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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, Plaintiff, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	No. 3:10-cv-2241 LAB CAB FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION Date: December 13, 2010 Time: 11:15 a.m. Courtroom No. 9, Second Floor Hon. Larry Alan Burns

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Federal Defendants U.S. Department of the Interior, Bureau of Land Management, Kenneth L. Salazar, Robert Abbey, Teri Raml, and Margaret Goodro hereby submit this memorandum of law in opposition to the motion for preliminary injunction [Dkt. #4] filed by Plaintiff Quechan Tribe of the Fort Yuma Indian Reservation ("Tribe"). The Federal Defendants also respectfully direct the Court's attention to the accompanying Declaration of Michael Pool and Preliminary Injunction Administrative Record, submitted to the Court with this memorandum.

I. Factual Background

On June 30, 2008, Tessera Solar, LLC ("Tessera") submitted an application to the State of California to develop the Imperial Valley Solar ("IVS") project on privately owned land and public lands managed by the Bureau of Land Management ("BLM"). Preliminary Injunction Administrative Record ("PI") 839. The IVS project site is approximately 6,500-acres in the southwest part of Imperial County. *Id.* The Project, as originally proposed by Tessera, would generate an estimated 750 mega-watts ("MW") of electricity and be constructed in two phases. PI 840. Phase I, as proposed, would include the construction and operation of a 300 MW facility, and Phase II would include the construction and operation of facilities to generate an additional 450 MW. PI 851. Power would be generated by approximately 30,000 SunCatcher solar dishes. *Id.* Because a significant portion of the Project will be constructed and operated on BLM managed lands, Tessera was required to submit an application to BLM for a right-of-way to construct, operate, maintain, and decommission a solar energy generation facility. PI 808-09. An approval of this application for a right-of-way requires BLM to initiate an environmental analysis pursuant to the National Environmental Policy Act ("NEPA"). PI 809.

Additionally, an approval of the right-of-way application would require BLM to amend the existing California Desert Conservation Area ("CDCA") Plan to allow for solar use on the Project site. *Id.* The CDCA Plan covers an area encompassing 25 million acres, which contains 12 million acres of public lands. PI 4851. The CDCA Plan itself allows for solar generating facilities within Multiple Use Class Limited ("Class L") lands so long as "NEPA requirements are met." PI 4895 (Table). Neither the CDCA Plan nor the Record of Decision ("ROD") for the CDCA Plan includes a prohibition on the placement of solar facilities on Class L lands, but both documents emphasize that an Environmental

Impact Statement ("EIS") must be prepared for individual projects. *See id.*; PI 5034 ("These [wind, solar, and geothermal] facilities are different from conventional power plants and must be located where the energy resource conditions are available. An EIS will be prepared for individual projects."). The final recommended decision in the ROD for the CDCA Plan explicitly allows the placement of solar power plants if they have been determined to be "environmentally acceptable" and if "[a]ppropriate environmental safeguards can be applied to individual projects." PI 5034. Indeed, when the CDCA Plan was issued in 1980, it projected that "[w]ind and solar technology will be advanced to the point that several electrical generation plants may be found in the Desert by the year 2000." PI 4973.

In compliance with its obligations under NEPA and the CDCA Plan, BLM prepared a Draft Environmental Impact Statement ("DEIS") for the IVS project.[1] PI 812. The Environmental Protection Agency published its Notice of Availability of the DEIS on February 12, 2010, opening the public comment period, which then closed on May 28, 2010. *Id.* On July 28, 2010, BLM issued the Final Environmental Impact Statement ("FEIS") for the IVS project. PI 690. The FEIS is a comprehensive document consisting of 2,834 pages and appendices. *See* PI 687-1692 (FEIS volume 1); PI 1693-2496 (FEIS volume 2). Significant changes to the proposed IVS project were introduced in the FEIS in response to public concerns raised during the comment period. PI 835-36; *see also* PI 13; PI 57-58 (documenting extensive public comments). Public comments also influenced the agency's Preferred Alternative.[2] Mitigation features were introduced to minimize and reduce impacts to the Flat Tailed Horned Lizard ("FTHL") and to cultural resources. PI 836. Some of these changes included relocating certain project features, including SunCatchers, to avoid drainages that might otherwise cause discharge

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[1] The BLM prepared the DEIS jointly with the State of California because the IVS project extends into both federal and state jurisdiction. Additionally, the preparation of the NEPA analysis involved other federal agencies, including the Army Corps of Engineers, but the BLM serves as the lead agency.

[2] Pursuant to 40 C.F.R. §1502.14(e), BLM is required to identify its Preferred Alternative in addition to analyzing the applicant's proposed project. Tessera's proposed IVS project would generate 750 MW of electricity and 30,000 SunCatchers. By comparison, the agency's Preferred Alternative would generate 709 MW of electricity and utilize 28,360 SunCatchers. *See* PI 836-37. After BLM completed its NEPA analysis, the agency ultimately selected the Preferred Alternative as documented in the IVS project ROD. PI 9.

impacts on site, reducing the total number of SunCatchers, and reducing the total amount of energy generated from 750 MW to 709 MW.[3] PI 837.

As part of the NEPA analysis, BLM prepared individual cumulative impacts analyses on a resource-by-resource basis (e.g., air quality, cultural resources). BLM explained how it arrived at the cumulative impacts analyses for each resource type. First, the geographic scope of the cumulative impacts area for each resource is established individually. PI 888-89. Second, BLM prepared a baseline for cumulative impacts that included past, present, and reasonably foreseeable future projects and measured the incremental impact of the IVS project against that baseline for each resource type. *Id.*; PI 889 ("Each discipline evaluates the impacts of the IVS project on top of the current baseline; the past, present (existing) and future projects near the IVS project site."). For this baseline, BLM included renewable energy projects on BLM, State, and private lands in the California Desert District area. PI 890-92. Some of these renewable energy projects were included in the baseline even though the environmental review process had not been completed or funding to construct the projects had not been made available. *Id.* Also included in the baseline are the reasonably foreseeable future and existing projects in the Plaster City area in addition to other projects. *See* PI 890; 893-900. Specifically for cultural resources, BLM included in the baseline for the cumulative impacts analysis, past and present projects including the United States Naval Air Facility El Centro, the recreation activities in the BLM West Mesa FTHL Management Area and the BLM Yuha Desert Area of Critical Environmental Concern ("ACEC"), the California State Prison, Centinela, and the recreation activities in the BLM Superstition Mountain and Plaster City Open Area. PI 904. For reasonably foreseeable future projects, BLM included several future renewable energy and urban development projects as part of the cumulative impacts baseline. PI 904-905.

As a result of this resource-by-resource approach to address cumulative impacts, the cumulative impacts analyses of the IVS project are addressed throughout the FEIS. *See* PI 1109-1112; PI 1130-32;

[3] Although the Preferred Alternative and Tessera's IVS project proposal (750 MW) encompass the same project site, the Preferred Alternative would avoid project construction or structures in certain areas, particularly Drainage E. PI 836-69.

PI 901-02 (air quality); PI 1184-87; PI 1229-32; PI 902-03 (biological resources); PI 1247-48; PI 903-04; PI 1249-50 (climate change); PI 1270-74; PI 904-05; PI 1290-94 (cultural resources); PI 1303-04; PI 905-06; PI 1306-07 (fire and fuels management); PI 1315; PI 906; PI 1318-19 (geology, soils, topography, mineral resources, and seismic); PI 1327; PI 906-07; PI 1328-29 (grazing and wild horses and burros); PI 1346-47; PI 907-08; PI 1348-49 (land use and corridor analysis); PI 1361-62; PI 909; PI 1366-67 (noise and vibration); PI 1383-84; PI 901; PI 1385-87 (public health and safety and hazardous materials); PI 1401 (hazardous materials); PI 1416-17; PI 910-11; PI 1418-21 (recreation); PI 1434; PI 911-12; PI 1436-37 (socioeconomics and environmental justice); PI 1451-52; PI 912-14; PI 1454-55 (special designations); PI 1479; PI 914-15; PI 1483-84 (traffic and transportation); PI 1506-08; PI 915-16; PI 1512-14 (visual resources); and PI 1547-50; PI 916-17; PI 1516-62 (hydrology). As explained in the FEIS, BLM took this approach because the geographic scope of the cumulative impacts varies from resource to resource. PI 888. For example, air quality impacts tend to disburse over a large area, while other impacts may be more localized. PI 888. With regard to cultural resources, the geographic scope for the cumulative impacts analysis is the Plaster City area. PI 904. As discussed further below, cultural resources, by their nature, may be appropriately analyzed in the geographic unit more directly affected by the proposed action, rather than over a larger area. Several portions of the FEIS discuss potential cumulative impacts on cultural resources. *See* PI 1270-74 (Cumulative Impacts); PI 1290-94 (Summary of Impacts); PI 904-05 (Past, Present, Reasonably Foreseeable Future Projects).

Concurrently with the NEPA analysis, BLM evaluated the impacts to cultural resources under Section 106 of the National Historic Preservation Act ("NHPA"). Pursuant to the NHPA, BLM must identify significant resources that may be affected by the IVS project, assess impacts on those resources, and develop and implement mitigation measures to offset or eliminate any adverse impacts. PI 1258. Throughout this process, BLM must consult with interested Native American Tribes, local governments, and other interested parties. *Id.*

In identifying potential cultural resources that may be impacted, BLM prepared a Class III inventory of the existing historic, archaeological, and ethnographic literature and records within the Area of Potential Effects that identify cultural resources and potential impacts. PI 982. The identifica-

tion of cultural resources included an extensive pedestrian field study of approximately 7,700 acres of land. *Id.* The final Class III inventory identified 459 cultural resource sites. PI 983; *see also* PI 2382-2496 (Appendix I). BLM prepared additional studies on cultural resources including a historic architecture survey and reconnaissance-level historic architectural survey. PI 983-84. BLM also conducted a record and literature search and consulted with local historical and archaeological experts and other interested groups, including various tribes. *Id.* Based on the preliminary results of the cultural resource investigations and input from a number of tribes, Tessera redesigned and reduced the size of the solar energy power plant by 1,200 acres to avoid the direct effects of the IVS project, because of the high concentration of archaeological sites, including cremation and human remains sites. PI 983; *see also* PI 2340-2349. By reducing the scope of the Project area, potential impacts to 114 of the 459 cultural resource sites will be avoided. PI 983.

Also, as part of the Section 106 process, on September 14-15, 2010, BLM executed a Programmatic Agreement signed by BLM, Army Corps of Engineers, the California State Historic Preservation Office ("SHPO"), and the Advisory Council on Historic Preservation ("ACHP"). PI 7347-72. Pursuant to the terms of the issued right-of-way grant, Tessera is required to comply with the Programmatic Agreement. PI 683. The Programmatic Agreement is designed to resolve adverse effects for complex projects such as the IVS project. BLM developed the Programmatic Agreement in consultation with the ACHP, the SHPO, other federal and state agencies, and interested parties, including the Tribe. PI 7350; PI 7345; 7374. The agreement provides for the continued identification and evaluation of historic properties and the resolution of any effects that may result from the IVS project. PI 7352. Although BLM did not identify all sites eligible for the National Register prior to the execution of the Programmatic Agreement, BLM may direct that additional testing and evaluation be conducted or require that adverse effects be resolved. PI 1260. For example, Tessera must develop and implement a Historic Properties Treatment Plan, approved by BLM and SHPO, before any ground disturbing activities may take place that would potentially affect historic properties. PI 7363-65; PI 7367-68.

Throughout the Section 106 process, BLM has actively engaged and consulted with the Tribe. Plaintiff has been invited to government-to-government consultations since 2008. *See* PI 7376-77.

BLM began informing the Tribe of proposed renewable energy projects within the California Desert District as early as 2007. PI 9725-47. Since that time, BLM has regularly updated the Tribe on the status of the IVS project. *See, e.g.*, PI 9706-24; PI 9655-95. In addition to various correspondence and communications made by letter and email, BLM engaged the Tribe through face-to-face meetings and conducted a field visit with Tribal members on July 29-31, 2010. PI 2340-49; PI 8155-56; PI 361; PI 379-80; PI 386; *see also* PI 8160 (summarizing May 2010 informational meetings between BLM with consulting parties and interested Tribes, including Plaintiff). BLM has also worked with the Tribe's Historic Preservation Officer in staff-to-staff meetings and through phone calls. PI 7376. In addition, BLM has met separately with the Quechan Culture Committee, hosted Tribal members at site visits and participated in project coordination meetings. PI 7376-77. The Tribe's input has been instrumental in shaping the IVS project and the Programmatic Agreement.

After considering the public comments it received on the FEIS and resolving all protests, BLM signed the Record of Decision on October 5, 2010, which amends the CDCA Plan, grants Tessera's right-of-way application, and approves the agency's Preferred Alternative for the IVS project. PI 64.

II. Statutory Background and Standard of Review

A. Federal Land Policy and Management Act

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–1787, "is primarily procedural in nature," *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006). FLPMA requires that

> public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). FLPMA directs the Secretary of the Interior to prepare land use plans for the public lands under the Department's control. 43 U.S.C. § 1712. This authority is delegated to BLM, which, by regulation, directed its managers to prepare "resource management plans" as land use plans to implement FLPMA. 43 C.F.R. § 1601.0-4.

> The objective of resource management planning by the Bureau of Land Management is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.

43 C.F.R. § 1601.0-2. As part of FLPMA, Congress designated approximately 25 million acres of southern California as the CDCA. *See* 43 U.S.C. § 1781(c). The purpose of the designation was "to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of environmental quality." *Id*. § 1781(b). In managing that area, BLM developed the CDCA Plan in 1980, amending it numerous times over the years. The CDCA Plan allocates CDCA lands into four "multiple-use" classes. PI 4857. Class L, in which the IVS project is proposed to be located, "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 significantly diminished." *Id*.

B. National Environmental Policy Act

NEPA is a procedural statute enacted to ensure that the federal government makes major decisions significantly affecting the environment only after considering the impacts of those decisions and exploring possible alternatives. 42 U.S.C. §§ 4321, 4331; 40 C.F.R. § 1501.1. Its dominant purpose is to ensure that federal agencies take a "hard look" at the environmental consequences of their proposed actions in advance of a final decision to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making. *Robertson*, 490 U.S. at 350; *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) ("NEPA does not mandate particular substantive results, but instead imposes only procedural requirements") (quotations and citation omitted).

If the proposed action is deemed to be a "major Federal action[] significantly affecting the quality of the human environment," NEPA requires an EIS. 42 U.S.C. § 4332(2)(C). The form and content of an EIS is guided by the statute's implementing regulations. Under 40 C.F.R. § 1508.25(a)(2), an EIS must consider the "cumulative impacts" of a proposed action. NEPA's implementing regulations define "cumulative impact" as "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. In undertaking that cumulative impacts analysis, the agency preparing the EIS is afforded considerable discretion in its choice of methodology, and its mode of analysis will be upheld as long as the agency "made no clear error of judgment that would render its action arbitrary and capricious." *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (quotations and citations omitted), *quoted in League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008).

C. National Historic Preservation Act

Section 106 of the NHPA, 16 U.S.C. §§ 470–470x-6, "requires a federal agency to '*take into account* the effect of [any] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.'" *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 581 (9th Cir. 1998) (quoting 16 U.S.C. § 470f) (emphasis added). Like those of NEPA, NHPA obligations are chiefly procedural in nature; the NHPA is thus a "stop, look, and listen" statute. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097–98 (9th Cir. 2005); *Pres. Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). "NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment." *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993).

Determining a property's eligibility for listing on the National Register for Section 106 purposes "is the responsibility of the agency and the SHPO and in absence of an abuse of discretion, their application of the regulations to the facts must be sustained." *Wilson v. Block*, 708 F.2d 735, 756 (D.C. Cir. 1983) (citation omitted); *see also* 36 C.F.R. § 800.4(c). If those historic properties may be affected by the project, the agency continues consultation with the SHPO to determine if the effects are adverse,

taking into consideration the views of the consulting parties and the public. 36 C.F.R. § 800.5(a). If the agency makes a finding of adverse effect, consultation continues "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). This process often culminates in either a memorandum of agreement or a Programmatic Agreement, which reflects the understanding of the agency, SHPO, and consulting parties as to how historic properties are to be managed, including references to mitigation. *See* 36 C.F.R. §§ 800.6(c), 800.16(o), 800.14(b).

Programmatic Agreements are generally reserved for the implementation of a program or the resolution of adverse effects from complex project situations or multiple undertakings. 36 C.F.R. § 800.14(b). And they are ideal "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii). When an undertaking may affect historic properties of religious and cultural significance to an Indian tribe, the agency "shall ensure that development of the program [agreement] includes appropriate government-to-government consultation . . . ." 36 C.F.R. § 800.14(f).

D. Review of Agency Action under the Administrative Procedure Act

Under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, this Court must decide whether the agency's action challenged by Plaintiff was arbitrary and capricious. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374, 375–78, 385 (1989); *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97–98 (1983); *Okanogan Highlands Alliance*, 236 F.3d at 471; *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331–32, 1336 (9th Cir. 1992). Under that standard, the burden of proof remains on the plaintiff. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398 (9th Cir. 1994). The APA's judicial review provisions apply equally to challenges under FLPMA and NEPA, *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1195 (9th Cir. 2010), and apply to the NHPA as well, *San Carlos*, 417 F.3d at 1096.

The "arbitrary and capricious standard" is necessarily a deferential one. As the Ninth Circuit has recently reaffirmed, a court

> "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation '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.'" *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)). In other words, there must be "'a clear error of judgment.'" *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)).

League of Wilderness Defenders, 549 F.3d at1215; *accord Earth Island Inst. v. Carlton*, No. 09-16914,___ F.3d ___, 2010 U.S. App. LEXIS 23183, at *6–7 (9th Cir. Nov. 8, 2010).

Moreover, the Ninth Circuit's *en banc* decision in *McNair* makes clear that the role of a court reviewing agency action is necessarily at its most deferential when assessing the agency's consideration of technical matters. 537 F.3d at 993 (citing *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)). In that role, the reviewing court is not itself

> to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the [Agency] has complied with [its regulations], and orders the agency to explain every possible scientific uncertainty.

Id. at 988. Indeed, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* at 1000 (quoting *Marsh*, 490 U.S. at 378); *see also League of Wilderness Defenders-Blue Mountains Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (court's deference is at its highest when reviewing matters within agency's expertise); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009) (same).

E. Standard for Demonstrating Entitlement to Extraordinary and Preliminary Relief

An injunction "is a matter of equitable discretion" and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Earth Island*, 2010 U.S. App. LEXIS 23183, at *8 (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 376, 381 (2008)). The Ninth Circuit had often awarded preliminary injunctive relief when a plaintiff demonstrated either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or

(2) that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *McNair*, 537 F.3d at 987. The Supreme Court recently clarified the standard for injunctive relief in *Winter*. In that case, the Supreme Court reviewed the Ninth Circuit's affirmance of a preliminary injunction against the U.S. Navy's use of certain sonar during training exercises. 129 S. Ct. at 375. The Supreme Court vacated the injunction, noting in part that the Ninth Circuit's preliminary injunction standard, by allowing injunctive relief where a plaintiff showed only a "possibility of irreparable harm," was "too lenient." *Id.* Instead, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis in original).

Two post-*Winter* decisions from the Ninth Circuit provide guidance on evaluating a plaintiffs' demand for preliminary relief. In *American Trucking Associations v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009), the court held that the grant or denial of a preliminary injunction must follow the rule "succinctly stated" in *Winter*:

> [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.

559 F.3d at 1052 (quoting *Winter*, 129 S. Ct. at 374). In *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045 (9th Cir. 2010), the Ninth Circuit held that "[a] preliminary injunction is [also] appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." 622 F.3d at 1052 (quoting *McNair*, 537 F.3d at 987) (internal quotations and modification omitted). The Court added, however, that "plaintiffs must also satisfy the other *Winter* factors, including the likelihood of irreparable harm." *Id.*

Under controlling Supreme Court precedent, even where success on the merits is likely or "serious questions" are raised, an injunction "is not a remedy which issues as of course," even in an environmental case. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (reversing court of appeals' determination that an injunction was required to address unpermitted discharges of pollutants following a finding of liability against the Navy under the Clean Water Act). The Supreme Court has rejected a presumption of irreparable injury even where an agency fails to evaluate thoroughly the

environmental impact of a proposed action. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545–46 (1987) (court cannot presume elevation of subsistence interests over economic concerns); *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 664 (9th Cir. 1988) (court may weigh costs to industry and public of delaying oil and gas exploration activities). Recently in *McNair*, the Ninth Circuit has reaffirmed that "irreparable harm" should not be presumed in environmental cases and that alleged environmental injuries may in fact be outweighed by other considerations, including the risks to public resources of taking no action. 537 F.3d at 1005 (risks of catastrophic fire, insect infestation and disease may outweigh alleged harm to individual species). In balancing the relative hardships, there is also no presumption that environmental harm should outweigh other harm to the public interest. *See McNair*, 537 F.3d at 1004–1005; *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992).

Finally, an injunction even when issued and even in an environmental case, must be crafted so as not to extend more broadly than necessary. *Monsanto Co. v. Geertson Seed Farms*, No. 09-475, ___ U.S. ___, 130 S. Ct. 2743, 2758–60 (2010). Such an injunction should not cover areas or activities that fall outside those that are challenged by the plaintiffs or found by the Court to require further agency analysis. *See McNair*, 537 F.3d at 1004 n.14.

III. Argument

A. The IVS Project FEIS Fully Complies with NEPA

In challenging the extensive FEIS prepared for the IVS project, Plaintiff limits its argument under NEPA to the assertion that BLM's analysis of the potential cumulative effects of the IVS project was inadequate because, in Plaintiff's view, BLM considered an analysis area for cultural resource impacts that was too small and failed to provide a sufficiently detailed discussion of potential cumulative impacts for that area. (*See* Pl. Mem. at 10–15.) Plaintiff fails to demonstrate either a "likelihood of success" or even "serious questions" as to either contention.

1. The size of the analysis area for cultural resources was appropriate

Plaintiff argues that the proper analysis area for assessing potential cumulative impacts should have been the entire CDCA (Pl. Mem. at 11:22 –14:19), an area encompassing 25 million acres, including 12 million acres of public lands. *See* PI 4851. But, Plaintiff's contrary assertions aside, the

CDCA is not a single undifferentiated area of land. Rather, it is an ecologically diverse area and for that reason is divided for management purposes into four Multiple Use Classes and managed in accordance with 19 identified Multiple Use Class Guidelines. PI 4857-4864. In addition, specific ACECs have been identified as areas where special management attention is required to protect "important historic, cultural, or scenic values," among other resources. 43 U.S.C. § 1702(a). The IVS project itself is not sited in any ACEC.[4]

Because of the disparate uses permitted and managed within the different areas comprising the CDCA, BLM determined that it would not have been appropriate to use the entire CDCA as an analysis area for assessing cumulative impacts. Instead, as noted in Section I above, the geographic scope of the agency's analysis varied with the particular type of resource being evaluated. PI 888-89. For cultural resources, BLM determined that the area surrounding Plaster City was the appropriate analysis area and identified past, present, and reasonably foreseeable projects in that area. PI 1270-74; PI 904-05; PI 1290-94. The agency's determination of the appropriate area for consideration of cumulative impacts is to be accorded discretion. In *Kleppe v. Sierra Club*, 427 U.S. 390, the Supreme Court considered whether the agency erred in determining the proper geographic scope of its cumulative impacts analysis. The Court held that the "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." *Id*. at 414; *accord Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002) ("under NEPA we defer to an agency's determination of the scope of its cumulative effects review"); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 763–65 (9th Cir. 1996) (Agency decision to evaluate impacts at a watershed scale was not arbitrary or capricious). For this reason, the Court should defer to BLM's determination that the Plaster City area reflects the appropriate scale of analysis.

[4] Although the IVS project is not sited within an ACEC, the transmission line for the IVS project will traverse the Yuha Desert ACEC, running parallel to the existing Southwest Powerlink transmission line. PI 1444. Mitigation will provide protection to eligible cultural resources within the ACEC. PI 1283.

As explained above, in determining the analysis area in which it should evaluate potential cumulative impacts to cultural resources, BLM considered the unique nature of each resource. Cultural resources are necessarily inanimate and static, and therefore potential impacts are generally not widely dispersed as compared to impacts to air quality or to wildlife. *See* PI 888. Thus, BLM determined that the appropriate scope of the cumulative impacts analysis for cultural resources would be the Plaster City area, not the larger CDCA. *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), is instructive. Plaintiff in *Selkirk* similarly argued that the Forest Service violated NEPA by constraining the geographic scope of the EIS. 336 F.3d at 958. However, the Forest Service raised concerns that expanding the scope of the cumulative impacts analysis would actually dilute the magnitude of the cumulative impacts and would be improper. *Id.* at 959. The court found that "the Forest Service in this case took a 'hard look' at the activity in the [project area] and made a considered judgment that the EIS would be a more accurate document if it did not consider the IPNF activity in the EIS's cumulative impacts analysis." *Id.* Here, BLM determined that the geographic scope for the cumulative impacts analyses should be done on a resource-by-resource basis and concluded that the most reasonable cumulative impacts area for cultural resources was the Plaster City area. This determination should not be disturbed.[5]

Finally, the cases Plaintiff cites do not call into question BLM's determination that the Plaster City area was the appropriate analysis unit for potential cumulative impacts to cultural resources. In *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895–97 (9th Cir. 2002), the court found simply that road density amendments proposed in successive timber sales on same National Forest should have been considered together. But the case does not stand for the proposition that all cumulative effects of any action on a National Forest unit must be considered forest-wide. *See, e.g.*, *Neighbors of Cuddy Mountain*, 303 F.3d at 1071 (analysis of cumulative effects on only portion of forest upheld); *Inland*

[5] Ironically, agencies have often been challenged for designating a geographic scope for their environmental analyses that was too large. *See, e.g., Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678 (D.C. Cir. 2004) (challenging the FAA's designation of Suffolk County for its environmental justice analysis as being too large in scope).

Empire Pub. Lands Council, 88 F.3d at 763–65 (Agency may, as appropriate, analyze effects within project boundary or within larger watershed, but not forest-wide). And *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006), did not concern the proper geographic scope of a cumulative impacts analysis at all. Rather, the court evaluated the adequacy of the agency's discussion of particular potential impacts from identified facilities. *Id*. at 971–74.

2. BLM's evaluation of potential cumulative effects within the Plaster City area was adequate

As explained above, the analysis of potential effects on cultural resources within the Plaster City area is appropriately limited in geographic scope because of the unique characteristics of cultural resources — namely, that they are stationary objects. As noted in Section I, the potential for such impacts has been exhaustively considered. Various levels of inventory, research, and consultation have provided information about cultural resources within the Area of Potential Effects, including 7,700 acres of on-the-ground surveys. PI 982-84. In addition, BLM further consulted with Tribal organizations and individuals, as well as with the National Park Service, concerning the presence of cultural resources in the vicinity of the Project area. PI 984-85; *see also* PI 7345 – 10227 (consultation documents). Information on potential archeological sites within the Project area and vicinity is further provided in Appendix I of the FEIS. *See* PI 2415-2443. Significantly, most of these inventoried sites actually are projected to have low or very low potential for containing buried resources. *Id*.

BLM then considered that the potential direct and indirect effects on cultural resources from the IVS project may include the destruction or loss of artifacts (where they exist) from construction activities, from vehicle traffic, from vandalism, or from illegal collection, resulting from increased access to the site. PI 1271-72. Much of those impacts are already being avoided as Tessera has redesigned and reduced the size of the solar energy power plant by 1,200 acres to avoid impacts to cremation and human habitation sites. PI 983; *see also* PI 2340-2349. Additionally, BLM has developed an extensive mitigation program designed to alleviate further potential impacts, in consultation with Tribes and a wide range of federal and state agencies and other interested parties. PI 1274-84; PI 7363-65; PI 7367-68. Such mitigation measures include physical avoidance of areas containing

cultural resources, based upon an inventory and mapping of potentially affected resources, monitoring of construction activities, and training of personnel in appropriate treatment of cultural resources and buried human remains. *See id.* Such mitigation measures and their value in addressing potential impacts were properly considered in the FEIS, under NEPA's implementing regulations, at 40 C.F.R. § 1502.14(f); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1212-13 (9th Cir. 2004) (finding that discussion of possible adverse impacts along with mitigation measures demonstrated the agency's "hard look" at the environmental impacts); *N. Idaho Cmty. Action Network v. Dep't of Transp.*, 545 F.3d 1147, 1157 (9th Cir. 2008) ("detailed analysis of the impacts . . . and mitigation measures to minimize those impacts, was more than sufficient to meet NEPA's requirements").

Although Plaintiff claims that the cumulative impacts analysis is limited to Section 4.5.5 (Pl. Mem. at 15:15-17), as described in Section I above, the cumulative impacts analyses, including impacts to cultural resources, are discussed in various sections of the FEIS. *See supra* at 4. Even though the FEIS has a separate cumulative impacts section, other areas of the EIS also help to inform the cumulitive impacts analysis on cultural resources. *See Shasta Res. Council v. U.S. Dep't of Interior*, 629 F. Supp. 2d 1045, 1063 n. 5 (E.D. Cal. 2009) ("[T]he court does not restrict its review of the EA's site-specific cumulative-impact analysis to [the cumulative impacts] portion of the EA; the section titled 'Proposed Action-Environmental Consequences' also provides site-specific information as to the foreseeable 'incremental impact' of the land exchange, and consistent with *Klamath-Siskiyou*, the courts looks to the substance of the information provided, not merely to how it is labeled or where it is categorized.") (citing *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989 (9th Cir. 2004)); *see also Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, 404 F. Supp. 2d 212, 218 (D.D.C. 2005) (finding that BLM overcame any deficiencies in the cumulative impacts analysis by considering the proposed action's cumulative impacts in other sections of the NEPA document).

More importantly, Plaintiff is simply incorrect when it asserts that BLM only discussed the direct effects of the IVS project rather than prepare a cumulative impacts analysis for cultural resources. (*See* Pl. Mem. at 15:13) The FEIS fully discloses that the cumulative impacts analyses for each resource type is arrived at by analyzing the incremental impact of the IVS project against the baseline, which includes

past, present, and reasonably foreseeable future impacts. PI 889. For cultural resources, the FEIS describes the past, present, and reasonably foreseeable future projects that were considered. PI 904-05. The impacts of the IVS project were measured against this baseline information.[6] *See* PI 1270-74; PI 1290-94.

The cases on which Plaintiff relies do not support their challenge to the adequacy of BLM's analysis in this case. In *Great Basin Mine Watch*, the court held that the agency's cumulative impacts analysis was not detailed enough, 456 F.3d at 971–74, relying on *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2007), and *Klamath-Siskiyou Wildlands Center*, 387 F.3d at 993. Both of those latter cases, along with *Oregon Natural Resources Council v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (requiring specificity in analysis of other projects), are called into question by more recent Ninth Circuit precedent concerning the level of detail required in a cumulative impacts analysis. The court in *League of Wilderness Defenders v. Allen* upheld the agency's use of an aggregate effects approach to assessing cumulative effects, where the details of the "time, place, and scale" of past actions would not have been particularly useful to that analysis. 615 F.3d at 1135-37. The court reached similar conclusions in *League of Wilderness Defenders v. U.S. Forest Serv*ice, 549 F.3d at 1217–18, and *Ecology Center v. Castaneda*, 574 F.3d at 666–67. In *Bark v. U.S. Bureau of Land Management*, 643 F. Supp. 2d 1214 (D. Or. 2009), the court extended the aggregate effects approach to include reasonably foreseeable future projects. 643 F. Supp. 2d at 1223 (declining to find that the cumulative impacts analysis "requires a cataloguing of all past, present, and foreseeable projects by listing the time, type, place, scale, different plans and methods").

While it is true that the particular approach that the agency may employ in assessing cumulative impacts may vary widely from project to project, what remains true is that the agency's selected approach is a matter that should be left to the technical expertise of the agency. *League of Wilderness*

[6] Briefly, Plaintiff also alleges that the cumulative impacts analyses for biological resources and land use are deficient. (Pl. Mem. at 15) For the same reasons that Plaintiff fails to demonstrate any flaw in the cumulative impacts analysis for cultural resources, Plaintiff also fails to identify any deficiency in the cumulative impacts analyses for these other resource values.

Def., 549 F.3d at 1218; *McNair*, 537 F.3d at 993. The cases cited by Plaintiff do not derogate from that principle.

In *Te-Moak Tribe v. Interior*, 608 F.3d 592, 603–07 (9th Cir. 2010), the court held that the agency's Environmental Assessment ("EA") did not adequately consider the potential cumulative effects of a proposed amendment to a plan of operations for a mining project, in light of other proposed or foreseeable mineral extraction projects in the area. That case does not control here, because BLM prepared an EIS, not an EA, to support the IVS project. An agency may prepare an EA to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If, after preparing an EA, the agency finds that the proposed action would have no significant impact, the agency issues a Finding of No Significant Impact ("FONSI"). *Id.* § 1508.13; *Pub. Citizen*, 541 U.S. at 757–58; *Klamath-Siskiyou Wildlands*, 387 F.3d at 993. Where the agency makes a FONSI determination that the proposed action will not significantly affect the human environment, NEPA does not require the preparation of an EIS for that action. *See also* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.3, 1501.4. The difference is important. Where an agency relies on an EA to support a project, a challenger need only show that, contrary to the conclusion of the EA and FONSI, there may be a "significant" environmental impact. In contrast, where an agency prepares a full EIS, as BLM did here, the challenger must demonstrate, not simply that the project may result in significant impacts, but that the agency failed to consider those impacts. *Robertson*, 490 U.S. at 349–51; *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008); *Okanogan Highlands Alliance*, 236 F.3d at 473. Because the FEIS prepared in this instance considered the incremental impact of the IVS project measured against the baseline cumulative impacts, BLM's analysis is complete. BLM need not demonstrate, to survive challenge here, that there will be no potential adverse effects on cultural resources. As a purely procedural statute, NEPA does not require anything other than evaluation and disclosure.

In short, Plaintiff has failed to show that it is likely to succeed on the merits of its NEPA claim, or even that it has raised "serious questions" on the merits.[7]

B. The IVS Project Is Properly Sited Under FLPMA

Plaintiff insists that it was unlawful under FLPMA for BLM to have approved the IVS project within a Class L area of the CDCA. (Pl. Mem. at 16–18.) But the CDCA Plan specifically allows for solar (and wind) facilities within Class L areas as long as NEPA requirements are met. PI 4859 (Table). Indeed, the CDCA Plan confirms that one of its multiuse goals is to identify potential sites for the development of solar energy facilities. PI 4939. Thus, amending the CDCA Plan for this purpose is entirely consistent with FLPMA. *Cf. Sierra Club v. Clark*, 774 F.2d 1406, 1409 (9th Cir. 1985) (upholding BLM's amendment of the CDCA Plan to allow for the development of a race-track, noting that amendment was a "proper exercise of the BLM's discretion in providing for combined use of the desert").

Solar facilities, by their nature, "are different from conventional power plants and must be located where the energy resource conditions are available." PI 5034. As detailed in the FEIS and discussed further below, the IVS project was located where it is for good reason. That siting decision has now been memorialized in an amendment to the CDCA Plan. Such plan amendments are contemplated by the CDCA Plan, because the CDCA Plan, as adopted in 1980, did not identify any specific sites for the generation of solar power, but encouraged their development. PI 4939; *see also* PI 1337. More importantly, FLPMA allows for amendments to land use plans, 43 C.F.R. § 1610.5-5, which BLM has adopted under the CDCA Plan over the course of time. The plan amendment process was contem-

[7] Plaintiff discusses potential effects to the FTHL in the background section of its brief (Pl. Mem. at 7:17–21), but does not carry that discussion over into its argument that BLM's NEPA analysis was deficient. In any event, BLM considered potential effects to the FTHL and its habitat and recommended a number of mitigation measures. *See* PI 1160-61. Avoidance, minimization, and mitigation measures are generally initiated with the start of construction, PI 1160, and must be implemented in conformance with the Construction and Environmental Compliance Monitoring Program, PI 453. Significantly, BLM recommended that FTHL habitat be acquired to offset any loss of habitat from the project, at a ratio ranging from 1:1 to 6:1. PI 1156-59; PI 1158-59 (Table 4-27).

plated as a mechanism to meet future renewable energy goals.[8] PI 4939 (providing that "[s]ites associated with power generation or transmission not identified in the Plan will be considered through the Plan Amendment process.").

Although sited in a Class L area, the IVS project is located where it is for a variety of sensible reasons. First, the site is within or near existing energy transmission and transportation corridors. PI 1342. The Project operations will require a high level of solar energy per unit of ground surface and relatively low winds. *See* PI 854. The location selected provides those conditions. PI 823. Finally, operations will be able to take advantage of the availability of reclaimed water from the Seeley County Water District. PI 856-60. Until that water is available, the Project would be able to use ground water from an existing permitted well through the Dan Boyer Water Company in Ocotillo, California. PI 860.

BLM did consider alternative sites, but rejected them for good reason. *See* PI 873-77; PI 874-76 (Table 2-5). The Mesquite Lake site, near the cities of Brawley and Imperial, consists of 70 parcels of private land owned by 52 different parties, none controlled by BLM. PI 877. Similarly, the Agricultural Lands site, seven miles west of Calexico, is comprised of seven parcels of unconnected land owned by various parties, again none controlled by BLM. *Id.* Siting the IVS project in either of those locations would obviously be impractical. The lands south of Highway 98 are Bureau of Reclamation withdrawn lands and are not presently available for renewable energy projects. *Id.* In addition, at that location the Project would require a 38-mile water pipeline from the Seeley Waste Water Treatment Plant, as well as a 30-mile transmission line to the San Diego Gas and Electric Imperial Valley Substation. PI 876. Those additional miles of corridors might well have raised additional environmental concerns, too. *Id.*

In short, BLM fully complied with FLPMA and the CDCA Plan in approving the IVS project site, even though it is located within a Class L area.[9] That decision has been duly adopted in a CDCA

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[8] As noted in the amended CDCA Plan, as of 1999, the CDCA Plan had been amended 147 times to make allowances for approved activities within the CDCA. PI 4844.

[9] Because the CDCA Plan expressly permits siting of a solar facility in a Class L area, Plaintiff's citation to *Brong*, 492 F.3d at 1127, is inapposite. (*See* Pl. Mem. at 17:13–26.). By way of contrast, in *Brong* the land use plan at issue strictly prohibited logging. 492 F.3d at 1126-27. *Brong* is further distinguishable because the land use plan there prioritized environmental concerns over other values. *Id.* at 1125. Such is not the case here.

Plan amendment, as contemplated by the CDCA Plan. Although Plaintiff characterizes the Class L area as "reserved for resource protection" (Pl. Mem. at 17:4), the CDCA Plan promotes development of renewable energy facilities and simply encourages the "avoid[ance] of sensitive resources *wherever possible*" in Class L areas. PI 4937 (emphasis added). Finally, BLM prepared the NEPA analysis for the IVS project as required by the CDCA Plan and, as argued above, that analysis is perfectly adequate to support the Project. For these reasons, Plaintiff has failed to demonstrate either the "likelihood of success" or "serious questions" as to the merits of its FLPMA claim.

C. BLM Fully Complied With NHPA

Plaintiff's allegation that BLM did not comply with Section 106 requirements because it did not evaluate the eligibility of cultural resources for the National Register is not supported by law or the record. (*See* Pl. Mem. at 18.) Under 36 C.F.R. § 800.4, an agency, in consultation with the SHPO, must make "a reasonable and good faith effort" to identify historic properties. Such efforts may include conducting background research and field surveys. 36 C.F.R. § 800.4(b)(1). Here, BLM prepared a Class III inventory in addition to other studies and conducted consultation to identify cultural resources that may be impacted. *See supra* at 4-5. The results of BLM's findings are well documented in the FEIS. *See* PI 982-985. The FEIS clearly identifies 459 cultural resources within the Area of Potential Effects. PI 983. Of those 459 cultural resources, BLM has further classified these resources as 235 prehistoric sites, 71 historic sites, 43 multicomponent sites, 16 indeterminate sites, and 81 isolated finds. *Id.* The SHPO, the state's expert in historic resources, was involved throughout the cultural resource identification process as required under 36 C.F.R. § 800.4, but raised no objections to the quality of BLM's cultural resources studies. *See* PI 9697. Accordingly, BLM made more than "a reasonable and good faith effort." *See Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 547 F. Supp. 2d 1033, 1038 (D. Ariz. 2008) (finding that the agency made a reasonable and good faith effort to identify cultural resources even where the agency did not survey 100% of the project area as it prepared numerous cultural resource inventories); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009) (same).

Plaintiff also contends that BLM failed to engage Plaintiff in consultation as required under Section 106. (Pl.'s Mem. at 18.) The record, however, documents the intense level of engagement between Plaintiff and BLM in the consultation process, which began as early as 2007 when BLM first gave the Tribe notice of potential renewable energy projects within the California Desert District. *See supra* at 6. From that point forward, BLM has actively consulted with the Tribe and continues to do so to this day under the terms of the Programmatic Agreement. PI 7350; PI 7345; PI 7374; PI 9706-24; PI 9655-95. Accordingly, the Tribe's claim that BLM failed to consult with it is baseless.

Finally, Plaintiff further argues that BLM improperly executed the Programmatic Agreement because the agency did not identify all sites eligible for the National Register prior to issuing the IVS project ROD. (Pl.'s Mem. at 18.) Plaintiff thus alleges that BLM did not complete the Section 106 process. There is no merit to Plaintiff's allegation. As an initial matter, the execution of a Programmatic Agreement completes the Section 106 process, and thus the Tribe is incorrect to say that BLM has deferred its Section 106 obligations. 36 C.F.R. § 800.14(b)(2)(iii) ("Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities"); *see also* PI 7373 (letter from ACHP confirming that "[b]y carrying out the terms of this [Programmatic] Agreement, the Bureau of Land Management will have fulfilled its responsibilities under Section 106"). Moreover, deferral of final identification and evaluation of historic properties (as opposed to deferral of the Section 106 process) is permissible under the NHPA. 36 C.F.R. § 800.4 (b)(2) ("The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in . . . a programmatic agreement . . . ."). NHPA's implementing regulations also allow for the negotiation of Programmatic Agreements "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii); *see also Mid States Coal. for Progress v. Surface Transp. Board*, 345 F.3d 520, 555 (8th Cir. 2003) (Once the Programmatic Agreement is executed, an agency may "finalize[] the NHPA details at a future date according to the terms of the agreement").

Although Plaintiff contends that the agency failed to explain why impacts to cultural resources could not be determined prior to the execution of the Programmatic Agreement, nothing in the NHPA or

its implementing regulations requires this, and Plaintiff cannot cite to any such requirement. Accordingly, BLM's determination is sound and should not be disturbed. *See Lesser v. City of Cape May*, 110 F. Supp. 2d 303, 319 (D.N.J. 2000) (declining to question the agency's determination that adverse effects could not be ascertained prior to project approval). Despite this and contrary to Plaintiff's allegations, BLM has, in fact, explained why a Programmatic Agreement was necessary in this instance. PI 294 (explaining that BLM determined, in consultation with the SHPO and ACHP, that the phased final identification and evaluation of historic properties was appropriate because the project consists of large land areas). This has been documented and agreed to by the ACHP and the SHPO through the execution of the Programmatic Agreement, to which both entities are signatories. *See* PI 7372. Determining a property's eligibility for listing on the National Register "is the responsibility of the agency and the SHPO and in the absence of an abuse of discretion, their application of the regulations to the facts must be sustained." *Wilson*, 708 F.2d at 756.

In sum, Plaintiff has failed to demonstrate either the "likelihood of success" or "serious questions" as to the merits of its NHPA claim.

D. The Balance of Harms Tips In The Government's Favor

In contrast to the absence of credible harm to the Plaintiff, as demonstrated by BLM's comprehensive analysis of the environmental impacts of the IVS project, *see supra* at 2-6, substantial injury will be suffered by BLM. In balancing the relative hardships, there is no presumption that environmental harms should outweigh other harms to the public interest. *Alliance for Wild Rockies*, 622 F.3d at 1056 ("We will not grant a preliminary injunction, however, unless those public interests [in consideration of environmental impacts] outweigh other public interests that cut in favor of not issuing the injunction."); *see also Fund for Animals*, 962 F.2d at 1400; *McNair*, 537 F.3d at 1004–1005. If injunctive relief is granted, the IVS project may be jeopardized because Tessera may not qualify for short-term American Recovery and Reinvestment Act of 2009 ("ARRA") funds. Declaration of Michael Pool ("Pool Decl.") at ¶ 12. Under Section 1603 of ARRA, short-term incentive grants are awarded to qualified projects that begin construction by December 31, 2010 and that begin commercial operation before January 1, 2017. *Id.* at ¶ 11. Thus, Tessera has only a small window of opportunity to secure this funding, which may not

be possible as a result of a preliminary injunction. Here, Tessera may lose its ability to take advantage of several hundreds of millions of dollars from the ARRA funds if the preliminary injunction impedes Tessera's ability to meet these deadlines. *Id.* at ¶ 12.

Although this is a direct harm to Tessera, BLM will be impacted because it has a strong interest in facilitating the development of renewable energy resources. Pool Decl. at ¶¶ 2-8, 14-15. If the IVS project cannot commence, the Department will be unable to fulfill one of its highest priorities, which is the development of renewable resources on public lands. *Id.* at ¶¶ 2-6. Development of renewable energy is necessary for energy independence and to address the Department's concerns over climate change and other environmental and natural resource concerns. *Id.* at ¶¶ 5-7. Further, Section 211 of the Energy Policy Act of 2005 directs the Secretary of the Interior to approve renewable energy projects, such as solar projects, on public lands with a generation capacity of at least 10,000 MW of electricity before 2015. *Id.* at ¶ 3. A suspension of the IVS project will add to the delay in meeting this goal. Even before the Energy Policy Act of 2005, the President issued E.O. 13212, which requires federal agencies to expedite the production, transmission, or conservation of energy. *Id.* at ¶ 4. The Secretary has also issued a series of Secretarial Orders emphasizing that it is the top priority of the Department to foster the development of renewable energy projects. *Id.* at ¶¶ 5-7. If Tessera does not secure the necessary funding, the IVS project may not proceed at all; thus, frustrating the Department's objectives in meeting its priorities.

Additionally, if the IVS project does not move forward, the government will lose greatly needed revenue that would be generated from the IVS project. Tessera is required to pay approximately $1.2 million dollars in annual base rent for its right-of-way, with additional rental payments of $4.6 million per year with the start of energy generation. *Id.* at ¶ 14. Moreover, BLM has already expended over $602,800 in processing the IVS application and preparing the EIS and various cultural studies, which will have been for naught if Tessera is prohibited from beginning development. *Id.* at ¶ 15.

E. A Preliminary Injunction Would Not Be In the Public's Interest

The public interest favors denial of Plaintiff's motion. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary

remedy of injunction." *Weinberger*, 456 U.S. at 312. The public interest is an important factor to weigh in deciding whether courts should grant preliminary injunctions. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) ("If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction."). In the instant case, the public interest will not be served if the IVS project is preliminarily enjoined.

First, the public has a strong interest in seeing that renewable energy projects are developed. The IVS project alone is expected to generate enough renewable electricity to power up to 531,000 homes. Pool Decl. at ¶ 13. The IVS project, along with other renewable energy projects, is important for enhancing energy security and reducing greenhouse gas emissions. *Id.* at ¶¶ 5-7. As stated by Secretary Salazar, these renewable energy projects "while a significant commitment of public land, actually represent less than one-hundredth of one percent of that total area. Given the many benefits, the extensive mitigation measures, and the fair market value economic return, approval of these projects is clearly in the public interest." *Id.* at ¶ 14.

Second, from a fiscal standpoint, the public interest compels the denial of a preliminary injunction. The IVS project is expected to produce approximately $840,000 in property tax revenue annually for Imperial County. *Id.* at ¶ 13. Moreover, the IVS project will create new jobs in a state with a 12 percent unemployment rate and in a county with an unemployment rate of 30 percent. *Id.* The primary purpose for enacting the ARRA was to preserve and create jobs, promote economic recovery, and invest in infrastructure. *Id.* at ¶¶ 8-9. If Tessera is denied an opportunity to take advantage of the ARRA funds, all the benefits to the public that would accrue from the ARRA will be lost.

IV. CONCLUSION

For the reasons stated above, this Court should deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

DATED: November 29, 2010

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CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that, on November 29, 2010, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

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

Dated: November 29, 2010

/s/*David B. Glazer*
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