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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

*** * * ***

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendant, and OCOTILLO EXPRESS LLC Defendant-Intervenor	CASE NO.: 3:12-cv-1167 WQH-MDD MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT-INTERVENOR OCOTILLO EXPRESS LLC IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER Date: May 18, 2012 Time: 2:00 pm Courtroom: 4 Judge: The Hon. William Q. Hayes Action Filed May 14, 2012

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I. INTRODUCTION

Our nation, the State of California and Imperial County have all placed the highest priority on developing domestic renewable energy resources to boost energy security, reduce greenhouse gas emissions and improve our domestic economy. The Ocotillo Wind Energy Facility ("OWEF" or the "Project"), a 112-wind turbine project on federal multiple-use lands in the Imperial Valley, advances all of those goals.

OWEF will help the Department of the Interior ("Interior") to meet its statutory mandate to approve 10,000 megawatts of renewable energy generating capacity on public lands by 2015,[1] and San Diego Gas & Electric ("SDG&E") to meet the requirements of state law that it provide 33 percent of its power from renewable sources by 2020.[2] It will generate badly needed jobs in a county with 27 percent unemployment, highest in the nation,[3] and generate enough electricity to power 125,000 homes while avoiding 360,000 metric tons/year of greenhouse gas emissions.[4] It achieves these benefits while temporarily disturbing less than 460 acres and having a final footprint of about 120 acres, out of a 12,500 acre Project area.[5]

The Project site is already impacted by roads, railroads, transmission lines, telecommunication lines, and open and closed mining operations, as well as offroad vehicle use.[6] OWEF also straddles the 500 kV Sunrise Powerlink transmission line, a $1.9 billion project that is being constructed specifically to bring renewable energy from projects like OWEF to the residents of Southern California. This Court has twice rejected opponents' attempts to enjoin construction of the Sunrise Powerlink,[7] and that line is scheduled to be completed this summer.

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[1] § 211, Energy Policy Act of 2005, Pub. L. 109-58, (Aug. 8, 2005).

[2] Declaration of Daniel M. Elkort ("Elkort Dec.") ¶¶ 4, 12-13.

[3] Elkort Dec. ¶ 16; Declaration of Andrew Horne ("Horne Dec.").

[4] Declaration of Natalie McCue ("McCue Dec") ¶ 4.

[5] Declaration of Joan Inlow ("Inlow Dec.") ¶ 4.

[6] *See, e.g.*, Proposed Plan Amendment & Final Environmental Impact Statement/Environmental Impact Report for the Ocotillo Wind Energy Facility (Feb. 2012) (hereinafter "FEIS") at 3.13-1 (attached to the Declaration of Svend A. Brandt-Erichsen ("Brandt-Erichsen Dec.") as Exhibit ("Ex.") 1 at 9).

[7] Preliminary Injunctive relief was denied in two cases challenging BLM and U.S. Forest Service approvals for Sunrise Powerlink. In *Protect our Communities Foundation v. U.S. Dept. of Agriculture*, S.D. Cal. No. 11-cv-00093 BEN (BGS), Judge Benitez denied a motion for preliminary injunction (No. 11-cv-00093 Dkt. 39, September 15, 2011) and denied a motion for injunction pending appeal. 2012 WL 113751 (S.D. Cal. Jan. 13, 2012). In *Backcountry Against Dumps v. Abbot*, S.D. Cal. No. 10-cv-1222 BEN (BGS), Judge Benitez denied a motion for

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The Plaintiff seek, but cannot justify, the extraordinary remedy of a TRO based only upon vaguely described environmental values and the Tribe's interest in the region's cultural resources. However, as explained below, those interests are amply protected – and certainly will be for the next few weeks while a preliminary injunction motion is decided. Moreover, their claims are not likely to succeed on the merits. Interior's Bureau of Land Management ("BLM") completed an exceptionally thorough evaluation of all of the Project's potential impacts on environmental and cultural resources, reflected in a detailed FEIS, and issued detailed findings supporting the CDCA Plan Amendment for the Project. BLM also went to extraordinary lengths to consult with tribes that expressed an interest in the Project, including Quechan, even delaying the final decision almost three months to obtain more tribal input. BLM also worked with the Project developer, Ocotillo Express LLC ("Ocotillo Express"), to shrink and reshape the Project specifically to avoid and reduce impacts to biological and cultural resources, and developed detailed and expansive mitigation to benefit wildlife and the culture of local Native American tribes, as well as the social fabric of local communities.

As a result of this effort, no TRO is needed to protect Quechan's interests, but granting a TRO could be devastating to this Project. Renewable energy development is such a high national priority that wind projects receive federal financial support through an investment tax credit grant ("ITC Grant") – but that support is conditioned on the wind turbines being installed and commercially operational ("placed in service") before the end of 2012. BLM's extended tribal consultation has sharply compressed the Project's construction schedule, putting great pressure on the Project qualifying for **any** ITC Grant.[8] The ITC Grant is critical to the financing for the Project, and a TRO by this Court would put those ITC Grant funds at grave risk.

II. STATEMENT OF ISSUES

Whether Quechan has met its extraordinary burden of demonstrating that it is likely to succeed on the merits of its claims, that it will suffer irreparable harm that outweighs the injuries that would result from imposing a TRO, and that the public interest supports issuance of a TRO?

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injunction pending appeal, 2011 WL 3567963 (S.D. Cal. Aug. 12, 2011), and the Ninth Circuit denied an emergency motion for injunction pending appeal. 9th Cir. Case No. 11-56121 Dkt. 21 (Aug. 30, 2011).

[8] Inlow Dec. ¶¶ 2, 6-9, 15-33; Elkort Dec. ¶¶ 4-11.

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III. STATEMENT OF FACTS

A. OWEF Is An Exceptionally Beneficial Wind Energy Project

With 112 wind turbines, OWEF will generate enough clean energy to meet the needs of approximately 125,000 homes, avoiding the generation of 360,000 metric tons of greenhouse gases each year.[9] The components of OWEF are described in the Declaration of Joan Inlow, filed herewith. OWEF will be located on federal land within BLM's California Desert District in Southern California. Although the ROW granted by Interior covers approximately 12,500 acres, construction of the Project will temporarily disturb less than 460 acres and the permanent Project footprint will disturb even less – only about 120 acres.[10] BLM's CDCA Plan designates the OWEF ROW area as Class L lands (Limited Use). The CDCA Plan specifically authorizes wind energy facilities within Class L lands.[11]

The Ocotillo Valley has one of the highest quality wind resources in Southern California.[12] Moreover, it is one of the few sites with high-quality wind potential that has not been foreclosed to wind development.[13] The Project site also is well suited for wind development. Interstate 8, the Imperial Highway, State Route 98, and the San Diego and Arizona Eastern Railway all run through the Project area.[14] The Project site is crisscrossed by a system of 27 roads and trails and is currently open for "off-highway vehicle [] use and shooting," among other things.[15] Throughout the site there are abandoned mines and mine infrastructure and several open and closed mines are located within two miles of turbine locations.[16]

The Project site consists of two parcels, a smaller 1,200 acre southern parcel and a larger, 11,300 acre northern parcel.[17] The northern parcel is bisected by an existing 500 kV

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[9] McCue Dec ¶ 5.

[10] McCue Dec. ¶ 2.

[11] CDCA Plan at 15 (Table 1) (attached to the Thane Somerville Declaration ("Somverville Dec.") as Ex. 1, p. 13).

[12] *See* Brandt-Erichsen Dec., Ex. 2.

[13] *See* Brandt-Erichsen Dec., Ex. 3.

[14] FEIS at 3.6-2 to -3, fig. 2.3-1 (Brandt-Erichsen Dec., Ex. 1 at 5-7).

[15] FEIS at 3.13-1 (Brandt-Erichsen Dec., Ex. 1 at 9); *see also* FEIS at 3.19-3 (Somerville Dec., Ex. 6, p. 217); FEIS App. N. at RTC N8-10 (Brandt-Erichsen Dec., Ex. 1 at 88-91) (response to tribal comments).

[16] FEIS at 3.4-14 (Somerville Dec., Ex. 6, p. 183), 3.8-2; 3.6-1 to -2.

[17] FEIS at 2-27, fig. 2.3-1 (Brandt-Erichsen Dec., Ex. 1 at 3, 7).

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transmission line as well as the Sunrise Powerlink,[18] to which OWEF will be connected.[19] Two designated utility corridors also run through the Project area, occupying over 9,700 acres within the OWEF ROW.[20] The CDCA Plan designates a network of such joint-use planning corridors to meet projected utility needs and to concentrate the effects of energy related projects.[21]

San Diego Gas & Electric ("SDG&E"), which developed Sunrise Powerlink to transmit power from renewable energy projects to the population centers of Southern California, is counting on output from OWEF toward its obligation under California law to obtain at least 33 percent of its retail power supply from renewable sources by 2020.[22]

The Project also will make an important economic contribution to the region.[23] Imperial County's Board of Supervisors recognized the importance of this Project to the region, certifying the EIR and approving the Project on a 4-1 vote, after hearing public testimony for 12 hours over two days.[24] The Project advances the County's strategic goal of revitalizing the local economy through development of renewable energy projects, while also noting its considerable environmental benefits.[25] The Project also advances a host of national and state policy objectives, including statutory Congressional direction provided to Interior seven years ago to permit 10,000 MW of renewable energy projects on our public lands by 2015.[26]

B. Success For OWEF Depends On Meeting An Incredibly Tight Construction Schedule

In January 2011, during the NEPA/CEQA scoping process, Ocotillo Express was projecting completion of permitting in the fall of 2011 and construction over 15 months.[27] As the year progressed, the permitting target slipped to February 2012. Then in January 2012, BLM

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[18] *See* Brandt-Erichsen Dec., Ex 4.
[19] FEIS at 2-5 to -6 (Somerville Dec., Ex. 6, p. 156-57); 3.6-1 to -2 (Brandt-Erichsen Dec., Ex. 1 at 4-5).
[20] FEIS at 3.6-2 to -3 (Brandt-Erichsen Dec., Ex. 1 at 5-6).
[21] *Id.*
[22] Declaration of Daniel M. Elkort ("Elkort Dec.") ¶¶ 4, 12.
[23] *Id.* ¶¶ 15-19; Horne Dec.
[24] Brandt-Erichsen Dec., Ex. 5.
[25] *Id.*; Horne Dec.
[26] § 211, Pub. L. 109-58.
[27] Brandt-Erichsen Dec., Ex.6.

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decided to delay its final decision three months, to May 1, specifically to allow further time for tribal consultation.[28] Ultimately Interior issued its ROD on May 11 and BLM issued the Notice to Proceed on May 14, 2012. Thus, Ocotillo Express now has only 7 ½ months, exactly half of its original estimate, to complete construction of the Project before the end of December 2012. The difficulty posed by this task is illustrated by comparing the projected OWEF construction schedule to the actual construction time line for Spring Valley Wind, a comparable (but smaller) project nearing completion in Nevada, which will be completed in 15 months.[29] From this point forward, any material delay in this schedule would seriously jeopardize Ocotillo Express' ability to meet that year-end deadline.[30]

C. A TRO Would Put OWEF At Risk Of Missing Its Construction Deadline And Could Prevent The Project From Obtaining Financing, Thus Killing The Project As Currently Conceived

The construction schedule having been compressed to accommodate tribal concerns, it is no longer feasible to complete the entire Project before year end; about a quarter of the turbines likely will not be installed until 2013.[31] However, the switchyard and substation can be completed and energized this year, which will connect the Project to the Sunrise Powerlink, and three quarters of the wind turbines can be installed and commissioned before year's end.[32]

Completion of the switchyard and substation, interconnection with the Sunrise Powerlink, and placing the planned wind turbines into service **before the end of 2012** is critical to the success of OWEF. The Project's financing plan is premised on the Project's ability to benefit from the ITC Grant for the planned turbines, and the ITC Grant is only available for turbines that are placed in service before the end of 2012.[33] Without the ITC Grant, the Project would no longer be economically viable as it is currently conceived.[34] Due to the very large equity

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[28] Inlow Dec. ¶ 6; FEIS at 5-12 (Sommerville Dec. Ex. 6, p. 359).

[29] Inlow Dec. ¶ 8 and Ex. 2.

[30] Inlow Dec. ¶ 2.

[31] Inlow Dec. ¶ 6.

[32] Inlow Dec. ¶ 6.

[33] Elkort Dec. ¶¶ 2-5.

[34] *Id*. ¶ 10. The wind industry already has responded to the pending December 2012 expiration of the ITC Grant. In the United States as a whole, very few wind energy projects are currently planned to go into service in 2013 because of this looming deadline. Elkort Dec. ¶ 11 and Ex. 1; Declaration of Nancy Rader.

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investment already made in this project ($106 million spent and an additional $86 million committed),[35] Ocotillo Express would try to recapture its investment by restructuring the Project after this litigation is concluded. However, it may not be possible to secure financing for such a restructured project.[36]

D. BLM Made Detailed Findings Supporting The CDCA Plan Amendment For The Project

About 5.8 million acres, or more than 48 percent of the federal lands in the CDCA, are designated as Class L, limited multiple use, under the CDCA Plan.[37] The CDCA Plan provides that all land-use actions within a multiple-use class must meet the Plan's guidelines for that class.[38] As Quechan grudgingly acknowledge, the CDCA Plan expressly authorizes wind energy facilities on Class L lands: they "may be allowed after NEPA requirements are met."[39]

The CDCA Plan also identified twelve Plan Elements. Quechan discuss only two: Cultural Resources and Native American Values.[40] Quechan fails to mention the Energy Production and Utility Corridors element, which recognizes California's long term goals for solar and wind energy development and specified that the Plan Amendment process is to be used to implement future renewable projects:

> Plan Amendment procedures will adequately provide for the coordination needed for assuring rapid implementation of these important fuel-replacement alternative energy programs in an environmentally sound manner.[41]

Quechan also fails to mention that over 9,700 acres of the 12,500-acre Project site are within utility corridors that were previously designated under this Plan Element.[42] Each Plan Element specifies decision criteria, and – as required by the CDCA Plan – it was the nine criteria specified in this Plan Element, as well as the Plan's criteria for Plan Amendments, that BLM applied in approving the Plan Amendment for OWEF.[43]

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[35] Elkort Dec. ¶ 14.

[36] *Id*. ¶ 10.

[37] CDCA Plan at 13 (Somerville Dec., Ex. 1, p. 11).

[38] CDCA Plan at 14 (Somerville Dec., Ex. 1, p. 12).

[39] CDCA Plan at 15 (Table 1) (Somerville Dec., Ex. 1, p. 13); Plaintiff's Memorandum ("Plaintiff's Mem.") at 3.

[40] Plaintiff's Mem. at 6-8, 11-14.

[41] CDCA Plan at 95 (Brandt-Erichsen Dec., Ex. 12 at 212).

[42] FEIS at 3.6-2 to -3 (Brandt-Erichsen Dec., Ex. 1 at 5-6).

[43] ROD at 33-35 (Somerville Dec., Ex. 5, pp. 119-121). *See* FEIS at 4.8-1 to 4.8-6.

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E. BLM Conducted A Thorough Environmental Review Of The Project

BLM, working with Imperial County, completed an extraordinarily thorough Draft Environmental Impact Statement/Environmental Impact Report ("DEIS") designed to comply with both NEPA and its state equivalent, the California Environmental Quality Act ("CEQA"). This joint document was circulated in draft form for comment by government agencies, Tribes (including Quechan), and members of the public. It was then revised in light of those comments and a Final Environmental Impact Statement/Environmental Impact Report ("FEIS") issued (which also responded to each comment). The Imperial County Board of Supervisors approved the FEIS, and, on May 11, 2012, the Secretary of the Interior executed a Record of Decision ("ROD"), approving the document and making the Federal decision to allow OWEF to proceed.

F. BLM's Consultation With Tribes Was Exhaustive

The Quechan's central NHPA claim, that BLM's Section 106 consultation with it did not satisfy the requirements of the NHPA, is incorrect. BLM provided all of the consulting tribes with all key documents, in draft form, for their input,[44] and routinely granted tribal requests for additional time to review and comment on these documents.[45] In fact, BLM delayed issuing the ROD by three months to allow more time to complete consultation,[46] and continued consulting with the tribes, through meetings, field trips, conference calls and emails, right up until the weeks before the ROD was issued. Throughout this process, BLM afforded consulting tribes a reasonable opportunity to identify concerns about historic properties, advise on the identification and evaluation of historic properties, articulate their views on the Project's effects, and participate in the resolution of adverse effects, all as contemplated by NHPA regulations.[47]

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[44] *See* FEIS at 5-9 to -12 (Somerville Dec., Ex. 6, p. 356-59) (providing the following draft documents to the tribes for review and comment: draft Class II and III Archeological Resources Inventory Research Design on July 28, 2010, preliminary archeological survey results at site meeting on May 12, 2011, draft ASR on October 5, 2011, initial draft MOA on November 23, 2011, and revised Section 106 findings and determinations and revised draft MOA on February 27, 2012).

[45] *See, e.g.*, FEIS at 5-10 to -11 (tbl. 5-1) (Somerville Dec., Ex. 6, p. 357-58) (documenting BLM correspondence with Viejas Tribal Chairman on: (1) October 5, 2011 granting additional time for tribal comments on draft EIS; and (2) November 1, 2011 granting additional time for review and comment on draft ASR and extending tribal comment period for draft EIS until December 9, 2011).

[46] FEIS at 5-12 (Somerville Dec., Ex. 6, p. 359) (January 27, 2012 correspondence explaining decision to delay ROD).

[47] 36 C.F.R. § 800.2(c)(2)(ii)(A); *see also id.* §§ 800.4, 800.5, 800.6.

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Late in the consulting process, some of the consulting tribes commented that the Project would have an adverse impact on an "area-wide" cultural landscape, encompassing the Project site and a large region surrounding it, that they asserted is a traditional cultural property ("TCP") eligible for listing on the National Register.[48] The tribes have used only the most general terms to describe this claimed TCP. It appears to encompass any and all parts of the region between the Pacific and the Colorado River where any signs of prehistoric habitation may be found. The Viejas, for example, adopted a resolution in November 2011 referring to this claimed TCP, which they marked on an accompanying map as a rough oval that covers roughly one million acres.[49] Even though the tribes did not provide sufficient detail to enable BLM to determine the National Register eligibility of the claimed TCP, BLM nevertheless agreed to *assume* for purposes of its review of this Project that the area-wide TCP was eligible for NHPA listing and to evaluate the project's potential effects on the portion of the TCP that overlaps the Project area.[50] BLM then proceeded to consult with the tribes for five more months on how to avoid, minimize and mitigate for the Project's direct and indirect impacts.

BLM initiated formal consultation with Quechan and other tribes on February 4, 2010 (10 months before the Project's formal NEPA scoping process began), and continued consulting with the tribes through the end of April, 2012.[51] Several tribes accepted BLM's invitations early on, resulting in sixteen individual government-to-government meetings that began in January 2011 and continued throughout the year.[52] Even though Quechan leadership chose not to meet with BLM one-on-one until January 2012,[53] it does not mean Quechan failed to participate in the interim. In fact, Quechan's Tribal Historic Preservation Officer attended BLM's Section 106

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[48] *See* FEIS at 5-7 (Somerville Dec., Ex. 6, p. 354).

[49] Brandt-Erichsen Dec., Ex. 7.

[50] FEIS at 5-7, 5-17 (Somerville Dec., Ex. 6, p. 354, 364) (recounting that BLM has agreed to evaluate potential effects on the area-wide TCP even though BLM "has not received detailed information . . . sufficient to allow it to asses its eligibility [of the area-wide TCP] for the National Register, as it is required to [do] under Section 106."); *see also id.* at 3.4-15 (Somerville Dec., Ex. 6, p. 184).

[51] FEIS at 5-5, 5-9 (tbl. 5-1) (Somerville Dec., Ex. 6, p. 352, 356); *see also* ROD at 20-25 (Somerville Dec., Ex. 5, p. 106-11) (documenting tribal consultation efforts following issuance of FEIS).

[52] FEIS at 5-18 to -29 (tbls. 5-2, 5-3) (Somerville Dec., Ex. 6, p. 365-76). BLM also conducted four government-to-government meetings in 2012. *See* FEIS at 5-30 to -33 (tbl. 5-4) (Somerville Dec., Ex. 6, p. 377-80).

[53] FEIS 5-31 (tbl. 5-4) (Somerville Dec., Ex. 6, p. 378).

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consulting parties meeting and field trip to the OWEF on May 12, 2011, to provide tribal input on the proposed Project and the preliminary archeological survey results, and Quechan's declarant, Mr. Bathke, attended another meeting and site visit with BLM on August 26, 2011.[54] At the May 12 meeting, BLM presented the preliminary archeological survey results, discussed options for avoiding the archeological sites identified through the survey, and conducted a field visit at the project site.[55]

Throughout 2011, BLM sent letters to Quechan providing Project information regarding cultural resources, soliciting information from Quechan regarding cultural and religious properties, seeking to include Quechan in the Section 106 process, and offering government-to-government meetings for consultation.[56] Quechan tribal officials attended Section 106 consulting parties meetings and/or field trips to the OWEF with BLM on two more occasions,[57] and attended two BLM government-to-government meetings with the Viejas Band of Kumeyaay Indians ("Viejas" or "Viejas Tribe").[58] When Quechan finally requested its own government-to-government meeting, BLM promptly responded and met with tribal officials on January 31 and February 22, 2012.[59] Thus, the record shows that BLM sought Quechan's input on various aspects of the Project early on. BLM made numerous offers for individual government-to-government meetings, which Quechan chose not to accept until very late in the process.

G. The Project Was Significantly Reduced And Reshaped In Direct Response To Tribal Concerns About Cultural Resource Impacts

[54] FEIS at 5-9 (tbl. 5-1) (Somerville Dec., Ex. 6, p. 356) (discussing meeting and field trip), 5-19 (tbl. 5-2) (Somerville Dec., Ex. 6, p. 366) (showing attendance of Mrs. Bridget Nash-Chrabascz, Historic Preservation Officer (former), Fort Yuma Quechan Tribe at May 21, 2011 meeting and Mr. John Bathke, Historic Preservation Officer, Fort Yuma Quechan Tribe on August 26, 2011).

[55] FEIS at 5-9 (tbl. 5-1) (Somerville Dec., Ex. 6, p. 356).

[56] FEIS at 5-9 to -12 (tbl. 5-1), 5-18 to -33 (tbls. 5-2, 5-3, 5-4) (Somerville Dec., Ex. 6, pp. 356-59, 365-80).

[57] FEIS at 5-9 to -12 (tbl. 5-1) (Somerville Dec., Ex. 6, p. 356-59) (discussing meetings on January 23 and February 21, 2012), 5-31 (tbl. 5-4) (documenting attendance of Quechan Historic Preservation Officer and additional tribal member at January 23 and February 21, 2012 meetings). The Quechan failed to accept BLM's invitation to attend a Section 106 consulting parties meeting on December 14, 2011. *See id.* at 5-25 to -26 (tbl. 5-3) (Somerville Dec., Ex. 6, p. 372-73).

[58] FEIS at 5-25 (tbl. 5-3) (Somerville Dec., Ex. 6, p. 372) (documenting attendance of Quechan Historic Preservation Officer and additional tribal member at BLM government-to-government meetings with Viejas Tribe on December 5, 2011), 5-31 (tbl. 5-4) (Somerville Dec., Ex. 6, p. 378) (documenting attendance of Quechan Historic Preservation Officer, a tribal council member, and additional tribal member at BLM-Viejas meeting on January 23, 2012).

[59] FEIS 5-31 (tbl. 5-4) (Somerville Dec., Ex. 6, p. 378) (documenting BLM's government-to-government meetings with Quechan Tribe on January 31 and February 22, 2012).

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Ocotillo Express originally proposed developing a two-phase wind project with 239 turbines, which the site easily could have sustained given the extraordinary wind resource in the area.[60] However, in response to initial cultural, biological and other investigations at the site, when the NEPA/CEQA scoping process began in December 2010 the proposal had been reduced to 193 wind turbines.[61] Based on tribal input during the NEPA scoping process, the Project was again reduced to 155 turbines, eliminating turbines to avoid direct impacts on cultural resources, and in one area to avoid wildlife habitat. This was the preferred alternative evaluated in the DEIS.[62]

Then in January 2012, in direct response to the concerns raised by tribes during the consultation process, an additional 43 turbines were eliminated from the Project to reduce indirect impacts on cultural resources. This resulted in the "Refined Project" described in the FEIS consisting of 112 wind turbines.[63] These changes, along with further changes made in the final weeks of the consultation process, were made to preserve views of Coyote Mountain and Mount Signal.[64] As a result of these changes, the Project avoids all direct impacts to known archeological resources and greatly reduces the Project's viewshed impacts.[65] BLM also incorporated the tribes' requests for additional mitigation into the binding MOA between Ocotillo Express, BLM, the SHPO, and the ACHP.[66] The MOA imposes a host of mitigation measures aimed at alleviating adverse effects to cultural resources, many of which were in direct response to tribal concerns,[67] at a cost of approximately $5 million.[68]

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[60] McCue Dec. ¶ 4.

[61] Brandt-Erichsen Dec., Ex. 8.

[62] Draft EIS at 2-1; Brandt-Erichsen Dec., Ex. 9 (DEIS Figure 2.1-2).

[63] McCue Dec. ¶ 4; Brandt-Erichsen Dec., Ex. 10.

[64] *See* McCue Dec. ¶ 4.

[65] FEIS at 5-6 to -8, 5-13 to -17 (Somerville Dec., Ex. 6, p. 353-55, 360-64), 5-34 (Brandt-Erichsen Dec., Ex. 1 at 87); *see also* FEIS at 4.4-19 (Somerville Dec., Ex. 6, p. 264).

[66] ROD at 20-25 (Somerville Dec., Ex. 5, p. 106-11).

[67] *See* Final MOA (May 8, 2012), at Sections III-VI; *see also* FEIS at 5-17 (Somerville Dec., Ex. 6, p. 364), 5-34, and Appx. R (draft version of MOA) (Brandt-Erichsen Dec., Ex. 1 at 87, 92-180).

[68] Elkort Dec. ¶ 19.

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As the consultation process came to a close, the Chairman of the Campo Kumeyaay Nation (Campo Band of Mission Indians) complemented the way in which the Project had been reshaped in response to the input from the tribes:

> We appreciate the fact that Pattern Energy has taken many actions that go beyond the level of cooperation we normally see from developers. Tribal monitors were sought out and given a direct role that we seldom see in most developments. Restrictions and reduction in the project footprint have been extraordinary.[69]

H. MOA Protocols Adequately Protect Cultural Resources

The Project was designed to avoid direct impacts to known cultural resources, based on 35,000 man-hours of archaeological survey work and another 5,000 man-hours of tribal monitoring of those surveys, and additional site-specific surveys will be done before disturbing the ground.[70]

Tribal monitoring of construction is organized through a Tribal Participation Plan, in which 15 tribes were invited to participate. Five have so far confirmed their participation and another six have said they will send monitors to training.[71] Tribal monitors will oversee: (1) identification and marking of cultural resources before ground disturbance occurs (cultural resource sites are labeled as Environmentally Sensitive Areas (ESAs), the same label used for protected biological resources, to avoid drawing unwanted attention); (2) initial ground-disturbing activities for all project features; (3) any ground-disturbance within 150 feet of an ESA; and (4) any other location where it is deemed warranted based on pre-construction on-site soil testing.[72]

Protocols are in place that dictate the response should previously undiscovered archaeological material be encountered during prescreening or construction. The discovery of any archaeological material in the work area, whether by a tribal monitor or members of the work crew, triggers an immediate suspension and redirection of work while the area around the find is inspected.[73]

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[69] Brandt-Erichsen Dec., Ex. 11.
[70] McCue Dec. ¶¶ 3, 10-19.
[71] McCue Dec. ¶ 18.
[72] McCue Dec. ¶ 11.
[73] McCue Dec. ¶¶ 3, 12-13.

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In the case of an isolated find, the material will be documented, collected and curated. If three or more archaeological items (such as three rock flakes from shaping stone tools) and/or an archaeological feature are found, then BLM and the County will determine whether the find is eligible for listing on the national or state historic registries. If determined to be register-eligible, a treatment plan must be developed for the find in consultation with the tribes. The plan must prioritize avoidance and preservation. If the discovery is a burial site, work in that area will cease immediately, BLM will coordinate with the Imperial County coroner, and the detailed protocol for treatment of the discovery will be applied.[74]

Neither BLM nor Ocotillo Express generated these protocols on their own. They were the product of months of consultation with the Tribes, which BLM carried out under the watchful guidance of the federal Advisory Council on Historic Preservation ("ACHP") and the State Historic Preservation Officer ("SHPO"), the federal and state arbiters of compliance with the National Historic Preservation Act ("NHPA"),[75] and state historic preservation requirements.[76] BLM successfully completed the NHPA Section 106 consultation process with a Memorandum of Agreement ("MOA") entered into by BLM, the California SHPO, ACHP and Ocotillo Express that specifies how impacts on archaeological and cultural resources will be avoided, minimized and mitigated, and that includes the construction protocols just described. Thus, the conservation of cultural resources at the Project site is occurring and would continue to occur under the watchful eye of consulting tribes without need for this Court's intervention.

IV. STANDARD FOR TEMPORARY RESTRAINING ORDER

The United States Supreme Court has made clear that preliminary injunctive relief is "an extraordinary and drastic remedy" that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.[77] The same standards apply to temporary restraining orders and to preliminary injunctions.[78]

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[74] McCue Dec. ¶¶ 12-13.

[75] 16 U.S.C. §§ 470, *et seq*.

[76] *See* Final MOA (May 8, 2012).

[77] *Munaf v. Geren*, 553 U.S. 674, 689-90, 128 S. Ct. 2207 (2008).

[78] *Credit Bureau Connection, Inc. v. Pardini*, 726 F. Supp. 2d 1107, 1114 (E.D. Cal. 2010).

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In *Winter v. Natural Res. Defense Council*,[79] the Supreme Court held that in order to obtain preliminary injunctive relief a plaintiff must demonstrate: (1) likelihood of success on the merits; (2) likelihood plaintiffs will suffer irreparable harm; (3) balance of the equities; and (4) the public interest. As the Ninth Circuit has observed, "Under *Winter*, plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction."[80] Provided the other *Winter* factors also are met, a preliminary injunction also may be issued if the balance of hardships tips sharply in plaintiffs' favor, and they have raised serious questions going to the merits.[81]

A. First *Winter* Element: Plaintiff Is Not Likely To Succeed On The Merits

1. Plaintiff Is Not Likely To Succeed On Their FLPMA Claims

Pursuant to the Federal Land Policy and Management Act ("FLPMA"),[82] BLM manages federal public lands "under principles of multiple use and sustained yield, in accordance with the land use plans developed" by BLM.[83] The CDCA is managed under the same standards,[84] and consistent with these standards, FLPMA authorizes BLM to issue rights-of-way on public lands for "systems for generation, transmission, and distribution of electric energy."[85] The controlling land use plan – the CDCA Plan – explicitly authorizes new wind energy development on CDCA Class L lands upon BLM's evaluation of numerous "decision criteria."[86] Quechan contend that the CDCA Plan does not contemplate any form of "high-intensity renewable energy projects" on Class L lands, but cannot overcome the fact that the CDCA Plan *specifically contemplates* wind energy facilities on Class L lands.[87] While Quechan argue that BLM must only have meant small-scale wind energy, the CDCA Plan makes no such distinction. BLM has made the requisite findings and approved the ROW in accordance with FLPMA and the CDCA Plan, and Quechan cannot demonstrate that BLM, with its unique expertise and broad discretionary

[79] 555 U.S. 7, 129 S. Ct. 365 (2008).
[80] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (emphasis in the original).
[81] *Id*. at 1134-35.
[82] 43 U.S.C. § 1701 *et seq*.
[83] *Id.* § 1732(a).
[84] *Id.* § 1781(b).
[85] *Id.* § 1761(a)(4).
[86] CDCA Plan at 15 (Somerville Dec., Ex. 1, p. 13), 93, 121 (Brandt-Erichsen Dec., Ex. 12 at 210, 216).
[87] CDCA Plan at 15 (Somerville Dec., Ex. 1, p. 13).

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authority, has failed to consider relevant facts, based its conclusion on inappropriate factors, ignored relevant evidence, or violated the law.[88] Consequently, Quechan cannot demonstrate likely success on the merits of its FLPMA claims.

a) **OWEF Is Appropriate for CDCA Class L Lands**

Quechan frames its FLPMA challenge as a tenuous analogy to *Oregon Natural Resources Council Fund v. Brong*.[89] In that case, the Northwest Forest Plan (controlling logging to protect the spotted owl) was found to strongly disfavor salvage logging, placing "substantive limitations" on the precise activity that BLM was trying to approve.[90] The present case is easily distinguished: while the *Brong* management plan specifically and strongly disfavored the challenged action, the CDCA Plan specifically *promotes* wind power on Class L lands. Therefore Quechan's reliance on *Brong* is misplaced.

Nonetheless, Quechan combs the CDCA Plan for supposed "substantive limitations," and purport to find them in two selectively quoted phrases: "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;" and "judgment is called for in allowing consumptive uses [on Class L lands] only up to the point that sensitive natural and cultural values might be degraded."[91] Despite the obviously descriptive and discretionary aspects of these words, Quechan contends that any development which, in its judgment, fails to meet these "standards" cannot be built on Class L lands.

The fundamental flaw in the Quechan argument is that these phrases, and particularly the "might be degraded" comment, are not decision criteria under the CDCA Plan. The relevant decision criteria are found in CDCA Plan Chapter 7, the Plan Amendment Process, and the Energy Production Plan Element. The CDCA Plan requires BLM to consider six "decision criteria" for any Plan Amendment, as well as nine additional decision criteria applicable to new energy projects.[92] BLM has done so.[93] None of these decision criteria impose the substantive

[88] *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1124-25 (9th Cir. 2007).
[89] 492 F.3d 1120 (9th Cir. 2007)
[90] *Id.* at 1128.
[91] CDCA Plan at 13, 21 (Somerville Dec., Ex. 1, p. 11, 19).
[92] CDCA Plan at 93, 121 (Brandt-Erichsen Dec., Ex. 12 at 210, 216).

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limitation that Quechan attempt to impose, and Quechan ignores the controlling elements of the CDCA Plan. Thus, this claim is not likely to succeed on the merits.

b) **Quechan's Visual Resource Argument Is Without Merit**

Quechan also argues that the Project does not meet Class III Visual Resource Management guidelines, and therefore is inconsistent with the CDCA Plan.[94] However, the CDCA Plan "does not contain a visual resource element and has no established VRM Classes."[95] Consequently, Class III VRM Class guidelines are not substantive requirements of the Plan. BLM explained that because Class L lands permit wind development, and wind development can only conform with Class IV objectives, BLM would apply those objectives in this case.[96] "Nevertheless, the overall goal remains to mitigate visual impacts so that any adverse contrasts can be minimized while meeting the purpose of the project."[97] Quechan fails to recognize the decision framework BLM applied to the visual resource issue, and ignores the extensive discussion of visual resource impacts in the FEIS (*see* Sec. 2(d), below). Given these failings, Quechan's visual resource claim is not likely to succeed on the merits.

2. **Plaintiff Is Not Likely To Succeed On Their NEPA Claims**

NEPA "does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the consequences of their actions."[98] In determining whether an agency has taken a "hard look," the courts must allow the agency "discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, [the] court might find contrary views more persuasive."[99] As the Ninth Circuit recently cautioned, "we may not impose ourselves as a panel of scientists that instructs the agency, chooses among scientific studies, and orders the agency to explain every possible scientific

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[93] ROD at 33-35 (Somerville Dec., Ex. 5, p. 119-121).

[94] Plaintiff's Mem. at 14-15.

[95] FEIS at 3.19-3 (Somerville Dec., Ex. 6, p. 217).

[96] FEIS at 4.18-3 (Somerville Dec., Ex. 6, p. 293).

[97] *Id.*

[98] *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835 (1989)).

[99] *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851 (1989).

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uncertainty."[100] Preparation of an EIS "necessarily calls for judgment, and that judgment is the agency's."[101] For that reason agencies are entitled to considerable discretion in defining the need for a project.[102]

a) **BLM did an exceptionally thorough job of complying with NEPA's requirements with respect to the examination of cumulative and indirect impacts.**

Quechan argues that Interior violated NEPA by failing to conduct an adequate analysis of cumulative and indirect effects.[103] Its argument -- unsupported by the facts -- is refuted by the very document on which it relies, the FEIS. As the Supreme Court had emphasized, the test is whether the agency has taken a "hard look" at the impact in question.[104] More specifically, an agency's analysis of cumulative impacts will be upheld as long as it is "reasonably thorough."[105]

The following portions of the FEIS[106] amount to 115 pages dealing with cumulative impacts (when an entire EIS "shall normally be less that 150 pages . . . ."),[107] demonstrating that the agency has taken the most detailed of "hard looks" at both cumulative and indirect impacts: FEIS at 4.1-1 (explanation of direct, indirect, and cumulative impacts), 4.1-4 to 4.1-23 (cumulative impacts, includes a 17 page chart explaining review of more than 100 potentially cumulative projects); 4.2-1 *et seq*., air quality impacts (direct and indirect); 4.2-16 to 4.2.22, air quality cumulative impacts; 4.3.1 *et seq*., climate change impacts (direct and indirect); 4.3-8 to 4.3-9 climate change cumulative impacts; 4.4-1 *et seq*. cultural resource impacts (direct and indirect); 4.4-31 to 4.4-36, cultural resource cumulative impacts; 4.5-1 *et seq*., environmental justice impacts (direct and indirect); 4.5-4 to 4.5-5, environmental justice cumulative impacts;

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[100] *Tri-Valley Cares v. U.S. Dep't of Energy*, 671 F. 3d 1113, 1124 (9th Cir. 2011).

[101] *Westlands Water Dist. v. United States*, 376 F.3d 853, 866 (9th Cir. 2004) (quoting *Lathan v. Brinegar*, 506 F.3d 677, 693 (9th Cir. 1974)).

[102] *Westlands*, 376 F.3d at 866 (quoting *Angoon v. Hodel*, 803 F.3d 1016 (9th Cir. 1986)); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 69-73 (D.C. Cir. 2011) (upholds BLM acting upon a project proponent's proposal).

[103] Complaint at 17, para. 99 *et seq*.

[104] *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350 (1989); *Tri-Valley Cares v. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2011).

[105] *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994); *see also* 40 C.F.R. §§ 1508.7 (cumulative impacts), 1508.8(b) (indirect impacts).

[106] The specific FEIS pages cited in the string citation that follows are contained in Somerville Dec. Ex. 6 and Brandt-Erichsen Ex. 1.

[107] 40 C.F.R. § 1502.7.

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4.6-1 *et seq*., lands and realty impacts (direct and indirect); 4.6-8 to 4.6-10, land and realty cumulative impacts; 4.7.1 *et seq*., mineral resources impacts (direct and indirect); 4.7-10 to 4.7-12, mineral resources cumulative impacts; 4.8-11 *et seq*., multiple use classes (direct and indirect) 4.8-9 to 4.8-11, multiple use classes cumulative impacts; 4.9-1 *et seq*., noise (direct and indirect effects); 4.9-19 to 4.9-24, noise cumulative impacts; 4-10.1, *et seq*., palentological resources (direct and indirect effects); 4-10-9 to 4.10-11, palentological resources cumulative effects; 4.11-1 *et seq*., public health and safety impacts (direct and indirect); 4.11-29 to 4.11-37, public heath and safety cumulative impacts; 4.12-1 *et seq*., recreation impacts (direct and indirect effects; 4.12-7 to 4.12-10, recreation cumulative effects; 4.13-1 *et seq*., social and economic effects (direct and indirect); 4.13-11 to 4.13-15, social and economic cumulative impacts; 4.14-1 *et seq*., soil resources impacts; 4.14-15 to 4.14-17, soil resources cumulative effects; 4.15-1 *et seq*., special designations (land use) impacts (direct and indirect); 4.15-9 to 4.15-11, special designation cumulative impacts (direct and indirect); 4.16-1 *et seq*., transportation and public access impacts (direct and indirect); 4.16-18 to 4.16-20, cumulative transportation and public access impacts; 4.17-1 *et seq*., vegetation impacts (direct and indirect); 4.17-17 to 4.17-24, vegetation resources cumulative effects; 4.18-1 *et seq*., visual resource impacts (direct and indirect); 4.18-13 to 4.18-18, cumulative visual resources impacts; 4.19-1 *et seq*., water resource impacts (direct and indirect); 4.19-48 to 4.19-61, water resource cumulative impacts; 4.20-1 *et seq*., wildlife fire ecology impacts; 4.20-7 to 4.20-10, wildlife fire ecology cumulative impacts; 4.21-1 *et seq*. wildlife resources impacts (direct and indirect); 4.21-34 to 4.21-42, wildlife resources cumulative impacts. The record clearly refutes Plaintiff's unsupported assertions. BLM clearly gave the requisite "hard look" – and more – to cumulative and indirect impacts.

b) **BLM has already prepared a programmatic EIS on wind energy in the west, and no law or regulation requires that they prepare another.**

Plaintiff argues that Interior violated NEPA by failing to prepare a programmatic EIS regarding renewable energy in the California Desert Conservation Area prior to completion of

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the Ocotillo ROD.[108] However, there is no requirement for another programmatic environmental impact statement (PEIS).

First, as Plaintiff appears backhandedly to acknowledge, Interior has *already* prepared "a broad PEIS relating to Wind Energy Development in 11 Western States . . . ."[109] That PEIS was prepared by BLM (in 2005) in cooperation with the Department of Energy ("DOE") to assess the environmental, economic, and social impacts associated with wind development on BLM land and to evaluate alternatives to determine a management approach for BLM to adopt in terms of mitigating potential impacts and facilitating wind energy development.[110] Based on that PEIS, BLM decided to implement a comprehensive Wind Energy Development Program to administer wind energy resources on 11 western states (including California and its deserts).[111] With a wind PEIS already completed and in place covering the BLM's lands where OWEF is to be built, Plaintiff is ill-positioned to demand yet another.[112]

Second, there simply is no requirement for a further PEIS. The applicable CEQ NEPA Regulations,[113] use the most permissive language to suggest that "agencies may find it useful" to evaluate proposals in one of several ways, including geographically.[114] A program EIS is to be used with "tiering" from statements of broader scope, "to eliminate repetitive discussion of the same issues."[115] Tiering is defined as proceeding from a program EIS to an EIS of narrower scope (such as a site-specific EIS) to eliminate repetitive discussion of the same issues.[116] Here Plaintiff would turn tiering on its head -- instead of reducing paperwork and delay by

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[108] Complaint at 25.

[109] *See* Complaint at 25, para. 158

[110] FEIS at 1-9 to 1-10 (Brandt-Erichsen Dec., Ex. 1 at 1-2).

[111] *Id.* at 1-10 (Brandt-Erichsen Dec., Ex. 1 at 2).

[112] *See Kleppe v. Sierra Club*, 427 U.S. 390, 96 S. Ct. 2718 (1978) (where Interior had already issued a "Coal Programmatic EIS" (*id*. at 398), the Court rejected plaintiffs' attempt to require preparation of a further regional EIS (*id*. at 414-15)).

[113] 40 C.F.R. Parts 1500-1508. The Council on Environmental Quality's ("CEQ") regulations governing the application of NEPA government-wide are entitled to "substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 357-58, 99 S. Ct. 2335 (1979). (One of the undersigned counsel for intervenor, Nicholas C. Yost, was, as General Counsel of CEQ, the principal draftsperson of those regulations.)

[114] 40 C.F.R. § 1502.4.

[115] 40 C.F.R. § 1500.4, Reducing Paperwork.

[116] 40 C.F.R. §§ 1502.20, 1508.28.

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streamlining a NEPA process (from the general to the specific) it would add to paperwork and delay by requiring a PEIS after there has already been a comprehensive site-specific FEIS.

c) **Plaintiff's argument that BLM failed to take a "hard look" at state or local plans is unfounded.**

Insofar as Claim Five purports to criticize the agencies for failure to take a "hard look" at consistency with state and local land use plans, it is misguided. First, OWEF is located on Federal land, so there is no state or local land use plan which applies on this site.[117] The lands on which OWEF is being constructed are being managed by the BLM pursuant to FLPMA.[118] FLPMA vests the BLM with *exclusive* land use jurisdiction over Federal lands it manages. The Federal government and only the Federal government has the power to regulate what happens on Federal land.[119] Second, insofar as there is residual land use jurisdiction off Federal lands, it has been exercised by the Board of Supervisors of Imperial County by their approval of OWEF.

d) **Plaintiff's argument that visual impacts are inadequately considered is not supported by the record.**

Plaintiff also suggested (albeit without providing detailed argument) that BLM failed to take a "hard look" at the Project's visual impacts under NEPA.[120] They are mistaken. In fact the FEIS explicitly addresses "visual impacts from the project … identified as important to Tribes."[121] First, the FEIS identifies visual elements of the existing environment, including rocky mountains; sparse vegetation; the 500-kv Sunrise Powerlink transmission line and its metal lattice towers; an interstate freeway; state and county highways; the town of Ocotillo; 27 miles of off-road vehicle trails; active mines; and the remains of abandoned mining operations.[122] Next,

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[117] 40 C.F.R. § 1506.2(d), cited by Plaintiff, applies to consistency with any approved state or local plan or law. But -- no such state or local plan or law applies on Federal (BLM) land. (And – the section Plaintiff quotes only requires discussion of any inconsistency and description of the extent to which the agency would reconcile its action with an applicable plan.) By way of contrast, BLM and Imperial County have cooperated to prepare the joint FEIS/FEIR to comply with both NEPA and its State analogue, CEQA, as required by 40 C.F.R. § 1506.2(a) - (c).

[118] 43 U.S.C. § 1701 *et seq.*; *see also* FEIS ES-1 to -6 (Somerville Dec., Ex. 6, p. 131-36).

[119] *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 585, 107 S. Ct. 1419 (1987); *see also* 1 Longtin's California Land Use § 3.61 (1987) (citing Supremacy Clause of the United States Constitution, which prevents the states from interfering with the "free and unencumbered exercise by the Federal government of all powers conferred upon it").

[120] Complaint at 19-22 (Claim Four).

[121] FEIS at 4.4-21 (Somerville Dec., Ex. 6, p. 266).

[122] *See* FEIS at 2-6, 3.4-13 to -14, 3.19-3, 4.18-15, (Somerville Dec., Ex. 6, p. 157, 182-83, 217, 316), 3.8-2, 3.13-1 (Brandt-Erichsen Dec., Ex. 1 at 8-9).

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the FEIS identifies a series of "key observation points" – places from which the completed Project will be visible – within this visual environment.[123] Finally, the FEIS provides detailed photo simulations (prepared in color and to scale) showing the appearance of the completed Project from each key observation point.[124] And, as noted above, the Project was designed to move turbines out of culturally-significant viewsheds. In short, BLM recognized concerns about the visual environment, took a "hard look" at visual impacts, made all relevant information available to the public, and took steps to avoid culturally-important viewsheds.

3. Quechan Is Not Likely To Succeed On Its NHPA Claims

The record amply demonstrates that BLM satisfied all NHPA requirements, including its obligation to consult with Quechan and other tribes, and so Quechan's claims under that statute are not likely to succeed. NHPA Section 106 requires federal agencies 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."[125] Like NEPA, the NHPA is procedural in nature,[126] and the statute "imposes no substantive standards on agencies."[127] Judicial review of NHPA decisions is pursuant to the APA, and such review is made under the arbitrary and capricious standard.[128] The arbitrary and capricious standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its determination."[129]

The NHPA Section 106 process requires the lead agency (here, BLM) to work with the SHPO to: (1) determine the project's "area of potential effects"; (2) make a "reasonable and good faith effort" to identify historic properties within that area; (3) evaluate the historical significance of resources within the area to determine whether those resources are eligible for

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[123] *See* FEIS at 3.19-3 to -8 (Somerville Dec., Ex. 6, p. 304-09).

[124] *See* FEIS at 4.18-3 to -12 (Somerville Dec., Ex. 6, p. 304-13), FEIS Appendix A, figures 4.18-2A to -9B (Brandt-Erichsen Dec., Ex. 1 at 181-96).

[125] 16 U.S.C. § 470f.

[126] *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th Cir. 2010).

[127] *Nat'l Mining Assoc. v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003); *see also San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097-98 (9th Cir. 2005) (explaining NHPA is "designed to insure that the agency 'stop, look, and listen' before moving ahead").

[128] *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1998).

[129] *Id.*

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listing on the National Register; and (4) determine whether the project will affect eligible historic properties in the area.[130] If historic properties may be affected, the agency and the SHPO must determine if the effects are adverse, and work to "develop and evaluate alternatives or modifications" that "avoid, minimize, or mitigate" those adverse effects.[131] As demonstrated by the facts here (*see* Sec. III.F-H, above), BLM has successfully completed each of these steps.

The agency must afford consulting tribes a "reasonable opportunity" to identify concerns about historic properties, advise on the identification and evaluation of historic properties, articulate views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.[132] NHPA "consultation" requires the agency to seek, discuss, and consider the views of consulting parties regarding the resolution of adverse effects, but the agency "has no duty to abandon or modify a project if the project is found to have an adverse effect that is not avoided or mitigated, but only to follow the mandated NHPA procedures."[133]

Here, BLM not only gave all of the consulting tribes, including Quechan, every reasonable opportunity to weigh in at each step in the NHPA process, but went out of its way to conduct an intensive dialogue with the consulting tribes over a six month period, even delaying its decision for three months solely for the purpose of discussing every aspect of the Project, its potential impact on archaeological resources, the nature of and impact of the Project on the claimed TCP, and mitigation of Project impacts with the consulting tribes.

In a disingenuous attempt to fit OWEF into the facts of an earlier case it brought against a solar project,[134] Quechan asserts that BLM merely sent out form letters, failed to provide information necessary for consultation, and met with Quechan only when the meeting was initiated by the Tribe. As demonstrated above in Sec. III.F, these allegations are not true. Moreover, Quechan's argument that only high level government-to-government meetings should

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[130] *See* 36 C.F.R. §§ 800.4, 800.5.

[131] *Id.* § 800.6.

[132] *Id.* § 800.2(c)(2)(ii)(A); *see also id.* §§ 800.4, 800.5, 800.6.

[133] *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 242 (5th Cir. 2006); *see also* 36 C.F.R. § 800.16(f)(defining consultation as "the process of seeking, discussing, and considering the views of other participants, and, *where feasible*, seeking agreement with them regarding matters arising in the Section 106 process") (emphasis added).

[134] *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

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"count" as Section 106 consultation was rejected by the courts in 2008 when Quechan's unsuccessfully challenged consultation on a federal land exchange.[135] BLM's has provided Quechan with a "sufficient opportunity to identify [their] concerns about historic properties."[136] Moreover, "consultation is not the same thing as control over a project."[137]

Nor is Quechan likely to succeed on their arguments that BLM has not satisfied its other obligations under the NHPA. Because BLM concluded that OWEF would have an adverse effect on the claimed TCP as well as the Spoke Wheel Geoglyph,[138] BLM proceeded to consult with the California SHPO and interested tribes to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate" such adverse effects.[139] The lead agency may invite the ACHP to participate in the resolution of effects through a MOA with the lead agency and the SHPO,[140] and at BLM's invitation here, the ACHP agreed to participate in the MOA process on December 9, 2011.[141]

Over the next five months, the ACHP carefully analyzed BLM's proposed mitigation measures and offered substantive comments to enhance the mitigation efforts. Before signing the final version of the MOA, the ACHP required BLM to fully explain how BLM had addressed tribal concerns raised through consultation and other issues related to the Section 106 process, and BLM did so by letter on May 3, 2012.[142] Satisfied with BLM's response to tribal concerns and compliance with Section 106, the ACHP signed the MOA on May 8, 2012. In doing so, the ACHP acknowledged that the agreement "fulfilled [BLM's] responsibilities under Section 106" and the NHPA regulations.[143]

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[135] *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 547 F. Supp. 2d 1033, 1048 (D. Ariz. 2008).

[136] *See Te-Moak Tribe*, 608 F.3d at 610 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)) (internal quotation marks omitted).

[137] *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003) (NHPA does not provide a "tribal veto").

[138] FEIS at 4.4-19 to -22 (Somerville Dec., Ex. 6, p. 264-67).

[139] 36 C.F.R. § 800.6(a)(1), (6)(b)(1)(i).

[140] *See* 36 C.F.R. § 800.6(a)(1), (b)(2).

[141] FEIS at 5-11 (tbl. 5-1) (Somerville Dec., Ex. 6, p. 357).

[142] BLM letter to Reid Nelson, ACHP (May 3, 2012).

[143] *See* ACHP letter to Robert Abbey, BLM (May 8, 2012).

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The NHPA specifically provides for the MOA process to resolve adverse effects. BLM utilized this process, obtaining both the SHPO and ACHP concurrence. As the courts have recognized, under NHPA regulations an MOA "executed and implemented pursuant to this section evidences the agency official's compliance with section 106." [144] Moreover, ACHP approval of an MOA is viewed as a "judicially sanctioned . . . means of compliance" with Section 106.[145] Thus, BLM has satisfied its NHPA obligations for mitigating adverse effects at the OWEF, and Quechan's claims the contrary are likely to fail when this Court proceeds to consider them on the merits.

B. Second and Third *Winter* Factors: Quechan is Not Likely To Suffer Irreparable Harm, And The Balance Of Equities Tips Strongly Against A TRO

To obtain a TRO, Quechan must demonstrate that irreparable injury is likely in the absence of a temporary injunction.[146] This Quechan cannot do. Their injury allegations center on the archaeological resources of the Project site. However, as detailed above, 38 turbines were eliminated from the Project to avoid archaeological sites identified during 35,000 hours of site surveys, and 43 more turbines were removed specifically to avoid indirect impacts to viewsheds and other cultural resources. And particularly relevant to this motion, during construction (a) follow up site-specific surveys, with tribal monitors participating, precede all ground disturbance; (b) tribal monitors are present during ground disturbance near any known archaeological resources; and (c) detailed protocols are in place to assess the significance of any newly discovered archaeological resources before they are disturbed, and under which a treatment plan for any register-eligible sites will be developed, with tribal consultation.[147] With these protections in place, Quechan cannot show it will suffer **any** irreparable injury to their

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[144] 36 C.F.R. § 800.6(c); *see also Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 243 (5th Cir. 2006) (executed MOA demonstrates NHPA compliance); *cf. Tyler v. Cisneros*, 136 F.3d 603, 610 n.3 (9th Cir. 1988) (holding under prior version of NHPA regulations that Section 106 review process "is concluded when the Advisory Council accepts the Memorandum of Agreement").

[145] *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 916 F. Supp. 1557, 1566 (N.D. Ga. 1995); *see also Coliseum Square Ass'n, Inc.*, 465 F.3d at 243-44 (agency compliance with Section 106 is demonstrated where SHPO and ACHP signed MOA); *Advocates For Transp. Alts., Inc. v. U.S. Army Corps of Eng's*, 453 F. Supp. 2d 289, 312-13 (D. Mass. 2006) (same).

[146] *Winter*, 129 S. Ct. at 375.

[147] McCue Dec. ¶¶ 3-6, 10-13, 18.

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interest in the site's archaeological and cultural resources, particularly in the few weeks that a TRO would be in place.

In deciding whether to grant a TRO, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[148] OWEF represents not only clean renewable energy that advances national, state and local objectives, but also badly needed jobs in a region with the nation's highest unemployment. If in a few weeks the Court grants the preliminary injunction that Quechan has indicated it will seek, such a decision would kill the Project as current conceived, because the end-of-year ITC Grant deadline would become impossible to meet. But even if a TRO were issued now and then lifted when the preliminary injunction motion is denied, the impact on the Project could be the same due to the tight construction schedule.[149] The damage that a TRO would do to the prospects of this valuable Project far outweigh any purported harms to Quechan's interests.

C. A TRO Would Be Against The Public Interest

In balancing the harms, the Court should consider the other public policy interests that would be affected by a preliminary injunction.[150] There is overwhelming public interest, at both the federal and state level, in developing renewable energy projects like OWEF. Indeed, federal courts have repeatedly ruled that national- and state-level economic and clean energy goals weigh against enjoining wind energy projects.[151]

OWEF is incredibly important to the local region, generating much-needed jobs and tax revenue as well as a range of community benefits.[152] It also advances longstanding state and federal policies that encourage the development of renewable energy projects on federal lands.

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[148] *Winter*, 129 S. Ct. at 376 (quotation omitted).

[149] Elkort Dec. ¶ 8-9.

[150] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798 (1982); *see also 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.").

[151] *See, e.g., W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1103-04 (D. Nev. 2011) (denying preliminary injunction against wind project in part because it would be contrary to federal and state policy); *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC.*, No. 11-CV-643-GKF-PJC, 2011 WL 6371384 *11 (N.D. Okla. Dec. 20, 2011) (ruling that an injunction against a wind project "would adversely affect the public interest").

[152] Elkort Dec. ¶¶ 15-19; Horne Dec.

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These include California's Renewable Portfolio Standard ("PRS"), which requires 33 percent of retail sales must come from renewables by the end of 2020. The California Air Resources Board has identified the 33 percent RPS as a vital component of the state's ability to achieve the statutory objective of reducing its greenhouse gas emissions levels to 1990 levels by 2020.[153]

At the federal level, President Obama, in his 2012 State of the Union Address articulated an "all-of-the-above" energy policy and directed federal agencies to "allow the development of clean energy on enough public land to power 3 million homes."[154] In 2001, President Bush issued Executive Order 13212 mandating that federal agencies act expediently and in a manner consistent with applicable laws to increase "the production and transmission of energy in a safe and environmentally sound manner."[155] In 2005, Congress passed legislation encouraging Interior to permit 10,000 MW worth of renewable energy projects on federal land by 2015.[156] And in 2009, the American Recovery and Reinvestment Act ("ARRA") included the ITC Grant program,[157] for which OWEF is eligible so long as it is in service before the end of 2012.

The December 31, 2012 "in service" deadline imposed by ARRA is most critical to this motion. OWEF qualifies for and is on track to obtain an ITC Grant, fulfilling all of the federal and state policies described. A TRO, however, would put the Project's ability to meet that deadline at risk, running counter to all of the energy policies just described.

V. CONCLUSION

For the reasons set forth above, Quechan cannot meet their extraordinary burden, and their motion for a TRO should be denied.

Respectfully submitted,

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[153] *See* Cal. Air Res. Bd., Climate Change Scoping Plan at ES-3 (Dec. 2008)., *available at* http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf.

[154] President Barack Obama, State of the Union Address (Jan. 24, 2012). Transcript available at http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

[155] Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001); *see also* Exec. Order No. 13,604, 77 Fed. Reg. 18,887 (Mar. 28, 2012) (establishing a steering committee to facilitate improvements in Federal permitting and review of renewable energy and other infrastructure projects).

[156] § 211, Energy Policy Act of 2005, Pub. L. 109-58.

[157] § 1603(a)(2), Pub. L. 111-5.

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Marten Law PLLC and that on May 17, 2012, a true and correct copy of OCOTILLO EXPRESS LLC'S MEM. IN OPPOSITION TO TRO to which this certificate of service is attached, was electronically filed and served on counsel of record by means of the court's CM/ECF filing.

/s/ Erin E. Herlihy

Erin E. Herlihy

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