexican truck operations would be caused by the President's decision to lift a long-standing moratorium, over which the agency had no control. 541 U.S. at 759-62.

The agency's rules were challenged on several grounds, including the narrow scope of analysis used by FMCSA. The Ninth Circuit concluded that FMCSA violated NEPA by not evaluating all environmental impacts resulting from cross-border truck traffic, including adverse air quality impacts in major cities near the border. *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1021-27 (9th Cir. 2003).

The Supreme Court reversed, holding that FMCSA had correctly limited the scope of its NEPA analysis to the effects of its rules. The Court explained that the agency's authority was limited to enforcing safety requirements, and "could only regulate emissions from Mexican trucks indirectly, through making the safety-registration process more onerous." 541 U.S. at 765. It also explained that it was uncertain whether "FMCSA could, consistent with its limited statutory mandates, reasonably impose … standards beyond those already required in its proposed regulations." *Id.*

The Court rejected the argument that because adoption of the rules was necessary for Mexican trucks to operate in the United States, the scope of NEPA analysis should include all impacts caused by their operation, stating that a "but for" causal relationship between an agency's action and an environmental effect "is insufficient to make an agency responsible for that particular effect under NEPA and the relevant regulations. … NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Id.* at 767 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). The Court also explained that an agency's obligation under NEPA is subject to a "'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id.* The Court concluded:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action."

Id. at 770. Thus, FMCSA was required to evaluate only environmental impacts resulting from activities that the agency was authorized by Congress to regulate.

3. The Proposed Refinery Is Not an Effect of the Title Transfer

In this case, the proposed refinery is not an effect of the Title Transfer for several reasons. As a preliminary matter, the refinery cannot be a *direct* effect of the Title Transfer because it is not "occur[ring] at the same time and place" as the Title Transfer. 40 C.F.R. § 1508.8(a). Instead, the refinery is in its preliminary planning stages and will be constructed and operated (if at all) in the future. Consequently, to fall within the required scope of analysis under NEPA, the refinery project must be an *indirect* effect of the Title Transfer. The conveyance of land by BOR to the District, under the terms of the 1998 MOA and the Transfer Act, however, is not the "legally relevant cause" (*Public*

Citizen, 541 U.S. at 769) of the refinery's future environmental effects, as BOR determined in the ROD.

First, the refinery could be constructed and operated at other locations. There are some 120,000 acres of private and state land available for development in the Wellton-Mohawk Valley. FEIS at 3-3. *See also id.* at 1-4 (table showing land ownership). Because of the large amount of land currently available for commercial and industrial development in the area, BOR determined that the Title Transfer would not alter existing growth and development patterns. *Id.* at 3-9 to 3-11. *See also id.* at 3-46 (the Title Transfer is not expected to increase development, but to provide more options), App. E at 4. ACF considered at least two potential sites for the refinery, including a site "located on private land in eastern Yuma County." *Id.* at 1-11. Thus, ACF intended to proceed with the refinery project on other land if Transfer Lands were not available, and it is clear from the record that land was available. *See* ROD at 9.

Consequently, there is no evidence that the Title Transfer induced the refinery project (or any other specific commercial or industrial activity), particularly given the large amount of private and state land already available for development within or near the District. The decision to site and build a refinery at a particular location is the product of a variety of complex factors, including current and projected demand for refined oil products, access to supplies of petroleum, the economics of the project, the ability to obtain permits and other approvals necessary to operate, and project financing. Thus, as BOR determined, the refinery project "will stand or fall on its own merits" and "is not a reasonably foreseeable result of the Title Transfer with the District." ROD at 9.

Second, BOR has no authority or control over the refinery project. BOR explained in the ROD that it "does not have any control over the location or siting of the proposed oil refinery in implementing the Title Transfer with the District, and there is no causal connection between the Title Transfer and a third party proposal to locate an oil refinery

in the Wellton-Mohawk Valley." *Id*. BOR is responsible for operating and administering various water development, storage and delivery projects on western river systems, such as the Gila Project. The Tribe has not alleged that BOR has been delegated authority to regulate oil refineries or other land use activities, and none of the BOR's enabling laws grant such authority to the agency. As discussed above, NEPA (as well as the NHPA) does not alter or enlarge BOR's substantive authority. Nor do the MOA and the Transfer Act give BOR any control over future uses of the Transfer Lands, or authorize BOR to withhold or condition the conveyance of land based on its future use, as the Tribe implicitly assumes.

BOR is, therefore, like the FMCSA, which had been delegated authority to enforce certain safety and registration requirements, but lacked authority to regulate other aspects of Mexican motor carriers' operations in the United States. In contrast to BOR, there are a number of federal agencies that do have involvement in or control over various aspects of the refinery project. *See* FEIS at 1-12. Applying the *Public Citizen* "rule of reason," it makes far more sense to allow those agencies to conduct any NEPA and NHPA analyses required for the refinery project because the information obtained would actually be useful to the decision-making process of those agencies.

In short, a "reasonably close causal connection" between the Title Transfer and the proposed refinery or other industrial projects does not exist. As explained in the FEIS and ROD, BOR's decision was based on an evaluation of potential effect resulting from the administrative act of transferring title to the District. BOR lacks control over future land use activities, including the refinery project, as it stated in the ROD. Consequently, an analysis of the refinery's future (and speculative) impacts would not have any bearing on the Title Transfer. The *Public Citizen* "rule of reason" prevents exactly the type of unnecessary environmental analysis advocated by the Tribe, which would have no impact on the agency's ultimate decision in this case. *See also* 40 C.F.R. §1500.1(b) ("NEPA

documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail").

Finally, it should be noted that the refinery was in the preliminary planning stages during the NEPA process for the Title Transfer. Thus, BOR had little information to evaluate relating to the refinery and requiring BOR to speculate as to the ultimate design, construction and impacts of the refinery would be an impossible task. "NEPA does not require the government to do the impractical." *Inland Empire,* 88 F.3d at 764. Once again, applying the rule of reason, it makes far more sense for the agencies that will be issuing permits and other approvals to ACF and, as a result, will have access to more current and detailed information about the project, to conduct the NEPA analysis, rather than forcing BOR to speculate about the future effects of a project over which it has no regulatory authority.

C. BOR Had No Duty to Supplement Its DEIS and FEIS

In paragraphs 72 to 111 of the Complaint, the Tribe alleges that BOR had a duty to issue a supplemental DEIS and/or supplemental FEIS specifically addressing the effects of the refinery project. Those allegations depend on the Tribe's erroneous belief that the refinery is a direct or indirect effect of the Title Transfer. *See, e.g.*, Compl. ¶102 (alleging the proposed refinery is an "impact of the land transfer proposal"), ¶ 110 (alleging that "the oil refinery is a significant indirect impact of the land transfer"). For the reasons stated above, the refinery is not a direct or indirect effect of the Title Transfer.

These claims also fail for several other reasons. First, it was contemplated throughout the NEPA review process that a portion of the land transferred to the District would be sold by the District and used for various residential, commercial and industrial purposes in accordance with Yuma County's comprehensive plan. For example, Appendix E to the DEIS contained a detailed "Land Use Evaluation," which explained that "approximately 9,800 acres [of the Transfer Lands] have been identified as candidate

lands for residential, commercial or enhanced agricultural development" under the Yuma County 2010 Plan. DEIS, App. E at 1-2 *See also id.* at 1-4 to 1-9, 3-6. The FEIS contains a similar discussion. *See, e.g.*, FEIS at 3-9 ("Approximately 8,400 acres of land have been identified by the District as candidate lands for potential community or commercial development.").

Moreover, the refinery project was widely publicized in the area, as the Tribe has admitted in its Complaint. Compl. ¶¶ 84-93. Yuma County conducted a public process in which the county amended its land use plan to accommodate the refinery project. Compl. ¶ 85. BOR held numerous meetings with members of the Tribe in 2004 during which the refinery project was discussed. DSOF ¶ 48. The Tribe's contention that supplementation was necessary because the Tribe (or the public generally) was unaware of the refinery is incorrect.

The refinery project was extensively addressed in the FEIS. *See*, *e.g.*, FEIS at 1-5, 1-11 to 1-13, 4-4 to 4-7, 4-9 to 4-12, E-2, Maps 1-3, 2-3, 2-9; Chapter 4 (addressing cumulative effects), App. E & F. BOR also addressed the refinery in the ROD issued on March 26, 2007, including responses to comments by the Tribe. ROD at 9-11. BOR further considered and analyzed industrial development and other future land uses on pages ES-5, 1-4, 3-3, 3-4, 3-6, 3-7, 3-8, 3-9, 3-10, 3-48, 3-49, 4-1, 4-2 and Appendix E of the FEIS. Thus, there was no legitimate basis for BOR to issue a supplemental FEIS.

NEPA imposes on federal agencies an ongoing duty to issue supplemental environmental analyses in limited circumstances. Under 40 C.F.R.§ 1502.9(c)(1)(ii), an agency must prepare a supplemental EIS if "there are significant new circumstances or information relevant to environmental concerns *and bearing on the proposed action or its impacts*." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added). In *Marsh*, the Supreme Court stressed that agencies should apply the rule of reason in determining whether to supplement an EIS, explaining that "an agency need not supplement an EIS every time

new information comes to light after the EIS is finalized." 490 U.S. at 373. The duty to supplement "turns on the value of the new information to the still pending decision making process." *Id.* Here, the effects of future, speculative land uses, including the proposed refinery, are not new circumstances with any bearing on the Title Transfer because of BOR's limited authority to consider and address the effects of those land uses. ROD at 8-9. Therefore, BOR properly determined that it was unnecessary to issue supplements to its DEIS and FEIS discussing the refinery project.[7]

D. BOR Did Not Segment Its Environmental Review

The Tribe also alleges the Title Transfer and the proposed refinery are "interrelated actions," and contends that BOR improperly "segmented" its NEPA analysis by noting that the refinery project would be subject to a separate NEPA (and NHPA) process conducted by other federal agencies. Compl. ¶¶ 136-138. This argument erroneously assumes not only that the refinery project is an effect of the Title Transfer, but that the two actions are "connected actions" under 40 C.F.R. § 1508.25. *Id.*

Under the CEQ's regulations, "connected actions" are actions that are "closely related and therefore should be discussed in the same [EIS]." 40 C.F.R. § 1508.25(a)(1). This regulation identifies three circumstances in which actions should be considered connected: (i) the action automatically triggers other actions that may require an EIS; (ii) the action cannot proceed unless other actions are taken previously or simultaneously; and (iii) the actions are independent part of a larger action and depend on the larger action for their justification. *Id.* at (i)-(iii). None of these circumstances are present here.

The final circumstance is clearly inapposite because the Title Transfer and the refinery project are two separate and discrete actions, subject to entirely different

[7] The Tribe also alleges that BOR failed to respond to the Tribe's comments on the DEIS. Compl. ¶¶ 139-142. However, as BOR explained, the Tribe failed to submit comments on the DEIS. ROD at 11. This claim asserted by the Tribe is nothing more than a variation of the Tribe's claim that BOR was required to issue a supplement DEIS to address the refinery, which, as explained, was not an effect of the Title Transfer.

regulatory requirements. BOR's conveyance of land to the District did not *automatically* trigger the refinery project, which has been separately planned and undertaken by ACF, a private party with no relationship to either BOR or the District. Indeed, at this time, it is uncertain whether the refinery will actually be built and operated. And the refinery project could proceed without the Title Transfer. As explained above, the Wellton-Mohawk Valley already contained more than 120,000 acres of private and state land available for development (*see* FEIS at 3-3.), and the Yuma County comprehensive plan designated approximately 10 percent of the land within the project area for community, commercial and industrial development, primarily land along the Interstate 8 corridor (*see* FEIS at 3-6). Thus, numerous sites were already available for commercial and industrial projects in the Wellton-Mohawk Valley prior to the Title Transfer, and the record shows that ACF considered other sites for its project. *See* ROD at 9; FEIS at 1-11.

Based on these circumstances, BOR specifically found that "neither action depends on the other in the sense that it cannot proceed unless the other action is previously or simultaneously taken; furthermore, the two actions are not interdependent parts of a larger action," and that "the two actions do not warrant a simultaneous review." ROD at 10. That finding was not arbitrary or capricious. "Where each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions." *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 894 (9th Cir. 2002). *See also Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.2d 1105, 1118-19 (9th Cir. 2000) (rejecting claim that multiple phases of a real estate development were connected actions); *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 579-80 (9th Cir. 1998) (rejecting claim that airport projects were connected actions), *following Northwest Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995).

Finally, the Tribe alleges in its Complaint that BOR improperly segmented its

environmental review because BOR noted that the refinery project would require various federal permits and approvals, and would therefore be subject to its own independent NEPA (and NFMA) analysis. Compl. ¶ 136. This argument misses the point, however. Because the refinery project was not an effect of the Title Transfer, BOR was *not* obligated to evaluate the effects of the refinery in its EIS. Therefore, BOR did not defer analysis of the refinery's impacts to those agencies that have regulatory authority over the refinery, but instead correctly determined that the refinery project was not an effect of its action. *See* ROD at 9-10.

E. BOR Adequately Analyzed Impacts on Cultural Resources

The Tribe also claims that BOR failed to adequately identify and analyze cultural resources in violation of NEPA. Compl. ¶¶ 114-123. Specifically, the Tribe alleges that the "Bureau failed to conduct an adequate survey of the Transfer Lands and failed to adequately evaluate whether, and to what extent, cultural resources will be impacted by the land transfer." *Id.* at ¶ 115. ACF has addressed the Tribe's allegations regarding the NHPA in its motion for summary judgment, in which the District joins. Here, the Court should reject the Tribe's attempt to turn its NHPA claim into a NEPA claim.

Boiled down, the Tribe claims that BOR violated NEPA because it failed to conduct Class II/III surveys on all 47,000 acres of the Transfer Lands. Neither NEPA nor the NHPA require such surveys. Rather, 36 C.F.R. § 800.4(b)(1) requires BOR to conduct a reasonable and good faith investigation of cultural resources, which the record demonstrates BOR did. *See also Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983); *National Indian Youth Council v. Watt*, 664 F.2d 220, 228 (10th Cir. 1981). The BOR determined that "the surveys conducted for this project constitute the most comprehensive cultural resource inventory conducted in this region to date." FEIS at 3-35. "Based on the overall survey results, approximately 92.5 percent of significant cultural resources were identified in the project area." *Id.* at 3-38. The ACHP specifically approved BOR's

survey program. DSOF ¶ 74. And the Arizona State Historic Preservation Office concurred with the BOR's eligibility determinations by letters dated November 28, 2005 and May 1, 2006. FEIS at 3-40.

In addition, BOR's cultural resource survey methodology is entitled to substantial deference under NEPA. *See Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) ("NEPA does not require that we decide whether an [EA] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology. … Our task is simply to ensure that the procedure followed by the Service resulted in a reasoned analysis of the evidence before it, and that the Service made the evidence available to all concerned"); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076-77 (9th Cir. 2003) (deference is owed to an agency's choice of scientific methodology). In short, the Tribe has failed to demonstrate any violation of NEPA or the NHPA relating to BOR's cultural surveys.

F. BOR Correctly Analyzed Cumulative Impacts

The Tribe's final NEPA claim is that BOR failed to properly consider the cumulative impacts of the Title Transfer. Compl. ¶¶ 124-135. This claim again is premised on the erroneous belief that the Title Transfer caused the refinery project to occur, which, in turn, will spur other industrial development in the area, such as an ethanol plant on adjacent private lands. Based on this attenuated causation, the Tribe quarrels with the adequacy of BOR's cumulative impacts analysis in the FEIS.

The Tribe, however, misapprehends the cumulative impacts analysis required under NEPA. "Cumulative impacts" are defined as the "impact on the environment that results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. In *Public Citizen*, the Supreme Court held that the requirement to consider cumulative impacts does not alter the scope of analysis under NEPA or eliminate the requirement that the impact be causally

related to the proposed action. 541 U.S. at 770. In other words, the scope of the cumulative effects analysis is also subject to the same "rule of reason" that limits the scope of analysis to "the usefulness of any new potential information to [BOR's] decision-making process." *Id.* at 767.

Here, BOR was required to consider the incremental impacts caused by its action, i.e., the Title Transfer, and was not required to consider other, unrelated and speculative impacts caused by future, unrelated developments in the project area. Consistent with that obligation, BOR provided a detailed discussion of cumulative impacts of the Title Transfer on other land and resource uses in the project area. This analysis is contained in Chapters 3 and 4, and Appendix E, of the FEIS, and included refinery's impacts on land resources and use (FEIS at 4-4), water resources (*id.* at 4-4), air quality (*id.* at 4-6), biological resources (*id.* at 4-7), cultural resources (*id.* at 4-9), transportation (*id.* at 4-10), visual resources (*id.* at 4-11), noise (*id.* at 4-11), and socioeconomics (*id.* at 4-12). Any claim that BOR failed to adequately consider cumulative impacts is unsupportable.

Moreover, the impacts resulting from future development in the area is speculative and unrelated to the Title Transfer. As explained above, there are some 120,000 acres of private and state land available for development in the Wellton-Mohawk Valley. FEIS at 3-3. Because of the large amount of land currently available for commercial and industrial development in the area, BOR determined that the Title Transfer would not alter existing growth and development patterns. FEIS at 3-9 to 3-11. BOR explained:

> Other land use decisions following the title transfer may occur. However, because these decisions are vague, speculative, and will depend on a number of future political, planning, zoning, and economic factors, they cannot be solely attributed to this federal title transfer action, but instead will result from the outcomes of these future, uncertain decisions and processes.

Id. at 4-13. An agency is not required "to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should

contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment." *Kleppe v. Sierra Club*, 427 U.S. 390, 420, n. 20 (1976). Put simply, a cumulative impacts analysis is not required for future, speculative projects. As the Ninth Circuit stated in *Lands Council v. Powell,* 395 F.3d 1019, 1023 (9th Cir. 2004), "[f]or any project that is not yet proposed, and is more remote in time, however, a cumulative effects analysis would be both speculative and premature." *See also National Wildlife Fed. v. F.E.R.C.*, 912 F.2d 1471, 1478 (D.C. Cir. 1990) ("*Kleppe* thus clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.").

Under these circumstances, BOR did not commit a clear error in determining that the refinery and other possible developments were not reasonably foreseeable actions within BOR's control and responsibility for the Title Transfer. ROD at 9-10.

G. The Tribe's Remaining Claims Are Groundless

In addition to alleging violations of NEPA and the NHPA, the Tribe alleges that BOR violated the Wellton-Mohawk Transfer Act (*see* Compl. ¶¶ 179-183) and the APA (*see* Compl. ¶¶ 184-192). Both of these claims are frivolous.

The Transfer Act does not allow a private right of action to be asserted by a third party against BOR or the District. *See San Carlos Apache Tribe*, 417 F.3d at 1093 (dismissing separate claim under § 106 of the NHPA "on the ground that NHPA contains no such private right of action). Like the NHPA, the Transfer Act "does not expressly provide that private individuals may sue to enforce its provisions." *Id.* at 1094. Further, the Tribe lacks prudential standing to assert a claim against BOR for violation of the Act. *See, e.g.*, *Bennett v. Spear,* 520 U.S. 154 (1997). The gist of the Tribe's claim is that "the transfer to ACF for purposes of developing an oil refinery on Transfer Lands is

inconsistent with the Transfer Act and in violation of law." Compl. ¶ 183. The Tribe is effectively asserting a breach of contract claim, arguing the District's sale of Transfer Lands to ACF for the refinery violated ¶ 2(b) of the MOA. In its Complaint, however, the Tribe (which is not a party to the MOA and has no right to enforce it) has failed to allege any interest within the zone of interests protected by the Transfer Act. To satisfy "prudential standing," the Tribe's "grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked" in the Complaint. *Bennett*, 520 U.S. at 163. Thus, this claim cannot be asserted.

The Tribe also asserts that the Title Transfer violated 5 U.S.C. § 706(2)(A). That provision does not impose any substantive or procedural obligations on agencies, but simply prescribes the proper scope of review when a court reviews an agency action under Chapter 7 of the APA, 5 U.S.C. §§ 701-706. *See Staacke v. United States Secretary of Labor,* 841 F.2d 278, 282 (9th Cir. 1988). Consequently, the Tribe does not have an independent cause of action against BOR because BOR cannot violate 5 U.S.C. § 706(2)(A).

V. CONCLUSION.

On this record, the Court must grant summary judgment in the District's favor because BOR "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Serv.,* 475 F.3d 1136, 1140 (9th Cir. 2007).

RESPECTFULLY SUBMITTED this 15th day of October, 2007.

FENNEMORE CRAIG, P.C.

By: /s/ Norman D. James
Norman D. James
Todd Wiley
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913
Attorneys for Defendant Wellton-Mohawk Irrigation and Drainage District and Charles W. Slocum

CERTIFICATE OF SERVICE

☒ I hereby certify that on October 15, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Frank R. Jozwiak
Thane D. Somerville
Morrisset, Schlosser, Jozwiak & McGaw
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
Attorneys for Plaintiff

Richard G. Patrick
Assistant U.S. Attorney
United States Attorney's Office
Two Renaissance Square
40 N. Central Ave., Suite 1200
Phoenix, AZ 85004-4408
richard.patrick@usdoj.gov
Attorney for Federal Defendants

Michael K. Kennedy
Gallagher & Kennedy
2575 E. Camelback Rd.
Phoenix, AZ 85016
mkk@gknet.com
Attorney for Arizona Clean Fuels Yuma, LLC

☒ I hereby certify that on October 15, 2007, I served the attached document by U.S. Mail on the following, who are not registered participants of the CM/ECF System:

The Honorable James A. Teilborg
United States District Court Judge
401 W. Washington St.
Phoenix, Arizona 85003

s/ Mary House

EXHIBIT A

◂Return to KWIC

LexisNexis® Congressional

COMMITTEE REPORTS

106th Congress, 1st Session

House Report 106-257

106 H. Rpt. 257

WELLTON-MOHAWK TRANSFER ACT

DATE: July 26, 1999. Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

SPONSOR: Mr. Young of Alaska submitted the following

COMMITTEE: From the Committee on Resources

REPORT
(To accompany H.R. 841)
(Including cost estimate of the ConRetrieve bill tracking report Retrieve full text version

TEXT:

The Committee on Resources, to whom was referred the bill (H.R. 841) to authorize the Secretary of the Interior to convey certain works, facilities, and titles of the Gila Project, and designated lands within or adjacent to the Gila Project, to the Wellton-Mohawk Irrigation and Drainage District, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

SECTION 1. SHORT TITLE.

This Act may be referred to as the "Wellton-Mohawk Transfer Act".

SEC. 2. TRANSFER.

The Secretary of the Interior ("Secretary") is directed to carry out the terms of the Memorandum of Agreement No. 8-AA-34-WAO14 ("Agreement") dated July 10, 1998, between the Secretary and the Wellton-Mohawk Irrigation and Drainage District ("District") providing for the transfer of works, facilities, and lands to the District, including conveyance of Acquired Lands, Public Lands, and Withdrawn Lands, as defined in the Agreement.

SEC. 3. WATER AND POWER CONTRACTS.

Notwithstanding the transfer, the Secretary and the Secretary of Energy shall provide for and deliver Colorado River water and Parker-Davis Project Priority Use Power to the District in accordance with the terms of existing contracts with the District, including any amendments or supplements thereto or extensions thereof and as provided under section 2 of the Agreement.

SEC. 4. SAVINGS.

Nothing in this Act shall affect any obligations under the Colorado River Basin Salinity Control Act (Public Law 93-320; 43 U.S.C. 1571 et seq.).

SEC. 5. REPORT.

If transfer of works, facilities, and lands pursuant to the Agreement has not occurred by July 1, 2000, the Secretary shall report on the status of the transfer as provided in section 5 of the Agreement.

SEC. 6. AUTHORIZATION.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

PURPOSE OF THE BILL

The purpose of H.R. 841 is to authorize the Secretary of the Interior to convey certain works, facilities, and titles of the Gila Project, and designated lands within or adjacent to the Gila Project, to the Wellton-Mohawk Irrigation and Drainage District, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Bureau of Reclamation (BOR) facility transfers has been of particular interest to Congress, local irrigation districts, and the Administration in recent years. Facility transfers represent an effort to shrink the federal government and shift the responsibilities for ownership into the hands of those who can more efficiently operate and maintain them. As a result of the National Performance Review (Reinventing Government II), BOR, which is part of the Department of the Interior, initiated a program in 1995 to ransfer ownership of some of its facilities to non-federal entities. However, to date, the Administration has not presented a legislative proposal for project transfers. During the 105th Congress, two legislatively initiated BOR transfers bills were signed into law that directed the Secretary of the Interior to convey all right, title, and interest of the United States in and to specified project facilities.

Much of the momentum for these transfers comes from local irrigation districts that are seeking title to these projects. The federal government holds title to more than 600 BOR water projects throughout the West. A growing number of these projects are now paid out and operated and maintained by local irrigation districts. The districts seek to have the facilities transferred to them since many of the districts now have the expertise needed to manage the systems and can do so more efficiently then the federal government. BOR has already transferred operation and maintenance responsibilities for about 400 of the projects to local irrigation districts. Under the provisions of Section

The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior:

32 Stat. 389; 43 U.S.C. Section(s) 491, 498

Many of these projects were constructed in remote locations and at a time when there were no local communities and utilities near the BOR project. Furthermore, many of the States in which the projects were built did not have a sufficient tax base to fund them. However, as the West became more populated, and with the urbanization of these areas, the BOR now owns and operates public facilities that would be owned, operated, and funded by private corporations or local government agencies if they were constructed today.

Legislative initiatives to transfer the title of BOR facilities have been in play for many years. Two bills enacted during the 105th Congress and signed into law directed the Secretary of Interior to convey all right, title, and interest of the United States in and to selected project features to the Burley Irrigation District and the Canadian River Project. See Public Law 105-351 and Public Law 105-316. In addition, Title XIV of Public Law 102-575 directed the Secretary to transfer the Rio Grande Project in New Mexico to the local irrigation district, once the local irrigation district consented to amend a contract.

Background of the Gila Project

The Gila Project in western Arizona was originally authorized for construction under a finding of feasibility approved by the President on June 21, 1937, pursuant to section 4 of the Act of June 25, 1910 (36 Stat. 836), and subsection B of section 4 of the Act of December 5, 1924 (43 Stat. 701). It was reauthorized and reduced in area to 115,000 acres by the Act of July 30, 1947 (61 Stat. 628). Further reduction in irrigable acreage of the Wellton-Mohawk Division was authorized by the Colorado River Basin Salinity Control Act of June 24, 1974 (88 Stat. 266). Project construction was begun in 1936, and the first water was available for irrigation from the Gila Gravity main canal on November 4, 1943. Construction of the Wellton-Mohawk Division features was started in August 1949. On May 1, 1952, water from the Colorado River was turned onto the Wellton-Mohawk fields for the first time. The project was essentially complete by June 30, 1957. The Wellton-Mohawk Irrigation and Drainage District operates the irrigation facilities in the Wellton-Mohawk Division.

Wellton-Mohawk has fully repaid its project costs and was provided a certificate of discharge on November 27, 1991. On July 10, 1998, the District and BOR signed a Memorandum of Agreement that covers the details of the transfer of title. It includes transfer of lands between the federal government and the District, including the acquisition of additional lands for exchange. All transfers will be at fair market value. No change in project operation is contemplated by the transfer and the District will continue to limit irrigated acreage to 62,875 as provided in Public Law 93-320. The transfer would include all facilities and works for which full repayment has been made.

COMMITTEE ACTION

H.R. 841 was introduced on February 24, 1999, by Congressman Ed Pastor (D-AZ). The bill was referred to the Committee on Resources, and within the Committee to the Subcommittee on Water and Power. On March 11, 1999, the Subcommittee met to mark up the bill. Congressman John Doolittle offered an amendment to the bill that would direct the Secretary of Interior, rather than authorize, to transfer the project works. The amendment was adopted by voice vote. The bill was then ordered favorably reported to the Full Committee by voice vote. On March 17, 1999, the Full Resources Committee met to consider the bill. No amendments were offered and the bill was then ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The short title of the bill is the Wellton-Mohawk Transfer Act.

Section 2. Transfer

The section directs the Secretary of Interior to convey certain facilities of the Gila Project, Arizona, to the Wellton-Mohawk Irrigation and Drainage District pursuant to a Memorandum of Agreement (MOA) between the Bureau and the District that was signed on July 10, 1998. The MOA states:

The goal of Reclamation and the District is that within one hundred eighty days of the execution of the Title Transfer Contract, the Secretary shall convey to the District all right, title and interest of the United States to the facilities, works and lands to be conveyed and transferred to the District; provided, that such transfer is not otherwise directed by Congress.

Furthermore, pursuant to the MOA, the bill authorizes the Secretary to sell adjacent withdrawn lands and related lands to the District based on a fair market valuation. No change in project operation is contemplated by the transfer and the District will continue to limit irrigated acreage to 62,875 as provided in Public Law 93-320. The transfer would include all facilities and works for which full repayment has been made. On November 7, 1991, the Bureau certified that full repayment had been made for all water delivery and drainage works.

Additionally, the Committee expects that title transfer should occur in an open and fair public process within the affected community. The Committee does not want to establish a one size fits all statutory procedure that would limit a State, or community from developing a process to address issues surrounding each individual project, and how it should be transferred. Furthermore, it is not the intent of the Committee to use the National Environmental Policy Act as a means to stall, or halt a project from transferring to a local entity. If environmental documentation is needed to facilitate a transfer, it is the intent of the Committee to have it done in a timely manner.

Section 3. Water and power contracts

This section requires the Secretary of the Interior and the Secretary of Energy to continue to provide water and power as provided under existing contracts and as provided under the MOA.

Section 4. Savings

This Section clarifies the application of the Colorado River Basin Salinity Control Act (43 U.S.C. 1571 et seq.).

Section 5. Report

This Section requires the Secretary to issue a report if the transfer has not occurred by July 1, 2000.

Section 6. Authorization

This Section authorizes an appropriation of such sums as may be necessary.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, Section 8 and Article IV, Section 3 of the Constitution of the United States grant Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under Section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and Section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in tax expenditures. According to the Congressional Budget Office, enactment of the bill would increase offsetting receipts by approximately $2 million from the sale of federal land.

3. Government Reform Oversight Findings. Under clause 3(c)(4) of rule XIII of the Rules of the House of

Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and Section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. Congress, Congressional Budget Office,

Washington, DC, March 18, 1999.

Hon. Don Young, Chairman, Committee on Resources,

House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 841, the Wellton-Mohawk Transfer Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Gary Brown (for federal costs), and Marjorie Miller (for the state and local impact).

Sincerely, Barry B. Anderson

(For Dan L. Crippen, Director).

Enclosure. congressional budget office cost estimate

H.R. 841 Wellton-Mohawk Transfer Act

Summary: H.R. 841 would authorize the appropriation of such sums as are necessary to implement a memorandum of agreement between the Bureau of Reclamation (the bureau) and the Wellton-Mohawk Irrigation and Drainage District (the district) regarding transfer of the federally owned Gila Irrigation Project to the district. The bill would give each party the discretion to exchange with each other, or purchase at fair market value, lands relating to the project.

CBO estimates that implementing this bill would result in additional spending of about $500,000 by the bureau over the 2000-2001 period, assuming appropriation of the necessary amounts. In addition, CBO estimates that the district would pay a minimum of about $2 million in 2002 for certain federally owned lands. Because the bill would affect direct spending by increasing offsetting receipts from the sale of federal land, pay-as-you-go procedures would apply.

H.R. 841 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). Local governments might incur some costs as a result of the bill's enactment, but these costs would be voluntary.

Estimated cost to the federal government: The estimated budgetary impact of H.R. 841 is shown in the following table. The cost of this legislation fall within budget function 300 (natural resources and environment).

(PLEASE REFER TO ORIGINAL SOURCE FOR TABLE.)

(PLEASE REFER TO ORIGINAL SOURCE FOR TABLE.) Changes in direct spending:1

Estimated budget authority 0 0 0 2 0 0

Estimated outlays 0 0 0 2 0 0

1Implementing the bill would also affect spending subject to appropriation, but in amounts less than $500,000 a year (for 2000 and 2001).

Basis of estimate: For the purpose of this estimate, CBO assumes that H.R. 841 will be enacted by the end of fiscal year 1999 and that the estimated amounts necessary to implement the bill will be appropriated for fiscal year 2000. Based on information from the bureau, CBO estimates that the federal share of costs for implementing the transfer of the federally owned irrigation project would be about $500,000, spread over fiscal years 2000 and 2001. These funds would pay for necessary environmental studies and legal transactions. The estimate of outlays is based on historical rates of spending for these activities.

H.R. 841 would give the district and the bureau the discretion to exchange, or purchase at fair market value, lands relating to the project. Based on information provided by the bureau, CBO estimates that the district would pay a minimum of about $2 million in 2002 for certain lands. That payment would be recorded as offsetting receipts (a credit against direct spending). Based on information provided by the bureau, CBO estimates that the government would not forgo any income by completing these transactions. In addition, we estimate that completing the land transfers would have no significant impact on spending subject to appropriation.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

(PLEASE REFER TO ORIGINAL SOURCE FOR TABLE.)

(PLEASE REFER TO ORIGINAL SOURCE FOR TABLE.)

Changes in outlays 0 0 0 2 0 0 0 0 0 0

Changes in receipts (10)Not applicable

Under the Balanced Budget Act of 1997, proceeds from nonroutine asset sales (sales that are not authorized under current law) may be counted for pay-as-you-go purposes only if the sale would entail no financial cost to the government. Based on information provided by the bureau, CBO estimates that the sale proceeds would exceed any net revenues currently projected to accrue from these lands; therefore, selling these assets would result in a net savings for pay-as-you-go purposes.

Estimated impact on state, local and tribal governments: H.R. 841 contains no intergovernmental mandates as defined in UMRA. The district has agreed to pay a share of the costs to implement this transfer as part of its memorandum of agreement with the bureau. These costs, which CBO estimates would equal about $1 million, were voluntarily accepted by the district as part of that agreement. The decision to purchase land from the federal government also would be voluntary on the part of the district.

Estimated impact on the private sector: This bill contains no new private-sector mandates as defined in UMRA.

Previous CBO estimate: On March 11, 1999, CBO prepared an estimate for S. 356, the Wellton-Mohawk Transfer Act, as ordered reported by the Senate Committee on Energy and Natural Resources on March 4, 1999. The two bills are similar and the estimates are the same.

Estimate prepared by: Federal costs: Gary Brown. Impact on State, local, and tribal governments: Marjorie Miller.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis. compliance with public law 104-4

This bill contains no unfunded mandates. preemption of state, local or tribal law

This bill is not intended to preempt State, local or tribal law. changes in existing law

If enacted, this bill would make no changes in existing law.

SUBJECT: IRRIGATION (93%); LEGISLATION (90%);

LOAD-DATE: July 28, 1999