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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally recognized Indian Tribe, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; United States Bureau of Land Management; Ken Salazar, Secretary of the Interior; Robert Abbey, Director, Bureau of Land Management; Teri Raml, District Manager, BLM California Desert District; Margaret Goodro, Field Manager, BLM El Centro Field Office Defendants	Civil Action No. 10cv2241 LAB CAB PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

On October 13, 2010, the Defendants United States Department of the Interior *et al.*, ("Interior") published a Record of Decision ("Imperial Valley ROD") that authorizes development of a massive utility-scale 709 megawatt (MW) solar power facility (the "IVS Project") on 6,144 acres of public lands set aside for heightened protection and preservation within the California Desert Conservation Area ("CDCA"). The IVS Project is only one of many large-scale solar and wind energy projects currently being rushed to approval by Interior in the California desert. Congress has not exempted renewable energy development from full compliance with the laws expressly designed to protect the resources of the California desert.

In developing and approving the Imperial Valley ROD, Interior violated the Federal Land Policy and Management Act, National Environmental Policy Act, the National Historic Preservation Act, Administrative Procedures Act, and the governing land management plan for the California Desert Conservation Area. Interior has confirmed that development of the IVS Project will destroy hundreds of cultural sites, and damage the habitat of species under consideration for listing on the Endangered Species Act. To prevent imminent and irreparable harm to these lands, the Quechan Indian Tribe ("Tribe") seeks a preliminary injunction halting implementation of the Imperial Valley ROD and development of the IVS Project on these lands.

II. STATUTORY BACKGROUND

A. The California Desert Conservation Area Plan

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. ("FLPMA") mandates a comprehensive planning system for the use of public lands managed by Interior, through the Bureau of Land Management ("BLM"). In FLPMA, Congress expressly set aside public lands of the California desert as the "California Desert Conservation Area" and mandated development of a comprehensive, long-range management plan for these unique desert lands. 43 U.S.C. § 1781. Interior developed the California Desert Conservation Area Plan ("CDCA Plan") in 1980. *See* Declaration of Thane D. Somerville ("Somerville Decl."), Exhibit 1. The CDCA Plan, like all land use plans developed under FLPMA, has

binding legal effect. 43 U.S.C. § 1732(a) (requiring Secretary to manage public lands in accordance with the land use plans developed under FLPMA).

To achieve Congress' mandate of multiple-use management and resource preservation, the CDCA Plan divides CDCA lands into four land-use classes, known as Classes C, L, M, and I, which provide a hierarchy of permissible land uses and development on CDCA lands. Somerville Decl., Exh. 1, p. 11.[1] The CDCA Plan provides:

> Multiple-Use Class L (Limited Use) protects sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not diminished.

Somerville Decl., Exh. 1, p. 11. The CDCA Plan further elaborates that consumptive uses on Class L lands are allowed "only up to the point that sensitive natural and cultural values might be degraded." *Id.*, Exh. 1, p. 19. Class L provides "protective resource management which complements many identified Native American values." *Id.*, Exh. 1, p. 25. In contrast, Class M provides for "higher intensity use" such as "mining, livestock grazing, recreation, energy, and utility development." *Id.*, Exh. 1, p. 11. Class I lands allow intensive development and provide for "concentrated use of lands and resources to meet human needs." *Id.* Nearly four million acres (over 30% of BLM lands under management in the CDCA) are Class M or I lands available for moderate to high-intensity development. *Id.*

The IVS Project is proposed for development on Class L lands. The CDCA Plan does not prohibit the use of Class L lands for solar energy. Somerville Decl., Exh. 1, p. 13. However, solar development (like all other uses of Class L lands) is permissible only if it satisfies the substantive standards of the CDCA Plan, as described above. The IVS Project, which would be one of the largest solar utilities ever built in the United States, and would cover 6,144 acres of sensitive lands with 30,000 separate solar power generation facilities, is not consistent with the requirements of the CDCA Plan, because the IVS Project is a high-intensity

[1] References to the page numbers of exhibits attached to the Somerville Declaration refer to the page numbers found on the bottom right hand corner of the exhibit.

use that would diminish and degrade sensitive cultural and biological resources on the protected Class L lands.

B. The National Environmental Policy Act (NEPA)

Pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), Interior must prepare an environmental impact statement and take a "hard look" at the potential impacts of its actions prior to making a final decision. In addition to examining the direct and indirect effects of a proposed action, Interior must also analyze cumulative effects. A cumulative effect is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

Interior's review of cumulative effects in this case is woefully inadequate and repeats the failures and deficient analyses rejected by the Ninth Circuit Court of Appeals in numerous cases including *Te-Moak Tribe of Western Shoshone of Nevada v. Department of the Interior*, 608 F.3d 592, 602-607 (9th Cir. 2010) (deficient cumulative effects analysis); *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1132-35 (9th Cir. 2007) (deficient cumulative effects analysis); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971-74 (9th Cir. 2006) (deficient cumulative effects analysis); *Oregon Natural Resources Council v. Bureau of Land Management*, 470 F.3d 818, 822-23 (9th Cir. 2006) (deficient cumulative effects analysis); *Lands Council v. Powell*, 395 F.3d 1019, 1027-28 (9th Cir. 2005) (deficient cumulative effects analysis); *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004) (deficient cumulative effects analysis); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-97 (9th Cir. 2002) (deficient cumulative effects analysis); *City of Carmel-By-The-Sea v. Dep't of Transportation*, 123 F.3d 1142, 1160-61 (9th Cir. 1997) (deficient cumulative effects analysis). Here, as in these prior cases, Interior provided a vague, incomplete, and conclusory examination of cumulative effects and failed to consider the cumulative effect of numerous foreseeable renewable energy projects on CDCA lands.

C. The National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires that Interior "shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. Like NEPA, the NHPA is designed to ensure that federal decision-makers thoroughly evaluate the impacts of their proposed actions on NHPA-eligible resources prior to taking action. *Te-Moak Tribe*, 608 F.3d 592, 607 (9th Cir. 2010).

The regulations implementing Section 106 require that, prior to approval of a federal undertaking (such as the IVS Project), the federal agency must engage in a four-part process. First, the agency must identify the historic properties within the affected area. 36 C.F.R. § 800.4. Second, the agency must evaluate the potential effects that the undertaking may have on historic properties. 36 C.F.R. § 800.5. Third, the agency must resolve the adverse effects through the development of mitigation measures. 36 C.F.R. § 800.6. Fourth, throughout all of these processes, the agency must consult with Indian tribes that might attach religious and cultural significance to historic properties within the affected area, even if such area is outside of reservation boundaries. 36 C.F.R. § 800.3(f)(2); § 800.4(a)(4); § 800.5(c)(2)(iii); § 800.6(a); § 800.6(b)(2), etc. Here, Interior approved the undertaking prior to completion of the Section 106 process and thus violated the NHPA and the Section 106 regulations.

D. The Administrative Procedures Act

The judicial review provision of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, governs review of agency actions under NEPA, NHPA, and FLPMA. Under § 706, a court must set aside agency actions that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To determine whether the agency action was arbitrary and capricious, a court must review whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87,

105 (1983). Agency action must be reversed where the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The agency must engage in "reasoned decision-making." A reviewing court "must not rubber-stamp . . . administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005).

III. STATEMENT OF FACTS

The Imperial Valley ROD, October 2010, "approves the construction, operation, maintenance, and termination (which includes decommissioning) of the proposed IVS Project on [6,144 acres of] public lands in Imperial County, California." Somerville Decl., Exh. 2, p. 35. The Imperial Valley ROD also amends the CDCA Plan to specifically authorize development of the IVS Project on Class L lands within the CDCA. *Id.* "Construction of the 709 MW project is planned to begin in late 2010." *Id.*, Exh. 2, at p. 36.

The IVS Project, as approved, will result in construction of nearly 30,000 "Suncatchers" spread out over a total of 6,500 acres (6,144 acres of which is public lands with a Class L management designation). Somerville Decl., Exh. 3, p. 92-93. According to Interior, it is "one of the first large-scale solar energy generation projects approved on public lands." *Id.*, Exh. 2, at 36. Each individual Suncatcher consists of a "dish structure" that is 40-foot high by 38-foot wide, which is attached to a pedestal of approximately 18 feet in height. *Id.*, Exh. 4, p. 234-35. Associated buildings, miles of roads, and other support infrastructure are also planned for the site. *Id.*, Exh. 3, p. 143. The IVS Project is proposed by a private entity called Imperial Valley Solar, LLC, a subsidiary of Stirling Energy Systems, Inc, in conjunction with NTR, who is "an international developer and operator . . . with a track record in developing large-scale renewable energy and infrastructure projects." *Id.*, Exh. 2, p. 37. The planned life of the IVS Project is 40 years. *Id.*, Exh. 3, p. 96.

Interior has confirmed that the IVS Project area has an extensive history of use by Native American groups, including the Quechan Tribe. Somerville Decl., Exh. 4, pp. 238-250; Exh. 3, pp. 150-156. The IVS Project area is located within the boundaries of Ancient Lake Cahuilla, a focal point of life for Native Americans in the Colorado Desert region for thousands of years. *Id.*, Exh. 4, p. 238. Researchers have "recorded the presence of ancient trails that extend almost from the eastern project boundary to the western boundary." *Id.*, Exh. 4, p. 239. "More than 300 locations of prehistoric use and settlement" have been recorded. *Id.* "Possible cremated human remains recorded in a number of locations are another indication of longer-term settlement in the project." *Id.*, Exh. 4, p. 240. "All Native American tribes associated with the project area cremated their dead. All of the tribes used trails for transportation and exploited the environment similarly." *Id.*, Exh. 4, p. 250. The Project area, used by Quechan ancestors in life and in death, has traditional, religious, spiritual, and historical significance to the Tribe in present-day. *See, e.g.,* Somerville Decl., Exh. 4, p. 252 (discussing the presence of human remains within the project area of analysis and the intense spiritual value that cremations have to Native Americans in the region); *see also* Declaration of Bridget Nash-Chrabascz ("Nash Decl."). California Energy Commission cultural resource expert, Mike McGuirt, testified that the IVS Project area contains "an extraordinary number of cultural resources." Somerville Decl., Exh. 10, p. 326. The Project area also borders the Yuha Desert Area of Critical Environmental Concern, which has unique spiritual significance to the Tribe. *Id.*, Exh. 3, p. 165. Development of the IVS Project on these specific lands will irreparably injure Quechan culture, history, tradition, and religion. Nash Decl., ¶¶ 16-17 26, 28.

The Final EIS identifies 459 cultural resources within the Project Area. Somerville Decl., Exh. 3, p. 177. The Final EIS also reports that "evaluations regarding the eligibility of the 459 resources in the [Area of Potential Effects] for listing in the National Register of Historic Places (National Register) have not yet been completed." *Id.* The Draft EIS previously confirmed that "it is certain that some of these cultural resources will be determined to be significant and to be eligible for nomination to the National Register." *Id.*, Exh. 4, p. 254. The Final EIS reports that 359 of these resources would be impacted by the Project. *Id.*,

Exh. 3, p. 182. The visual impact of the Project on these cultural lands will also be significant. *Id.*, Exh. 3, p. 227 (noting the Project "would substantially degrade the existing visual character and quality of the project site and its surroundings"); Nash Decl., ¶ 28.

The Draft EIS confirmed that "the construction of the proposed solar thermal power facility may wholly or partially destroy the majority of the surface archaeological resources in the proposed project area and may wholly or partially destroy other buried archaeological deposits that may be components of project area landforms." Somerville Decl., Exh. 4, p. 255. Similarly, the Final EIS advises that "given the high quantity and density of cultural resources present, cultural resources cannot be completely avoided by project construction [and] the potential exists for buried archeological deposits." *Id.*, Exh. 3, p. 179. Avoidance of cultural resources is not being required by Interior in this case; avoidance is merely "preferred" as mitigation where "feasible." *Id.*, Exh. 3, p. 192. No standards are provided to guide the "feasibility" determination. Even if avoidance of NHPA-eligible sites were required (or feasible), development of 30,000 Suncatchers on these protected Class L lands would irreparably harm the cultural landscape and impair the sacred nature and historical and cultural significance of the Project area to the Tribe. *See* Nash Decl. ¶¶ 26, 28.

The IVS Project will also destroy habitat for the Flat-Tailed Horned Lizard ("FTHL"), which is known to reside on the Project area lands. Somerville Decl., Exh. 3, p. 166; Exh. 11, pp. 339-345. The FTHL is currently proposed for listing and is anticipated to become listed under the ESA in the near future. *Id.*, Exh. 3, p. 166. The lizard is culturally significant to the Quechan Tribe as it is part of the Tribe's creation story. *Id.*, Exh. 5, p. 269; Nash Decl., ¶ 24.

Interior's approvals of the Imperial Valley ROD, IVS Project, and amendment to the CDCA Plan are not unique. Interior's California Desert District office (responsible for management of lands within the CDCA) is currently processing 133 separate applications for development of solar and wind energy facilities on over one-million acres of BLM land in the California Desert Conservation Area. Somerville Decl., Exh. 3, p. 114. In October 2010 alone, Interior issued Records of Decision approving the Blythe Solar Project (7,025 acres of BLM land in Riverside County), Calico Solar Project (4,604 acres of BLM land in San Bernadino

County), Ivanpah Solar Project (3,472 acres of BLM land in San Bernadino County), and Lucerne Valley Solar Project (422 acres of BLM land in San Bernadino County), in addition to the 6,144 acre IVS Project in Imperial County. Somerville Decl., Exh. 6, pp. 306-314. All of these Project approvals are located on BLM lands within the California Desert Conservation Area. In August 2010, the BLM California Desert District announced availability of a Final EIS for the Genesis Solar Project (4,640 acres of BLM land in Riverside County) and the Draft EIS for the Desert Sunlight Solar Farm Project (19,516 acres of BLM land in Riverside County). Somerville Decl., Exh. 7, pp. 315-319. These projects are also located on BLM lands. Many other projects located on state and privately owned lands in the California Desert Conservation Area are also being developed or considered for development. *Id.*, Exh. 3, p. 115. Interior is issuing these approvals pursuant to an internally prescribed "fast-track." *Id.*, Exh. 8, p. 320. This internal "fast-track" has no basis in law; that is, Congress has not directed Interior to "fast track" solar projects or to otherwise exempt renewable energy projects from full compliance with federal law.

On February 4, 2010, the Tribe wrote to Interior and expressed its concern that Interior was rushing through the administrative review process in order to meet an arbitrary project-approval deadline. Somerville Decl., Exh. 5, pp. 273-275. The Tribe objected to the deferral of the Section 106 process and requested government-to-government consultation with the Tribe to address the Tribe's concerns. *Id.*

On May 17, 2010, the Tribe submitted comments on the Draft EIS supporting denial of the proposed project and plan amendment. Somerville Decl., Exh. 5, pp. 276. The Tribe advised Interior that it had failed to complete a proper cultural resource analysis and failed to thoroughly evaluate the cumulative effect on cultural and biological resources within the California Desert Conservation Area resulting from Interior's intensive push to approve renewable energy projects in the California Desert District. *Id.*

On August 24, 2010, the Tribe submitted a written protest of BLM's Proposed Resource Management Plan Amendment for the California Desert Conservation Area Plan pursuant to 43 C.F.R. § 1610.5-2. Somerville Decl., Exh. 5, pp. 261-272. The Tribe noted that approval of

the Plan Amendment and the IVS Project would unlawfully result in destruction to cultural and biological resources on protected Class L lands. The Tribe also objected to the inadequate cumulative effects analysis and incomplete Section 106 evaluations. BLM denied the protest in an October 5, 2010 form letter and simultaneously issued the Imperial Valley ROD.

IV. ARGUMENT AND AUTHORITY

A. Legal Standard for Preliminary Injunctive Relief

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, ____ U.S. ____, 129 S. Ct. 365, 374 (2008). The *Winter* opinion does not affect the traditional equitable discretion of the trial court to apply a "sliding scale" approach, in which a stronger showing of irreparable harm may offset a weaker showing of likely success on the merits, or vice versa. *Alliance for Wild Rockies*, 613 F.3d 960 (9th Cir. 2010), *amended and superseded by* 622 F.3d 1045, 2010 WL 3665149 (Sept. 22, 2010), at *4-5. However, a mere "possibility" of harm is not sufficient to warrant injunctive relief under the *Winter* test. Irreparable harm must be likely.

Following *Winter*, the Ninth Circuit Court of Appeals has confirmed that preliminary injunctive relief may issue where a plaintiff demonstrates that serious questions going to the merits are raised and the balance of hardships tips sharply in the plaintiff's favor and if the other *Winter* factors, including the likelihood of irreparable harm are satisfied. *Alliance for Wild Rockies,* 2010 WL 3665149 (Sept. 22, 2010), at *8. The "serious questions" test remains valid and is consistent with the Supreme Court's analysis in *Winter*. *Id.*

Here, the Tribe meets each element of the *Winter* test. The Tribe is likely to succeed on its claim that Interior violated NEPA because Interior clearly failed to meet the Ninth Circuit Court of Appeals' standard for evaluating cumulative effects. The Tribe is also likely to succeed on its claim that Interior violated FLPMA and the CDCA Plan by approving this massive, utility-scale, energy project on Class L lands designated for heightened resource

protection. Finally, the Tribe is likely to succeed on its claim that Interior violated the NHPA by approving the IVS Project prior to completing the required steps of the Section 106 process.

The Tribe has raised "serious questions" going to the merits and the balance of hardships favors the Tribe because commencement of construction of the IVS Project is imminent. Construction of the IVS Project on these culturally significant lands, which contain hundreds of cultural resources, currently provide habitat for the Flat-Tailed Horned Lizard, and which are designated for resource protection under the CDCA Plan, will irreparably injure the Tribe. Nash Decl., ¶¶ 16-17, 24-28. Once the resources are damaged or destroyed, they cannot be replaced. *Id.*, at ¶ 26. They are gone forever. Interior would suffer no hardship, as an injunction in this case would not prevent Interior from proceeding with implementation of the numerous other solar energy projects that it has approved within the CDCA in recent weeks.

B. The Tribe Has Raised Serious Questions and Is Likely to Succeed on the Merits of its NEPA Claim

Interior's cumulative effects analysis offers the incomplete, vague, and conclusory analysis that the Ninth Circuit has repeatedly found to violate NEPA. *See supra p.* 3. In a recent case, the Ninth Circuit rejected Interior's cumulative effects analysis, explaining:

> In a cumulative impact analysis, an agency must take a 'hard look' at all actions. An EA's analysis of cumulative impacts 'must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. *Lands Council*, 395 F.3d at 1028. "General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification why more definitive information could not be provided." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380. "[S]ome quantified or detailed information is required. Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide."

Te-Moak Tribe, 608 F.3d 592, 603 (9th Cir. 2010). In another recent case rejecting Interior's deficient cumulative effects analysis, the Ninth Circuit explained that there are "two critical features of a cumulative effects analysis" which are:

> First, it must not only describe related projects but also enumerate the environmental effects of those projects . . . . Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project.

Brong, 492 F.3d 1120, 1133 (9th Cir. 2007). The purpose of a cumulative effects analysis is to examine the specific project at issue (here, the IVS Project) in its larger context and to not allow the agency to minimize the interactive and synergistic adverse environmental effects caused by multiple projects. *See Klamath Siskiyou Wildlands-Center*, 387 F.3d 989, 997 (9th Cir. 2004).

The cumulative effects analysis prepared by Interior here is woefully inadequate and clearly violates the mandates prescribed by NEPA, as interpreted by the Ninth Circuit. In Section 2.10 of the FEIS, Interior identifies past, present, and reasonably foreseeable projects, including one million acres of foreseeable renewable energy development on BLM lands within the CDCA.[2] Somerville Decl., Exh. 3, pp. 114-122. However, Interior's "analysis" of cumulative effects on cultural resources from past, present, and future projects consists of a few perfunctory paragraphs in Section 4.5.5 that offer nothing but the obvious conclusion that increased development pressure will result in the removal or destruction of cultural resources. *Id.*, Exh. 3, pp. 186-187. This cursory and conclusory "analysis" violates NEPA. *Brong* 492 F.3d at 1134 (rejecting analysis that merely summarized cumulative effects in broad terms, while failing to offer quantified or detailed data about the effects).

1. Interior Unlawfully Avoided Discussion of the Cumulative Effects of Past, Present, and Future Renewable Energy Development on CDCA Lands

Interior conveniently avoided any discussion of the cumulative effects of its massive program of renewable energy development in the California Desert Conservation Area by arbitrarily narrowing the area of cumulative effect analysis for cultural resources to the area immediately surrounding the IVS Project - the so-called "Plaster City" area. Somerville Decl.,

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[2] Interior does not separately discuss the foreseeable renewable energy projects in the CDCA, but merely identifies the total number of applications and acres affected. Somerville Decl., Exh. 3, p 114.

Exh. 3, pp. 128, 186. The proper area of analysis is the CDCA, which Congress set aside the CDCA as one cohesive management unit in 43 U.S.C. § 1781. The BLM California Desert District is responsible for management of the resources of that entire unit. Interior acknowledges in its EIS that it has received applications to develop over one-million acres of CDCA land for renewable energy. Somerville Decl., Exh. 3, p. 114. By narrowly focusing its analysis only on projects in the "Plaster City" area, Interior attempts to ignore the substantial impact that development of one-million acres of land in the CDCA would have on the cultural resources in the management unit established by Congress. *Dombeck*, 304 F.3d 886, 897 (9th Cir. 2002) (rejecting agency attempt to approve numerous projects in management unit in piecemeal fashion without considering cumulative effects). Destruction of the hundreds of cultural sites located within the boundaries of the IVS Project is harmful in itself, but when added to the impact of developing one million additional acres of land within the CDCA, the cumulative effect to cultural resources in the CDCA will be staggering.

Under Ninth Circuit precedent, agencies must consider the cumulative effects of foreseeable projects within the applicable established management unit (here, the CDCA). *Dombeck*, 304 F.3d at 897. In *Dombeck*, the Forest Service argued that it need not consider cumulative effects of various foreseeable road density amendments related to timber sales, because the amendments were "spread throughout the [2 million acre] Gallatin National Forest." *Id.* The Ninth Circuit disagreed, stating:

> The national forest was the geographic unit within which the Forest Service chose to set forth binding road density standards in the Forest Plan. All of these sales are proposed within the Gallatin National Forest and will necessarily have additive effects within that management unit. Unless the cumulative impacts of these amendments are subject to analysis *even though distantly spaced throughout the Forest*, the Forest Service will be free to amend road density standards throughout the forest piecemeal, without ever having to evaluate the amendments' cumulative environmental impacts. NEPA does not permit this . . ..

Id. Here, the CDCA is the management unit prescribed by Congress and managed by the California Desert District. Somerville Decl., Exh. 1, p. 26 (noting CDCA is single management unit). As in *Dombeck*, Interior is attempting to approve numerous large solar projects

"piecemeal" without considering the cumulative effects of its action in the established management unit. NEPA does not permit this. *See also Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1266 (E.D. Cal., 2006) (finding that Interior failed to consider whether cumulative effects would impair goals of applicable resource management plan).

Interior may argue that many of the renewable energy projects slated for CDCA lands will not come to fruition. However, in October 2010, Interior approved at least four large solar projects (covering a total of 15,000 acres of BLM land in the CDCA), in addition to the 6,000 + acre IVS Project. Somerville Decl., Exh 6, pp. 306-314. These projects were all "fast-tracked" as part of an internal push to approve solar projects prior to the close of 2010 in order to allow private applicants the opportunity to obtain expiring federal stimulus funding. *Id.*, Exh. 8, pp. 320. Other projects proposed for tens of thousands more acres of BLM-managed land within the CDCA are in the final stages of environmental review and will be approved by Interior in the near future. *Id.*, Exh. 7, pp. 315-319. The BLM California Desert District is processing all of these applications under the internal "fast-track" directive. *Id.*, Exh. 8, p. 320. Again, Congress has not authorized any "fast-track" program that excuses Interior from full compliance with applicable resource preservation laws.

At the very least, to comply with its NEPA obligations, Interior was required to evaluate the impacts of the numerous projects that the California Desert District was approving and reviewing simultaneously with the IVS Project in late 2010. NEPA requires Interior to "identify and discuss the impacts that will be caused by each successive [project], including how the combination of those various impacts is expected to affect the environment, so as to provide a reasonably thorough assessment of the projects' cumulative impacts." *Hankins*, 456 F.3d 955, 974 (9th Cir. 2006). A reader of the EIS for the IVS Project would learn nothing about the cumulative effect of simultaneously approving and developing these multiple large-scale solar projects within the CDCA, because there is no such discussion or analysis in the EIS.

Interior's actions in this case are precisely what NEPA is designed to prohibit. Interior is rushing to independently approve, in piecemeal fashion, numerous massive utility-scale solar projects in the CDCA, while failing to either: (a) consider in one Programmatic EIS the

cumulative effects of its unified program of solar development; or (b) consider in each individual EIS the cumulative effects that will result from the development of these foreseeable and largely simultaneous projects. Each independent project approved by Interior chips away at a piece of the cultural landscape, while cumulatively the entire landscape is at risk of being lost. *Klamath-Siskiyou*, 387 F.3d 989, 994 ("Sometimes the total impact from a set of actions may be greater than the sum of its parts . . . . [T]he addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact").

Analysis of cumulative effect is not merely a procedural exercise. It is intended to guide the decision-making process. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (stating "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late"). If Interior fully appreciated the overall cumulative effect of its program of solar development on cultural resources within the CDCA, it might reach a different decision with regard to the IVS Project. It might decide to approve a project with smaller scale, or to not approve it at all. NEPA does not mandate any particular substantive result; however, NEPA does require Interior to provide a thorough and detailed analysis of the cumulative effects of its decisions. In its haste to approve the IVS Project, Interior failed to meet its obligations. By closing its eyes to the cumulative effects of its overall program of renewable energy development in the California Desert Conservation Area, Interior has violated a fundamental purpose why Congress enacted NEPA.

2. Interior's Analysis of Cumulative Effects Within the "Plaster City" Area Fails to Comply with Ninth Circuit Precedent That Requires Detailed Analysis and Not Mere Vague Conclusions

As discussed above, Interior chose an arbitrarily small geographic area (the "Plaster City" area) to analyze cumulative effects to cultural resources. Interior fails to explain why or how it chose this area for analysis. However, even assuming *arguendo* that the Plaster City area of analysis is reasonable, Interior's discussion in Section 4.5.5 of the FEIS still violates Ninth Circuit precedent by failing to explain how the past projects in the chosen Plaster City area have impacted cultural resources, either individually or in the aggregate. Somerville Decl., Exh. 3, pp. 186-187. Section 4.5.5 fails to consider or explain whether there are significant cultural

resources located on lands slated for foreseeable future development in the Plaster City area. *Id.* Interior fails to consider how development of the identified projects would affect the overall cultural landscape in the Plaster City area. *Brong* 492 F.3d 1120, 1134 (9th Cir. 2007) (rejecting analysis that merely summarized cumulative effects in broad terms, while failing to offer quantified or detailed data about the effects); *Hankins*, 456 F.3d 955, 974 (9th Cir. 2006).

A reader of Interior's FEIS is offered nothing but the obvious conclusion that development of land may result in removal and/or destruction of resources. Somerville Decl., Exh. 3, pp. 186-187. This conclusory observation is not consistent with the Ninth Circuit's interpretation of NEPA requirements. *Te-Moak*, 608 F.3d at 603. *See also Hankins*, 456 F.3d at 974 (rejecting Interior cumulative effects analysis, and stating that BLM "cannot simply offer conclusions"); *Oregon Natural Resources Council*, 470 F.3d at 823 (rejecting Interior's "conclusory presentation" of "general statements" about "possible effects"). Also, as in *Te-Moak*, much of Section 4.5.5.3 discusses the direct effects of the IVS Project itself, which cannot substitute for a full analysis of "the combined impacts resulting from the [IVS Project] with other projects." *Te-Moak*, 608 F.3d at 604. Even in the arbitrarily narrow area discussed in Section 4.5.5, Interior's cumulative effects analysis still fails to meet the standard repeatedly required by the Ninth Circuit Court of Appeals' interpretation of NEPA.

Interior's deficient cumulative effects analysis is not limited to cultural resources. Interior's analysis of biological resources provides similar vague and conclusory opinions regarding cumulative effects, such as "proposed solar and wind energy projects have the potential to further reduce and degrade native plant and animal populations." Somerville Decl., Exh. 3, p. 174. The discussion of cumulative effects on "land use" in the CDCA opines that "it is anticipated that the potential combined development of approximately 1 million acres of land in the southern California desert and the IVS project cumulatively would result in adverse effects on BLM lands and open lands that support recreational resources." *Id.*, Exh. 3, p. 218. This cursory level of analysis is exactly what is prohibited and repeatedly overturned by the Ninth Circuit. Interior has violated NEPA and preliminary injunctive relief is appropriate.

C. The Tribe Has Raised Serious Questions and Is Likely to Succeed on the Merits of its FLPMA Claim

The governing land use plan, the California Desert Conservation Area Plan, does not authorize high-intensity, utility-scale, projects such as the IVS Project on Class L lands, which Interior acknowledges will destroy cultural resources and degrade habitat used by the Flat-Tailed Horned Lizard. Somerville Decl., Exh. 1, p. 11. Unlike the millions of acres of Class M and Class I lands within the CDCA, Class L lands permit only "lower-intensity" uses and only "up to the point that sensitive natural and cultural values might be degraded." *Id.*, Exh. 1, pp. 11, 19. "Once a land use plan is developed, '[a]ll future resource management authorizations and actions . . . shall conform to the approved plan.'" *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007).

Interior contends that it has complied with the law, because the CDCA Plan conditionally allows some development of solar energy on Class L lands. Somerville Decl., Exh. 2, pp. 48, 61, 68; Exh. 3, at p. 214. However, Interior wholly ignores the substantive limitations that are placed on the use of Class L lands in Chapters 2 and 3 of the CDCA Plan, and fails to recognize that not all solar projects are created equally in terms of size, scale, and scope of impact. There certainly may be solar projects that could satisfy the "low-intensity" requirement or that could be developed in a manner in which sensitive natural and cultural values are not degraded. The IVS Project is not one of them.

The IVS Project is a high-intensity, utility scale commercial energy project that will diminish and degrade sensitive resources. If completed, it would be either the largest, or one of the largest, solar power utility projects in the United States. Somerville Decl., Exh. 9, p. 322; Exh. 12, p. 346. It will cover over 6,000 acres of public land with 30,000 large individual "Suncatcher" facilities. *Id.*, Exh. 3, p. 92-93. Twenty-seven miles of paved roads will be developed to accommodate the construction and maintenance operation. *Id.*, Exh. 3, p. 143. Hundreds of cultural sites will be destroyed and habitat for species currently proposed for listing on the Endangered Species Act will be degraded. *Id.*, Exh. 3, p. 166 (re lizard habitat); Exh. 3, p. 186 (re damage to sites).

The Tribe is not generally opposed to development of solar or other renewable energy projects, large or small. The Tribe does object to Interior's unlawful manipulation of its land use planning process in a manner that authorizes development of a high-intensity utility project in a sensitive area that is reserved for resource protection (or, at least, reserved for projects with far less impact than the IVS Project). Congress developed the land use planning process to avoid this kind of piecemeal development of public lands, and to prevent development interests from always prevailing over resource protection. 43 U.S.C. §§ 1701(a); 1781(a). Once a project like the IVS Project is built, the desert resources on that land are lost forever. Thus, in accordance with FLPMA's multiple use mandate, some public desert lands were set aside for development – others for preservation. Somerville Decl., Exh. 1, p. 11. There are millions of acres of lands set aside for intensive development in the CDCA. *Id.* These Class L lands are set aside for preservation.

A similar factual scenario is presented in the *Brong* case. The *Brong* case involved the Northwest Forest Plan (NFP) that, like the CDCA Plan, divided the managed land into different classes or hierarchies of protection. *Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007). BLM proposed to authorize the logging of 1,000 acres of land after a forest fire – a "salvage" project. However, the proposed action was within an area that the NFP required "to be managed to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for . . . the northern spotted owl." *Id.* Although salvage logging was permitted in this area in "limited circumstances," the Court found that "the NFP clearly prioritizes the preservation of LSR ecosystems over commercial benefits." *Id.*, at 1127. The Court further found BLM's authorization of the salvage project as "inconsistent with the NFP's clear direction." At minimum, BLM was required to further explain its view of how the salvage project "is compatible with the NFP's direction to protect and enhance late-successional ecosystems." *Id.* The Court declined to give deference to Interior's decision, which was clearly inconsistent with the intent of the applicable land use plan. *Id.*

Similarly here, Interior has authorized a land use action that is plainly inconsistent with the CDCA Plan. Interior's unlawful interpretation of the CDCA Plan is not entitled to

deference. *Brong*, 492 F.3d at 1127. If the land use planning process prescribed by Congress means anything, Interior must not be permitted to authorize high-intensity, utility scale projects in areas designated primarily for resource protection and low-intensity uses. At minimum, the matter must be remanded to Interior for further explanation as to how this specific solar project is consistent with the provisions of the CDCA Plan that permit only "lower-intensity" uses and only "up to the point that sensitive natural and cultural values might be degraded." *Id.*

D. The Tribe Has Raised Serious Questions and Is Likely to Succeed on the Merits of its NHPA Claim.

Interior reached its approval decision prior to evaluating the eligibility of cultural resources identified in the Project area and without engaging in required consultation with tribes as required by Section 106 of the National Historic Preservation Act and its regulations. Instead, Interior unlawfully chose to defer the Section 106 process until after it made its decision to approve the Project. Interior claims that it complied with the law, through its execution of a Programmatic Agreement under 36 C.F.R. § 800.14(b)(1)(ii). Somerville Decl., Exh. 2, p. 59.

Interior cannot rely on a Programmatic Agreement in this case and must complete the Section 106 process (at least for Phase One of the IVS Project) prior to approving the Project. The applicable regulations permit the action agency (here, Interior) to negotiate a programmatic agreement "to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." 36 C.F.R. § 800.14(b). The regulations further identify specific situations where a programmatic agreement is appropriate. Here, Interior relies solely on 36 C.F.R. § 800.14(b)(1)(ii), which allows use of a programmatic agreement "when effects on historic properties cannot be fully determined prior to approval of an undertaking." Somerville Decl., Exh. 2, p. 63.

Interior has failed to identify any legitimate reason why effects on historic properties could not be determined prior to approval of this undertaking (or at least prior to approval of Phase One). Interior has been pushing to approve the IVS Project prior to the close of 2010 so that the applicant could potentially qualify for federal stimulus financing. Nash Decl.,

¶¶ 33-34; Somerville Decl., Exh. 8, 9, and 12. Interior could have determined the effects on historic properties prior to reaching a final decision on the undertaking, as required by Congress – it just chose not to. Nothing in the Section 106 regulations permits Interior to defer the Section 106 process in order to facilitate project funding for a private applicant. There are no exigent circumstances in this case that justify the deferral of the Section 106 process mandated by Congress. The California Energy Commission's cultural resource expert testified on August 16, 2010 that Interior's pre-determination was a "subversion of the [Section] 106 process." Somerville Decl., Exh. 10, at p. 336. Interior's reliance on a programmatic agreement in this case is arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedures Act, 5 U.S.C. § 706.

E. The Tribe Will Suffer Irreparable Harm Absent Injunctive Relief

"[T]he Supreme Court has instructed us that '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.'" *Alliance for Wild Rockies,* 2010 WL 3665149 (Sept. 22, 2010), at *9. Absent a preliminary injunction, the Tribe will suffer actual irreparable harm. The applicant will commence construction of the IVS Project imminently and no later than the close of 2010. Somerville Decl., Exh. 2, p. 36; Nash Decl, ¶ 35. The applicant may have already started construction by the time this motion is heard.

Interior has recognized the cultural significance of this area in the administrative process and environmental documents. Somerville Decl., Exh 4, pp 238-250; Exh. 3, pp. 150-156. Interior has identified over three hundred cultural sites that will be adversely affected (e.g., removed from the land or otherwise destroyed) by the IVS Project. *Id.*, Exh. 4, at p. 255; Exh. 3, p. 182. Cremation sites, potentially of Quechan ancestors, are also present on and near the IVS Project site. *Id.,* Exh. 4, p. 252. The applicant is not required to avoid cultural sites during construction. Avoidance is called for only when "feasible," with no standards to govern a determination of "feasibility." *Id.,* Exh. 3, p. 192. Destruction of the cultural resources by the IVS Project is not only likely, it is certain and anticipated. *Id.*,

Exh. 3, at p. 186. Once the cultural resources are destroyed or damaged, they cannot be replaced. As noted in the CDCA Plan itself:

> Many impacts on resources of Native American values are not amenable to mitigation. Desecration or sacrilegious treatment of religiously significant sites cannot be mitigated as can many adverse effects on material resources. These substantial potential and often irreversible impacts on cultural values will be carefully considered in all actions of the Plan.

Somerville Decl., Exh. 1, p. 25. Allowing the IVS Project to commence will cause irreparable injury to Quechan culture, history, tradition, and religion. Nash Decl., ¶¶ 16-17, 26, 28. The status quo must be preserved here to prevent irreparable harm.

F. The Balance of Equities and Public Interest Favor the Tribe

There is a well –established "public interest in preserving nature and avoiding irreparable environmental injury." *Alliance for Wild Rockies,* 2010 WL 3665149 (Sept. 22, 2010), at *12. The Ninth Circuit recently repeated its long-standing recognition of "the public interest in careful consideration of environmental impacts before major federal projects go forward." *Id.* "Suspending a project until that [careful] consideration occurs comports with the public interest." *South Fork Band Council of Western Shoshone of Nevada v. Department of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (finding public interest favored injunction and preservation of status quo pending compliance with NEPA); *Se. Alaska Conservation Council v. US Army Corps of Engineers*, 479 F.3d 1148, 1151 (9th Cir. 2007 ("the whole point of the injunction" is to maintain status quo pending evaluation); *Oregon Natural Resources Council*, 470 F.3d at 823 (remanding with direction to enjoin project pending compliance with NEPA).

Courts within the Ninth Circuit have similarly recognized the public interest in the protection of cultural resources from irreparable harm. In *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985), the Court enjoined a construction project pending compliance with NEPA and the NHPA noting that "the Court is also mindful of the advancement of the public interest in preserving these [tribal cultural] resources. They represent a means by which to better understand the history and culture of the American

Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians." *Id.* at 1440.

Neither the public, nor Interior, would suffer any harm from issuance of a preliminary injunction that maintains the status quo pending further review of Interior's compliance with applicable law in this matter. These public lands would remain undisturbed and protected in the interim. Any temporary economic harm that Interior or the project applicant would suffer does not outweigh the public interest in resource preservation. *Alliance for Wild Rockies,* 2010 WL 3665149 (Sept. 22, 2010), at *11-12; *South Fork Band Council*, 588 F.3d at 728. Interior can also continue to process and implement the numerous other solar projects that it has approved on other BLM lands in the CDCA. An injunction addressing the specific lands at issue here will not impair Interior's efforts to increase solar power development on other federal lands. A preliminary injunction will preserve the status quo here and prevent imminent irreparable harm to cultural resources on the specific lands at issue, which would result from construction of the IVS Project. The balance of equities and public interest favor the Tribe.

G. Posting of Security Should Be Waived Or Set At A Nominal Sum

Rule 65 references the posting of security upon issuance of a temporary restraining order or preliminary injunction, however the Court has authority to dispense with the security or to require mere nominal security. *People ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1316, 1325-36 (9th Cir. 1985). Courts often waive the bond requirement or require nominal security in NEPA litigation against federal agencies. *See Davis v. Minetta,* 302 F.3d 1104 (10th Cir. 2002) (where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered when granting a preliminary injunction); *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988) (setting bond of $100 for preliminary injunction barring timber sale); *Environmental Defense Fund v. Corps of Engineers,* 331 F. Supp. 925, 927 (D.D.C. 1971) ($1 bond for preliminary injunction restraining construction of 253-mile long Tennessee-Tombigbee waterway). In setting a $1 bond, the court commented in *State of Alabama ex rel. Baxley v. Corps of Engineers,* 411 F. Supp. 1261, 1276 (N.D. Ala. 1976)*:* "This court is simply unwilling to close the courthouse

door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to review governmental action."

Here, the Court should waive the security requirement. The Tribe brings this action as a last resort to protect its cultural resources. It has demonstrated a high likelihood of success on the merits, and the Defendants would suffer no cognizable prejudice from maintaining the status quo. A waiver of security or nominal security amount is justified.

V. CONCLUSION

Based on the foregoing, the Quechan Tribe respectfully requests entry of a preliminary injunction to preserve the status quo pending completion of this litigation.

Respectfully submitted this 12th day of November, 2010.

MORISSET, SCHLOSSER & JOZWIAK

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