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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE ADVISORY COMMITTEE; CALIFORNIANS FOR RENEWABLE ENERGY; ALFREDO ACOSTA FIGUEROA; PHILLIP SMITH; PATRICIA FIGUEROA; RONALD VAN FLEET; and CATHERINE OHRIN-GREIPP,	)	Case No. 2:11-CV-395-ODW-OP
	)	FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS
Plaintiffs,	)	Date: September 12, 2011 Time: 1:30 p.m. Judge: Hon. Otis D. Wright II Place: 312 North Spring Street Courtroom No. 11 Los Angeles, CA 90012
v.	)	

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in his official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT ABBEY, in his official capacity as Director, Bureau of Land Management; TERI RAML, in her official capacity as District Manager, Bureau of Land Management, California Desert Division; and ROXIE TROST, in her official capacity as Field Manager, Bureau of Land Management, Barstow Field Office,

Federal Defendants;

and

CHEVRON ENERGY SOLUTIONS,

Defendant.

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APA	Administrative Procedure Act
BLM	Bureau of Land Management
CARE	CAlifornians for Renewable Energy
CDCA	California Desert Conservation Area
CES	Chevron Energy Solutions
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
NAGPRA	Native American Graves Protection and Repatriation Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
PEIS	Programmatic Environmental Impact Statement
ROD	Record of Decision

1 Federal Defendants U.S. Department of the Interior ("Interior"), Bureau of
2 Land Management ("BLM"), Kenneth L. Salazar, Robert Abbey, Teri Raml, and
3 Roxy Trost hereby file their Motion to Dismiss Plaintiffs' Complaint (ECF No. 1)
4 pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

5 **I. INTRODUCTION**

6 Plaintiffs La Cuna de Aztlan Sacred Sites Protection Circle Advisory
7 Committee ("La Cuna"), CAlifornians for Renewable Energy ("CARE"), Alfredo
8 Acosta Figueroa, Phillip Smith, Patricia Figueroa, Ronald Van Fleet, and Catherine
9 Ohrin-Greipp have asserted claims against Federal Defendants under the
10 Administrative Procedure Act ("APA"), the National Environmental Policy Act
11 ("NEPA"), the National Historic Preservation Act ("NHPA"), the Federal Land
12 Policy & Management Act ("FLPMA"), and the Native American Graves
13 Protection & Repatriation Act ("NAGPRA"). Plaintiffs' claims should be
14 dismissed for failure to allege facts sufficient to establish standing, for failure to
15 state a claim upon which relief can be granted, and for failure to exhaust
16 administrative remedies.

17 **II. BACKGROUND**[1]

18 In October 2010, the Department of the Interior approved the application of
19 Chevron Energy Solutions ("CES") for permission to construct and operate the
20 Lucerne Valley Solar Project ("Lucerne" or "the Project") on public lands
21 managed by the Bureau of Land Management ("BLM"). Record of Decision
22 ("ROD"), attached hereto as Exhibit A at 29. The Project site is located in San
23 Bernardino County, California. *Id.* As approved, the Project will consist of an up
24 to 45-megawatt (MW) solar photovoltaic plant and associated facilities, which will
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[1] This background statement contains facts material to jurisdictional issues raised in the instant motion to dismiss, and also general background facts for the Court's convenience that are not material to the jurisdictional or other threshold legal issues raised in the instant motion.

be built on approximately 422 acres of public land in the Mojave Desert managed by the BLM. *Id.*

Because the Lucerne Valley Solar Project will be constructed and operated on BLM managed lands, its proponent, CES, was required to submit an application to BLM for a right-of-way under Title V of FLPMA, 43 U.S.C. §§ 1761-1771. Exh. A at 29, 31-32. An approval of this application for a right-of-way requires BLM to prepare an environmental analysis pursuant to the NEPA. *Id.* In addition, the proposed action would require BLM to amend the existing California Desert Conservation Area ("CDCA") Plan pursuant to FLPMA. Exh. A at 5-6, 10. Concurrently with the NEPA analysis, BLM evaluated the impacts to cultural resources under section 106 of the NHPA. Excerpts of Final Environmental Impact Statement ("FEIS"), attached hereto as Exhibit B at 75-84. Throughout the approval process, BLM worked extensively with state and federal agencies, Native American tribes, interest groups, and the general public to ensure a collaborative result. Exh. A at 30, 57-60; Exh. B at 82-84.

In compliance with its obligations under NEPA, BLM prepared a Draft EIS for the Lucerne Valley Solar Project. Exh. A at 57. BLM hosted two separate scoping meetings in communities near the Project site and invited agencies and members of the public to participate. 74 Fed. Reg. 36,504 (July 23, 2009); Exh. A at 57. Plaintiffs did not provide written or oral comments in conjunction with the scoping activities. Declaration of Roxie Trost, attached hereto as Exhibit C at ¶ 4. The Environmental Protection Agency's publication of the Notice of Availability of the Draft EIS on February 19, 2010, opened the public comment period, which then closed on May 19, 2010. 75 Fed. Reg. 7,479 (Feb. 19, 2010). BLM did not receive any comments on the Draft EIS from Plaintiffs. Exh. C at ¶ 4. Three months later, BLM issued the Final EIS for the Project. 75 Fed. Reg. 49,487 (Aug. 13, 2010). Again, the proposed plan amendment and Final EIS were made available for public review, and Plaintiffs had an opportunity to protest the

decision. Plaintiffs La Cuna, Alfredo Figueroa, Smith, Patricia Figueroa, Van Fleet, and Ohrin-Greipp neither protested the planning decision nor raised any objections or concerns associated with the Final EIS. Exh. C at ¶ 4. Only Plaintiff CARE filed a protest to the proposed plan amendment. *Id.*; *see* Exh. C at Attach. 1.

On October 5, 2010, Interior published the ROD. 75 Fed. Reg. 62,852 (Oct. 13, 2010); Exh. A at 62. The ROD announces Interior's decision to grant to CES a right-of-way under Title V of the FLPMA, 43 U.S.C. §§ 1761-1771, approving CES's application to construct, operate, maintain, and eventually decommission a photovoltaic solar panel project on federal public lands managed by the BLM, subject to the BLM's subsequent issuance of a Notice to Proceed with construction activities. Additionally, the ROD sets forth Interior's decision to amend BLM's CDCA Plan, which covers the area where the Project is to be built, and to allow for a solar energy generation project to be built at the site identified for the Project.

Approximately three months after publication of the ROD, Plaintiffs filed their Complaint. The Complaint alleges that Defendants: (1) failed to comply with the NHPA by failing "to perform the NHPA-prescribed consultations with Plaintiff LA CUNA" (Compl. ¶ 17); (2) violated NEPA by failing to "prepare[] an adequate EIS for the Chevron project" (Compl. ¶ 22); (3) violated NEPA by failing to "prepare a programmatic EIS for the Project (and other solar-electricity generation projects)" (Compl. ¶ 28); (4) violated FLPMA by failing "to comply with the CDCA Plan" and by failing to "take all action necessary to prevent unnecessary or undue degradation" of effected federal public land (Compl. ¶ 36); and (5) violated NAGPRA by failing "to consult with . . . the appropriate Indian tribe prior to excavating, disposing of, or otherwise removing Native American cultural items (including human remains) known . . . or strongly suspected of being on the site of the Chevron Project." (Compl. ¶ 42).

III. STANDARD OF REVIEW

A. Rule 12(b)(1)

Jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). Federal jurisdiction is properly challenged on a motion to dismiss under Fed. R. Civ. P. 12(b)(1). The plaintiff, as the party invoking federal jurisdiction, has the burden of proving its existence. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (internal citations omitted); *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996).

In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court is not necessarily limited to allegations in the complaint, but may consider materials outside the pleadings. *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may attack either the facial sufficiency of the allegations of the complaint or the existence of subject matter jurisdiction in fact. *See Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). If a motion to dismiss challenges the facial sufficiency of the complaint, the court presumes the factual allegations of the complaint to be true and assesses whether these allegations are sufficient as a matter of law to confer jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A court, however, does not have to accept as true allegations that are conclusory in nature. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

1 By contrast, if a motion to dismiss challenges subject matter jurisdiction in
2 fact, the court "may consider the evidence presented with respect to the
3 jurisdictional issue and . . . resolv[e] factual disputes if necessary." *Thornhill*, 594
4 F.2d at 733. In resolving such factual disputes, the Court does not presume that the
5 allegations of the complaint are true, and plaintiff maintains the burden of
6 establishing subject matter jurisdiction through affidavits or other appropriate
7 evidence. *See id.*; *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).
8 Accordingly, the consideration of evidence concerning the issue of jurisdiction
9 does not convert a Rule 12(b)(1) motion into one for summary judgment. *Biotics*
10 *Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). "If [a] court
11 determines . . . that it lacks subject-matter jurisdiction, [then it] must dismiss the
12 action." Fed. R. Civ. P. 12(h)(3).

13 **B. Rule 12(b)(6)**

14 A motion to dismiss for failure to state a claim upon which relief can be
15 granted under Rule 12(b)(6) may be based on either a "lack of a cognizable legal
16 theory" or "the absence of sufficient facts alleged under a cognizable legal theory."
17 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Although at
18 the pleading stage, the complaint does not have to contain detailed factual
19 allegations to survive a Rule 12(b)(6) dismissal, "it must provide more than 'a
20 formulaic recitation of the elements of a cause of action.'" *Mendiondo v.*
21 *Centinela Hosp. Medical Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (quoting *Bell*
22 *Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Moreover, a court need not accept as
23 true "allegations that contradict exhibits attached to the Complaint or matters
24 properly subject to judicial notice, or allegations that are merely conclusory,
25 unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l*
26 *Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (citing *Mazarek v. St. Paul Fire &*
27 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008)). When evaluating a motion
28 to dismiss under Rule 12(b)(6), the court may properly review public records, such

as the Federal Register, without converting the motion to a motion for summary judgment under Rule 56. *Mack v. S. Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) *abrogated on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); *see Nat'l Treasury Employees Union v. Whipple*, 636 F. Supp. 2d 63, 78 n.8 (D.D.C. 2009); *Louis v. McCormick & Schmick Rest. Corp.*, 460 F. Supp. 2d 1153, 1155 (C.D. Cal. 2006).

IV. ARGUMENT

A. Plaintiffs Lack Standing to Bring Their Complaint

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101(1998)). Such a case should be dismissed under Fed. R. Civ. P. 12(b)(1). "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, --- U.S. ---, 130 S. Ct. 2743, 2752 (2010); *accord Summers v. Earth Island Inst.*, 555 U.S. 448, 129 S. Ct. 1142, 1149 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The burden is on the plaintiff to make the necessary showing. *Lujan*, 504 U.S. at 561. As recently articulated by the Ninth Circuit, a plaintiff must demonstrate three elements to establish constitutional standing:

> (1) the plaintiff must have suffered an injury-in-fact that is, a concrete and particularized invasion of a legally protected interest that is actual or imminent, not conjectural or hypothetical; (2) the injury must be causally connected – that is fairly traceable – to the challenged action of the defendant and not the result of the independent action of a third party not before the court; and (3) it must be likely and not merely

> speculative that the injury will be redressed by a favorable decision by the court.

Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 624 F.3d 1043, 1049 (9th Cir. 2010).

Thus, as affirmed by the Supreme Court in *Summers*, the doctrine of standing "requires federal courts to satisfy themselves that 'the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction.'" 129 S. Ct. at 1149 (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). The alleged "deprivation of a procedural right without some concrete interest that is affected by the deprivation-a procedural right *in vacuo*-is insufficient." *Id.* at 1151. *See also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 483 (9th Cir. 2011) (holding that '"generalized harm . . . will not alone support standing.'" (omission in original) (quoting *Summers*, 129 S. Ct. at 1149)); *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (To satisfy standing in a case involving procedural rights, a plaintiff must "show that the interest . . . is more than a mere general interest [in the alleged procedural violation] common to all members of the public, [rather] the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." (first insertion in original) (internal quotations and citation omitted)).

Here, Plaintiffs have not demonstrated that they have standing to bring forth this action. Plaintiffs' Complaint alleges, for each of their five claims, only generalized grievances of the type that are common to members of the general public. The Complaint also does not explain, as it must, how the individual and organizational Plaintiffs will suffer injury as a result of Federal Defendants' alleged wrongdoing. Accordingly, neither the individual nor organizational Plaintiffs cannot meet the injury in fact requirement. In addition, none of the

1 Plaintiffs are a federally recognized tribe and therefore lack standing to pursue
2 Claims 1 and 5, which assert claims for tribal injuries.

3 1. Plaintiffs Cannot Demonstrate an Injury In Fact

4 An injury to recreational, aesthetic, scientific, and environmental well being
5 is admittedly "cognizable" for purposes of the injury-in-fact test. *See Sierra Club*
6 *v. Morton*, 405 U.S. 727, 734 (1972). However, to be constitutionally cognizable,
7 an injury-in-fact must be "concrete and particularized" and "actual or imminent,
8 not conjectural or hypothetical." *Catholic League*, 624 F.3d at 1049. The
9 Plaintiffs in this case have failed to meet the injury-in-fact requirement.

10 An injury is "particularized" when it "affect[s] the plaintiff in a personal and
11 individual way." *Lujan*, 504 U.S. at 560 n.1. By contrast, an alleged injury falls
12 short of Article III's requirements when it takes the form of a "generalized
13 grievance," which is defined as an impact that is "plainly undifferentiated" and
14 "common to all members of the public." *United States v. Richardson*, 418 U.S.
15 166, 176 (1974) (quoting ex parte *Levitt*, 302 U.S. 633, 634 (1937)); *see also*
16 *Alaska Right to Life PAC v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007). The
17 Supreme Court has "consistently held that a plaintiff raising only a generally
18 available grievance about government—claiming only harm to his and every
19 citizen's interest in proper application of the Constitution and laws, and seeking
20 relief that no more directly and tangibly benefits him than it does the public at
21 large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–
22 74; *see also Duke Power Co. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80
23 (1978).

24 Plaintiffs' Complaint is devoid of any detail establishing how Plaintiffs will
25 suffer any injury as a result of the Project. Rather, Plaintiffs make general
26 allegations of harm to themselves and the general public. For example, Plaintiffs
27 allege that Federal Defendants' non-compliance with NEPA, FLPMA, NHPA,
28 NAGPRA, and APA will result in harm to Plaintiffs "and other members of the

public" because they "have been denied the benefits and protections provided by compliance with those laws." Compl. ¶¶ 19, 24, 30, 37, 43. These generalized allegations of injury to Plaintiffs and the public at large are not enough to confer standing.

Moreover, Plaintiffs have failed to establish that they have any concrete, immediate plans to visit or frequent the Lucerne Valley Project site. The Supreme Court has made clear that allegations of past travel and "some day" intentions to return to the area are "simply not enough" to confer standing. *Lujan*, 504 U.S. at 564; *accord Summers*, 129 S. Ct. at 1151. Where a plaintiff fails to establish any plans to visit an area that may be potentially impacted by an action, that plaintiff has failed to demonstrate that injury is "actual or imminent." *D'Lil v. Best W. Encina Lodge Suites*, 538 F.3d 1031, 1036–37 (9th Cir. 2008). Here, Plaintiffs have not established any connection to the Lucerne Valley Project site, past, present, future or otherwise. *See* Compl. At best, Plaintiffs Alfredo Figueroa, Smith, Patricia Figueroa, Van Fleet, and Ohrin-Griepp claim they "reside in the areas affecting [sic] by the actions challenged in this lawsuit and have an interest in the responsible development of renewable energy and in the preservation of and respect for Native American culture." Compl. ¶ 3. This statement, however, does not establish an injury-in-fact because these Plaintiffs fail to show how they will be injured in relation to specific areas of the Project site. *Lujan*, 497 U.S. at 889 (evidence that a member "uses unspecified portions of an immense tract of territory, on some portions of which [an] activity has occurred or probably will occur" is insufficient under Article III).

Accordingly, Plaintiffs have failed to establish that they have standing to raise Claims 1 through 5.

2. Plaintiffs La Cuna and CARE Lack Organizational Standing

Although organizations may sue on their own behalf or on behalf of their members, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n. 19 (1982),

Plaintiffs La Cuna and CARE have failed to state a concrete injury beyond making statements of abstract organizational purposes. An organization has standing to bring suit on behalf of its members when "[1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *W. Watersheds*, 632 F.3d at 482-83 (alternations in original) (quoting *Friends of the Earth*, 528 U.S. at 181); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (no alterations) (quoting *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1019 (9th Cir. 2003)). An "organization asserting standing must provide 'specific allegations establishing that at least one identified member [has] suffered or would suffer harm,' and 'generalized harm. . . will not alone support standing.'" *W. Watersheds*, 632 F.3d at 483 (internal citation removed) (alterations in original) (quoting *Summers*, 129 U.S. at 1149, 1151).

Plaintiffs La Cuna and CARE fail to meet any of the requisite organizational standing requirements. First, both La Cuna and CARE have failed to meet the first element of organizational standing because Plaintiffs fail to allege how any of La Cuna or CARE's members have standing to sue on their own right. Even assuming that the individual Plaintiffs are members of these two organizations (which the Complaint does not allege), as discussed above, Plaintiffs have failed to allege any harm to such individuals other than generalized harms.

Second, Plaintiffs fail to sufficiently allege the second element of organizational standing (as well as any concrete harm to themselves as organizations). La Cuna claims it is "dedicated to physically protecting the Blythe Giant Intaglios, other geoglyphs, and several hundred sacred sites that are located along the Colorado River from Needles, California, to Yuma, Arizona." Compl. ¶ 1. CARE states that it was "formed to promote public education concerning the responsible development of renewable energy and in the preservation of and

respect for Native American culture." Compl. ¶ 2. However, neither La Cuna nor CARE allege how Federal Defendants' asserted violations of various environmental and other statutes harm them as organizations, or are "germane to the organization's purpose," *Kraayenbrink*, 632 F.3d at 482–83, particularly when they have failed to establish any connection to the Lucerne Valley Project site. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088-89 (9th Cir. 2010) (declining to find organizational standing where the organization failed to assert any factual allegations in its complaint that the alleged harm frustrated the organization's purpose or diverted its resources); *cf. Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 861 (9th Cir. 2005) (finding that organization had standing because organization sufficiently demonstrated that its main interest and purpose would be impacted by the proposed action). At best, the organizational Plaintiffs have expressed an interest in the issues present in this litigation, but that is not enough to confer standing. *Morton*, 405 U.S. at 739 ("[m]ere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." (internal citation removed)); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.").

Finally, because La Cuna and CARE cannot establish that its members have standing on their own right or that there is any potential injury to their organizational purposes, they can only bring this challenge through "the participation of individual members in the lawsuit," which is not appropriate for organizational standing purposes.

Accordingly, Plaintiffs La Cuna and CARE have failed to establish that they have organizational standing to raise Claims 1 through 5.

3. Plaintiffs Lack Standing To Assert Claims 1 and 5 for Alleged Injuries to Tribal Interests

Claims 1 and 5 of Plaintiffs' Complaint allege that BLM violated the NHPA and NAGPRA for failure to consult with Indian tribes. Compl. ¶¶ 15-19, 39-43. However, because none of the Plaintiffs is a federally recognized tribe, they lack standing to bring these claims.

The consultation requirements found in both the NHPA and NAGPRA are designed to ensure that there is adequate consultation and coordination between the Federal government and Indian tribes.[2] *See* 25 U.S.C. § 3010 (NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government."); 16 U.S.C. § 470a(d)(1)(A) (Pursuant to NHPA, "[t]he Secretary shall foster communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all types of historic properties and all public interests in such properties are given due

[2] Plaintiffs have attached as Exhibit A to their Complaint what appears to be a marked Memorandum of Agreement ("MOA") between the BLM's Yuma Field Office and the Southern Low Desert Resource Conservation and Development Council, which includes La Cuna. Compl. ¶¶ 16-19. Plaintiffs offer this document in an apparent attempt to demonstrate that BLM's Barstow Field Office was required to consult with Plaintiffs pursuant to the NHPA. *Id.* ¶ 17. However, this document does not place any obligation on BLM's Barstow Field Office because that office was not a signatory to the MOA. Moreover, the MOA governs the "cultural resources in the BLM Yuma Field Office planning area," of which the Lucerne Valley Project is not a part. Finally, the MOU, by its terms, does not impose any obligation on any BLM field office to consult with La Cuna. MOA, at 3.

1 consideration, and to encourage coordination among Indian tribes, State Historic
2 Preservation Officers, and Federal agencies . . . .").
3 Plaintiffs do not allege—and could not demonstrate—that they are an
4 "Indian tribe" under the applicable statutes. Under both NAGPRA and the
5 regulations governing section 106 of NHPA, "Indian tribe" has a specific
6 definition. Under NAGPRA, "Indian tribe" is defined as "any tribe, band, nation,
7 or other group or community of Indians, including any Alaska Native village"
8 which "is recognized as eligible for the special programs and services provided by
9 the United States to Indians because of their status as Indians." 25 U.S.C. §
10 3001(7). Under the NHPA regulations, "Indian tribe" is defined as "an Indian
11 tribe, band, nation, or other organized group or community, including a native
12 village, regional corporation or village corporation, as those terms are defined in
13 section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is
14 recognized as eligible for the special programs and services provided by the United
15 States to Indians because of their status as Indians." 36 C.F.R. § 800.16(m).
16 Because these statutes are not designed to protect Plaintiffs' interests but
17 those of various Indian tribes, any alleged failure to consult would not result in any
18 injury to Plaintiffs. *See Te-Moak Tribe v. U.S. Dep't of the Interior*, 608 F.3d 592,
19 608 n.19 (9th Cir. 2010) (Under the NHPA, an agency must engage in
20 government-to-government consultations *only* with recognized tribes and tribal
21 representatives duly designated by the governing tribal body); S*noqualmie Indian*
22 *Tribe v. FERC*, 545 F.3d 1207, 1215–16 (9th Cir. 2008) (same); 36 C.F.R. §
23 800.2(c)(2)(ii)(C); *Idrogo v. U.S. Army*, 18 F. Supp. 2d 25, 26 (D.D.C. 1998)
24 (finding that plaintiffs lacked standing on NAGPRA claim where plaintiffs did not
25 meet the definition of "Indian tribe" as defined by the statute); *cf. Schmit v. Int'l*
26 *Finance Mgmt. Co.*, 980 F.2d 498 (8th Cir. 1992) (per curium) (holding that non-
27 Indian lacked standing to bring action where challenged action was enacted to
28 protect the interests of the Winnebago Tribe). A plaintiff must assert his own legal

rights and interests and cannot raise a claim based on the legal rights or interests of a wholly separate third-party. *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). The Supreme Court has explained the reasons for limiting standing in this way:

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.

Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (citations omitted). Indian tribes are quite capable of asserting their own rights, and Plaintiffs have not demonstrated to the contrary.

Further, while a plaintiff might have standing if it can demonstrate that it has been designated to represent tribal interests, Plaintiffs have failed to make any such showing here. *Canadian St. Regis Band of Mohawk Indians v. New York*, 573 F. Supp. 1530, 1537 (N.D.N.Y 1983) (holding that plaintiffs lacked standing where "individual plaintiffs are not a tribe and do not represent a tribe"); *Bingham v. Massachusetts*, 616 F.3d 1, 6 (1st Cir. 2010) (holding that plaintiffs lacked standing because "[p]laintiffs do not represent the tribe, nor do they claim the capacity to do so").

As such, Plaintiffs lack standing with regard to Claims 1 and 5 because they are not an Indian tribe nor have Plaintiffs established that they have been designated by any tribe to represent tribal interests.

B. <u>Claim 3 Fails to State a Claim Under Sections 706(1) and 704 of the APA</u>

NEPA does not contain a specific judicial review provision; instead, NEPA cases are reviewable under the APA, 5 U.S.C. §§ 701–706. *Lujan*, 497 U.S. at

882–83; *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003). Therefore, Plaintiffs' NEPA claims must satisfy the requirements for judicial review under the APA, including that they challenge a "final agency action," within the meaning of APA § 704, 5 U.S.C. § 704.

Plaintiffs allege in Claim 3 that BLM has violated NEPA and the APA, claiming that BLM failed to prepare a Programmatic EIS ("PEIS") for the Lucerne Valley Project and other solar generation projects, which Plaintiffs claim is a mandatory duty. Compl. ¶¶ 26, 28. However, there is no legally enforceable requirement that BLM prepare a PEIS. Moreover, a Programmatic EIS is not a "final agency action" reviewable by this Court under APA § 704. And, although BLM is in the process of preparing a programmatic EIS for Solar Energy Development in Six Southwestern States (the "Solar Energy Development PEIS"), because the agency has not yet completed the Solar Energy Development PEIS, it is not a "final agency action" reviewable by this Court under APA § 704. Compl. ¶ 8(C); 75 Fed. Reg. 78,980-78,984 (Dec. 17, 2010).

1. Preparation of a Programmatic EIS Is Not a Discrete Agency Action That BLM is Required to Take.

In *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), the Supreme Court clarified that "a claim under [APA] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" 542 U.S. 55, 64 (2004). Nothing in NEPA or NEPA's implementing regulations required BLM to prepare a Programmatic EIS for the Lucerne Valley Project. Indeed, NEPA and its implementing regulations are completely silent with regard to PEISs. Rather, agencies are "encouraged," but not required, to tier EISs to eliminate repetition, which is particularly appropriate when broad program or policy issues are implicated. 40 C.F.R. §§ 1502.20, 1508.28; 43 C.F.R. § 46.140. "Tiering" means simply that more focused, site-specific EISs may "tier to" — that is, rely upon — more general, overarching programmatic

EISs. This, however, in no way creates a non-discretionary obligation upon an agency to prepare a PEIS in the first instance. Instead, courts have left the decision whether to prepare a PEIS to the agency's discretion. *Kleppe v. Sierra Club*, 427 U.S. 390, 413–14 (1976); *see also Nevada v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006) ("The decision whether to prepare a programmatic EIS is committed to the agency's discretion."). Plaintiffs also erroneously cite to 40 C.F.R. § 1502.4(b) in support of the proposition that BLM is required to prepare a Programmatic EIS. Compl. ¶ 26. That particular provision of NEPA's implementing regulations governs the preparation of EISs, which BLM has already prepared for the Lucerne Valley Project. *See* 40 C.F.R. § 1502.4(b) ("Major Federal actions requiring the preparation of *environmental impact statements"* (emphasis added)).

2. The Programmatic EIS Is Not a Final Agency Action Reviewable Under the APA.

The decision on whether to conduct a PEIS is not a final agency action; a PEIS would only be part of a NEPA review if it was used to inform the decision maker. Even if NEPA compelled BLM to prepare a PEIS, which it does not, under section 704 of the APA a plaintiff may only challenge a "final agency action." *Lujan*, 497 U.S. at 882 ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *Bennett v. Spear*, 520 U.S. 154, 178 (1997) ("Final agency action" occurs when the action is the consummation of the agency's decisionmaking process from which "legal consequences will flow" or "rights or obligations have been determined." (internal citations omitted)). At least one court has declined to recognize a Programmatic EIS as a "final agency action" where the preparation of the document is still underway. *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1189 (D. Haw. 2006) ("The fact that [the Agency] decided to initiate a PEIS

does not demonstrate that [it] engaged in 'final agency action' before beginning the PEIS."); *see also Lujan*, 497 U.S. at 891 (declining to find a "final agency action" where agency sought wide-scale programmatic improvements). Here, the Solar Energy Development PEIS is still undergoing public review and comment, and the NEPA analysis has yet to be completed.

Courts have found that a claim is not ripe for review if the agency has not concluded its NEPA analysis. *See, e.g.*, *W. Radio Servs. Co., v. Glickman*, 123 F.3d 1189, 1197 (9th Cir. 1997) (holding that a claim was not ripe because the agency had not concluded its Environmental Assessment); *see also Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) ("[I]t appears well-established that a final EIS or the ROD issued thereon constitute the 'final agency action' for purposes of the APA." (citing *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1504 (9th Cir. 1995))). Here, the agency did not use a PEIS in connection with any final agency action. Review of whether cumulative and indirect effects were properly taken into account rests on the evaluations that were conducted, not on any hypothetical PEIS.

Accordingly, Plaintiffs' Claim 3 fails both because Plaintiffs have not identified any source of a mandatory duty to prepare a programmatic EIS and because they have not identified a final agency action for judicial review. Therefore, Plaintiffs' Claim 3 must be dismissed for failure to state a claim.

C. <u>Claim 5 Must Be Dismissed for Failure to State a Claim</u>

Claim 5 of Plaintiffs' Complaint asserts violations of NAGPRA. However, NAGPRA is triggered only upon an "intentional removal from or excavation of Native American cultural items." 25 U.S.C. § 3002(c); *see also* 43 C.F.R. § 10.3(b) ("These regulations permit the intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands only if . . . ."). Courts have consistently interpreted NAGPRA to apply only when cultural items are excavated or discovered, not when there is only the

potential for excavation or discovery. *Rosales v. United States*, No. 07cv0624, 2007 WL 4233060, at *9 (S.D. Cal. Nov. 28, 2007) ("[A]n inadvertent discovery does not occur when an agency is placed on notice of likely or certain discovery, *but that discovery must be 'actual.'*" (emphasis added)); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 252 (D. Vt. 1992) ("As yet there have been no cultural or funerary items discovered at the mitigation site, though the possibility of their existence is extremely high. However, NAGPRA applies to cultural and funerary objects . . . already discovered or excavated, § 3002."); *see San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 888 (D. Ariz. 2003) (holding that NAGPRA did not apply because the government actions were "not intentional excavation and removal of human remains").

Two recent cases provide additional support for the longstanding proposition that NAGPRA is triggered only with the actual discovery or excavation of Native American cultural items. In *Winnemem Wintu Tribe v. U.S. Department of the Interior*, the court dismissed the plaintiffs' NAGPRA claim because the plaintiffs failed to allege any intentional excavation and removal of cultural items by the U.S. Forest Service. 725 F. Supp. 2d 1119, 1145 (E.D. Cal. 2010). Noting that the plaintiffs' allegations were "vague and conclusory," the court found that "[p]laintiffs fail[ed] to allege that any defendant excavated or removed, either intentionally or inadvertently, specific Indian remains or objects at the Rocky Ridge site." *Id*. Likewise in *Geronimo v. Obama*, the court found that the complaint failed to state a NAGPRA claim because there were no discoveries of any cultural items after the enactment of the statute and the only alleged discovery occurred in 1918. 725 F. Supp. 2d 182, 186-87 (D.D.C. 2010).

In the present case, Plaintiffs failed to allege or present any supporting documentation in their Complaint that there has been any discovery or excavation of any cultural item, inadvertent or otherwise, within the meaning of NAGPRA. *See* Compl. In the absence of an actual discovery or excavation of any Native

American cultural items, the requirements of NAGPRA have not been triggered. Consequently, Plaintiffs have failed state a claim under NAGPRA.

D. Plaintiffs Failed to Exhaust Their Administrative Remedies

The exhaustion of administrative remedies doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). The underlying basis of the exhaustion doctrine requires that parties pursue all administrative remedies:

> [A]s a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765 (1975); *see also McKart v. United States*, 395 U.S. 185, 193 (1969); *Nader v. EPA*, 859 F.2d 747, 754 (9th Cir. 1988) ("The purpose of this administrative exhaustion requirement is to give notice to an agency of specific errors or issues, so the agency can bring the Agency's experience to bear on a contested question, and either correct the error or provide a reasoned explanation."). Until a party has exhausted all administrative remedies required by a statute or agency rule, it may not obtain judicial review of the challenged agency action. *Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993). When, as here, the agency's regulations require an exhaustion of administrative remedies, "the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988).

For BLM's land use planning decisions, such as the one at issue here, the administrative appeals process is set forth in 43 C.F.R. § 1610.5-2.[3] Those regulations specify that "[a]ny person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment." 43 C.F.R. § 1610.5-2(a). Such protests must be in writing and filed within 30 days of the date of the publication of notice of the EIS. *Id.* § 1610.5-2(a)(1). Moreover, "[a] protest may raise only those issues which were submitted for the record during the planning process," *id.* § 1610.5-2(a), and the protest must contain "[a] copy of all documents addressing the issue or issues that were submitted during the planning process by the protesting party or an indication of the date the issue or issues were discussed for the record," *id.* § 1610.5-2(a)(2)(iv). NAGPRA's regulations also require that a party exhaust its administrative remedies, providing that "[a] person's administrative remedies are exhausted only when the person has filed a written claim with the responsible museum or Federal agency and the claim has been duly denied under this part." 43 C.F.R. § 10.15(c)(1).

Plaintiffs conclusorily allege that they have "satisfied each and every exhaustion-of-remedies requirement," (Compl. ¶ 11), but Plaintiffs La Cuna, Alfredo Acosta Figueroa, Phillip Smith, Patricia Figueroa, Ronald Van Fleet, and Catherine Ohrin-Greipp have not availed themselves of any of the administrative

[3] Ordinarily, exhaustion of administrative remedies under BLM regulations requires a timely petition for stay of decision and denial or partial denial of that petition by the Appeals Board. 43 C.F.R. § 4.21(c); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 n.1 (9th Cir. 1991). In this case, however the Secretary of the Interior approved the decisions to authorize the Project, including the decision to grant CES a right-of-way for the Project. Exh. A at 62. For that reason, and in accordance with 43 C.F.R.§ 4.410(a)(3), the decision to grant CES a right-of-way is not subject to appeal to the Appeals Board under 43 C.F.R. § 4.

appeals procedures promulgated by the Department of the Interior. These Plaintiffs failed to participate in the planning process and failed to provide any comments on the Draft EIS or the Final EIS. These Plaintiffs also failed to submit any protests regarding the Lucerne Valley Project to the agency. *Id.*

Although Plaintiff CARE submitted a protest to the Final EIS on September 11, 2010, this protest was Plaintiff CARE's first and only written involvement in the planning process for the Lucerne Valley Project. Plaintiff CARE failed to raise any issues during the planning process prior to issuance of the Final EIS, as would have been necessary for BLM to actually consider and address CARE's concerns prior to issuing the FEIS. Further, the protest plainly does not comply with the applicable exhaustion requirements. Among other things, the "protest" fails to provide "[a] copy of all documents addressing the issue or issues that were submitted during the planning process by the protesting party or an indication of the date the issue or issues were discussed for the record." 43 C.F.R. § 1610.5-2(a)(2)(iv). It further does not appear to even discuss topics at issue in Plaintiffs' complaint: for instance it makes no reference to the alleged need for a programmatic EIS or compliance with NAGPRA. *See id.* § 1610.5-2.

Claims 1 through 5 of Plaintiffs' Complaint should therefore be dismissed because the Complaint fails to allege that Plaintiffs have taken the required steps to exhaust the administrative remedies provided for their NEPA, FLPMA, NHPA, and NAGPRA claims. *See Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1139 (dismissing plaintiff's NEPA claims because plaintiffs failed to "plead any facts establishing that they have exhausted any available administrative remedies").

V. CONCLUSION

WHEREFORE, Federal Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted on this 7th day of June, 2011.

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CERTIFICATE OF SERVICE

I, Romney S. Philpott, hereby certify that on June 7, 2011, I caused the foregoing to be served upon counsel of record through the Court's CM/ECF system.

Dated: June 7, 2011

s/Romney S. Philpott
ROMNEY S. PHILPOTT