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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; CATHERINE OHRIN-GREIPP, RUDY MARTINEZ MACIAS, AND GILBERT LEIVAS

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in the official capacity of Secretary of the United States Department of Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT ABBEY, in the official capacity of Director of the United States Bureau of Land Management; TERI RAML, in the official capacity of District Manager of the California Desert District of the United States Bureau of Land Management; ROXIE TROST, in the official capacity of Field Manager of the Barstow Field Office of the United States Bureau of Land Management; and CHEVRON ENERGY SOLUTIONS,

Defendants.

Case No: 2:11-cv-00395 ODW (OPx)

DEFENDANT CHEVRON ENERGY SOLUTIONS COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date: July 2, 2012
Time: 1:30 p.m.
Judge: Hon. Otis D. Wright II
Place: 312 North Spring Street
Courtroom 11
Los Angeles, CA 90012

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Defendant Chevron Energy Solutions Company, a division of Chevron U.S.A. Inc. ("Chevron") submits this Memorandum of Points and Authorities in support of Chevron's Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC") (ECF No. 53).[1]

I. INTRODUCTION

Plaintiffs[2] are attempting a second bite at the apple. This Court previously dismissed the claims that Plaintiffs re-assert in the Second Amended Complaint. (ECF No. 38). This Court previously dismissed Plaintiffs' first claim to the extent it relies on the American Indian Religious Freedom Act ("AIRFA"), third claim under the National Environmental Policy Act ("NEPA) and the Administrative Procedure Act ("APA") and the fifth claim under the Religious Freedom Restoration Act ("RFRA"). The court cautioned that if Plaintiffs were to file a second amended complaint, they must allege "in good faith" "additional facts necessary to state viable causes of action for AIRFA, NEPA, APA and violation of the [Religious Freedom Restoration Act]." Order Granting Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint ("Order") (ECF No. 52). Plaintiffs have failed to comply with the Court's order. In the SAC, Plaintiffs have failed to allege any additional facts to sustain viable causes of action under

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[1] The Proof of Service filed with the SAC stated that the complaint was served on April 2, 2012 "via first-class mail by placing a true and correct copy thereof in a sealed envelope and depositing the envelope, with postage fully prepaid, in a mailbox located on 99 East "C" Street, Suite 111, Upland, CA, 91786, and regularly serviced by the United States Postal Service for receipt of first-class mail." (ECF No. 53). However, the envelope that contained the SAC had a metered prepaid postage that was dated April 4, 2012, and therefore it was impossible for the complaint to be have been placed in the mail with prepaid postage on April 2, 2012. *See* Declaration of Audrey M. Huang in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint ("Huang Decl.") Ex. A. Therefore, in accordance with Federal Rules of Civil Procedure 15(a)(3) and 6(d), the filing deadline for a response to the SAC is April 23, 2012. In an email dated April 9, 2012, counsel for Plaintiffs indicated that they would not challenge the April 23, 2012 filing deadline. Huang Decl. Ex. B.

[2] La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee ("La Cuna"), CAlifornians for Renewable Energy ("CARE"), and several individuals.

those statutes, and therefore, this Court should dismiss with prejudice Plaintiffs' first claim as it relates to AIRFA, and third and fifth claims entirely.[3]

II. FACTUAL BACKGROUND

A. The Chevron Project.

Chevron has obtained approvals to construct a 45-megawatt solar photovoltaic plant and associated facilities ("Chevron Project") on federal land managed by the Bureau of Land Management ("BLM"). The site of the Chevron Project is approximately eight miles east of Lucerne Valley in the Mojave Desert. The Chevron Project also includes an amendment to the California Desert Conservation Area Plan ("Desert Conservation Area Plan") to designate the proposed site as suitable for solar energy generation.

Chevron submitted an application to BLM for a right-of-way grant. In compliance with NEPA, BLM prepared an environmental impact statement ("EIS") for the Chevron Project. BLM published a Notice of Intent for the Chevron Project in the Federal Register on July 23, 2009, thereby initiating a 30-day scoping period. 74 Fed. Reg. 36,504 (July 23, 2009). BLM also held two public scoping meetings near the location of the Chevron Project. *Id.* The Environmental Protection Agency published a Notice of Availability of the Draft EIS on February 19, 2010, which opened a public comment period that closed on May 19, 2010. 75 Fed. Reg. 7,479 (Feb. 19, 2010). BLM issued the Final EIS for the Chevron Project in August 2010, which was made available for public review. 75 Fed. Reg. 49,487 (Aug. 13, 2010). On October 5, 2010, the Department of the Interior ("Interior") published the record of decision ("ROD") regarding the Chevron Project.

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[3] Chevron also joins in the Federal Defendants' motion and argument dismissing claim four under the Federal Land Policy Management Act ("FLPMA") (ECF Nos. 54, 55).

B. Procedural History.

This lawsuit is one of six that Plaintiffs have filed since December 2010 challenging various solar energy projects in California.[4] Plaintiffs have filed nearly identical complaints in each case, changing little more than the name of the challenged solar energy project from complaint to complaint. The other courts have also granted motions to dismiss against Plaintiffs.[5]

In this case, Plaintiffs filed their initial complaint ("Compl.") in January 2011 (ECF No. 1) alleging that Defendants (1) failed to comply with the National Historic Preservation Act by failing to perform the requisite consultations (Compl. 5:10-6:14), (2) failed to prepare an adequate EIS under NEPA (Compl. 6:18-7:14), (3) failed to prepare a programmatic EIS in violation of NEPA (Compl. 7:18-8:11), (4) violated the FLPMA by failing to "take all action necessary to prevent unnecessary or undue degradation" of the effected public land (Compl. 8:15-10:17), and (5) violated the Native American Graves Protection and Repatriation Act ("NAGPRA") by failing to conduct the requisite consultations (Compl. 10:21-11:28). Federal Defendants filed a motion to dismiss Plaintiffs' complaint (ECF No. 25), which Chevron joined (ECF No. 31). The Court granted in part and denied in part Defendants' motion to dismiss (ECF No. 38), holding that the individual plaintiffs had standing to proceed, but that La Cuna and CARE failed to sufficiently allege organizational standing. The Court granted Plaintiffs leave to amend with regard to La Cuna and CARE's standing.

Plaintiffs then filed their FAC on November 28, 2011. (ECF No. 41). In addition to the claims in their initial complaint, Plaintiffs alleged three additional claims that

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[4] *La Cuna v. Dep't of the Interior*, No. 3:10-cv-2664 (filed Dec. 27, 2010), *La Cuna v. Dep't of the Interior*, No. 2:11-cv-400 (filed Jan. 13, 2011); *La Cuna v. Dep't of the Interior*, No. 2:11-cv-4466 (filed May 24, 2011), *La Cuna v. Dep't of the Interior*, No. 5:11-cv-1478 (filed Sept. 15, 2011), *La Cuna v. Western Area Power Admin.*, No. 5:12-cv-5 (filed Jan. 3, 2012);

[5] *See* Case No. 2:11-cv-4466 (ECF No. 94), 2:11-cv-400 (ECF No. 94).

Defendants: (1) failed to comply with AIRFA by not conducting the requisite consultations with native traditional leaders and organizations (FAC 6:11-7:5), (2) violated RFRA by substantially burdening Plaintiffs' exercise of religion and Defendants' approval of the Chevron Project does not further a compelling governmental interest and is not the least restrictive means (FAC 11:14-12:23), and (3) violated NEPA by failing to provide the public with adequate opportunity to participate in the review-and-approval process for the Chevron Project (FAC 12:27-14:2).

Chevron and the Federal Defendants filed motions to dismiss the AIRFA claim, the RFRA claim, and the claim that Defendants violated NEPA by failing to prepare a programmatic environmental impact statement ("PEIS"). (ECF No. 42 and 45 respectively). This Court granted the motions to dismiss in their entirety. (ECF No. 52). In dismissing these claims, the Court cautioned that Plaintiffs could file an amended complaint "provided Plaintiffs can – in good faith – allege additional facts necessary to state viable causes of action for AIRFA, NEPA, APA and violation of the [Religious Freedom Restoration Act]." Order 10:15-17.

Despite this clear directive from the Court, Plaintiffs continue to take up valuable judicial resources by filing a Second Amended Complaint that is devoid of any additional facts that would support viable causes of action for the previously dismissed claims.

III. STANDARD OF REVIEW

A. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Whether a court has jurisdiction is a threshold matter, and if a court determines that it lacks subject-matter jurisdiction, then it must dismiss the action. Fed. R. Civ. P. 12(h)(3). The burden of establishing a federal court's jurisdiction rests with the party asserting the jurisdiction. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). Claims arising under the APA must consist of "*final* agency action" and can only proceed "where a plaintiff

asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 64 (2004) (emphasis in original).

B. Rule 12(b)(6) – Failure to State a Claim Upon Which Relief Can Be Granted.

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) must be granted when the complaint lacks a cognizable legal theory or where the complaint fails to plead essential facts needed to establish a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While the complaint need not contain detailed factual allegations to survive a Rule 12(b)(6) challenge, a complaint may not simply provide a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, although a court presumes the factual allegations in a complaint as true for the purposes of a motion to dismiss, the court need not accept as true those allegations that are "no more than conclusions[.]" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); *Daniels-Hall v. Nat'l Educ Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Finally, the court is not limited to consideration of the pleadings – the court may take judicial notice of facts outside the pleadings, for example, without converting the motion to dismiss into a motion for summary judgment. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

IV. ARGUMENT

A. Plaintiffs' AIRFA Claim Must be Dismissed Because AIRFA Does Not Create a Cause of Action.

In its March 21, 2012 Order, this Court recognized the legion of authorities that make clear "[N]owhere in [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." Order 5:27-6:3. As such, the Court reiterated that "AIRFA does nothing more than articulate a policy statement

that simply does not confer a right of action on private litigants." Order 6:10-12. Despite Plaintiffs' concession that they do not intend to assert the AIFRA claim[6], the SAC still references AIRFA. To the extent Plaintiffs' complaint alleges or seeks any relief that Defendants must comply with AIRFA, such claim should be dismissed with prejudice and such relief denied.

B. Plaintiffs' NEPA Claim Must be Dismissed Because BLM's Alleged Failure to Prepare a Programmatic EIS is Not Reviewable Under the APA.

Because NEPA does not contain a specific provision for judicial review, NEPA claims must be reviewed under the APA. 5 U.S.C. § 701-706; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 833, 882-883 (1990). Thus, in order for Plaintiffs' NEPA claims to be reviewable by the court, the claims must challenge a final agency action under the APA, 5 U.S.C. § 704. Furthermore, a claim under section 706(1) of the APA to compel agency action unlawfully withheld or unreasonably delayed "can only proceed where a plaintiff asserts that the agency failed to take a discrete action that it was *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

Plaintiffs have alleged nothing in their SAC that would overcome this Court's previous finding that "Defendants' decision not to prepare a PEIS is not reviewable by this Court." Order 8:6-7. Plaintiffs' new allegations do nothing to change the fact that their claim is not reviewable under the APA because as this Court previously recognized,

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[6] During the April 16, 2012 telephonic conference between counsel, Plaintiffs' counsel indicated that although the SAC references AIRFA in the first claim (SAC 6:11-13) and also requests injunctive relief "prohibiting Defendants (and any and all persons acting at the request of, in concert with, for the benefit of, in privity with, or under one or more of them) from taking any action on any aspect of, in furtherance of, or otherwise based on the Project unless and until Defendants fully comply with all applicable provisions of the NHPA, AIRFA, and the APA," that Plaintiffs did not intend to pursue a claim under AIRFA.

NEPA does not require the preparation of a PEIS. Order 7:12-15, 8:5-7 ("[P]ursuant to *Kleppe*, Defendants here had the discretion whether to prepare a PEIS. Thus, because this Court may review under APA only final agency action the agency was required to take, [] and because Defendants were not require to prepare a PEIS, Defendants' decision not to prepare a PEIS is not reviewable by this Court.").

Plaintiffs now allege that the Chevron Project was approved with other "priority" or "fast track" solar-electricity generation projects in the region and that Defendants violated NEPA by (1) failing to prepare a PEIS for the "fast track" or "priority" solar projects, (2) failing to prepare an EIS for the "priority" or "fast track" solar projects in the same environmental document, and (3) failing to "analyze the cumulative impacts of the project together with the other 'priority' or 'fast-track' projects in some other manner." SAC 8:23-9:3. Plaintiffs cite no authority to support their allegations that NEPA requires a PEIS in this circumstance. They are not able to cite to any authority because there is no such authority. As they did in response to the prior motions to dismiss, Plaintiffs rely on the Supreme Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976). But as this Court previously ruled, the *Kleppe* Court concluded the issue as to whether a comprehensive statement is necessary for major federal actions is best left to the *discretion* of the agency. Order 7:20-23.

Plaintiffs' amended claim remains the same as alleged in the FAC – that Defendants failed to prepare a PEIS. That Plaintiffs now allege the PEIS was required for the "priority" or "fast track" program does not change the analysis or the conclusion. The decision to prepare a PEIS is left to the discretion of the agency – NEPA does not require the preparation of a PEIS, and therefore Defendants' decision not to prepare a PEIS, be it for the "priority" or "fast track" solar projects or for several solar projects in the region that will have cumulative or synergistic environment impacts, is not reviewable by this Court.

The "new" facts alleged in the SAC do not correct the jurisdictional defect identified by the Court in its prior order. Plaintiffs' third cause of action should be dismissed because Defendants were not required to prepare a PEIS, and therefore the Court lacks subject matter jurisdiction and Plaintiffs have failed to state a claim for which relief can be granted.

C. Plaintiffs' Religious Freedom Restoration Act Claim Must Be Dismissed Because Plaintiffs Fail to Allege a Substantial Burden on Their Exercise of Religion.

To establish a claim under RFRA, a plaintiff must allege that a government action "substantially burdens" the plaintiff's free exercise of religion. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). A "substantial burden" is imposed only when individuals are (1) forced to choose between following the tenets of their religion and receiving a government benefit or (2) coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation*, 535 F.3d at 1070. Having failed to establish a prima facie claim under the first prong, Plaintiffs now attempt to establish a claim under the second prong.[7]

In the FAC, Plaintiffs alleged that "[t]he implementation of the Project denies Plaintiffs of the governmental benefit conferred by the [CDCA Plan] and other laws." FAC 12:19-20. Plaintiffs attempt to put more meat on this bare-boned, inadequate allegation without success. In the SAC, Plaintiffs now allege that the CDCA Plan "recognizes that many prominent features of the CDCA landscape, species, and other

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[7] Plaintiffs previously alleged that Defendants approval of the Chevron Project would substantially burden Plaintiffs' free exercise of religion because "the physical environs and objects that are essential" to Plaintiffs' free exercise of religion would be permanently destroyed as result of the Chevron Project in violation of RFRA. FAC 12:1-12. The Court found that Plaintiffs FAC failed to state a claim because Plaintiffs "fail to plead a substantial burden because Plaintiffs allege neither that the Project forces them to chose between practicing their religion and a government benefit nor that the Project coerce them into exercising their religion under fear of civil or criminal sanction." Order 10:1-6.

resources have religious values to Native Americans" and recognizes the "rights guaranteed to Native people under existing legislation include access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites." SAC 13:6-10. Therefore, Plaintiffs allege that Defendants are denying Plaintiffs the benefits conferred on them by law by "allowing the Chevron Project's site to be destroyed and denying Plaintiffs access to the site." SAC 13:10-12.

Plaintiffs again fail to establish a *prima facie* case that their religion is substantially burdened by the Chevron Project. In order to establish a substantial burden under the second prong, Plaintiffs must allege that they are "forced to choose between following the tenets of their religion and receiving a governmental benefit." *Navajo Nation*, 535 F.3d at 1070. A substantial burden exists "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). The Supreme Court recognized such action as a substantial burden in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, an individual was fired by her employer for refusing to work on her faith's day of rest. The state denied her claim for unemployment compensation benefits, finding that she failed to accept work without good cause. The Court held that the state was forcing the individual to choose between "following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404.

Here, Plaintiffs misinterpret the standard. Plaintiffs do not allege that the government is denying them the benefits conferred by the CDCA Plan because Plaintiffs are undertaking conduct mandated by their religious beliefs. Nor do Plaintiffs allege that the government is denying them the benefits conferred by the CDCA Plan because

Plaintiffs refuse to act in a manner contrary to their religious beliefs. Rather, Plaintiffs allege that they are being denied the benefit conferred by the CDCA Plan because the Chevron Project will deny Plaintiffs' access to the site. This is not the standard for establishing a substantial burden under RFRA under the second prong. The RFRA standard requires that to establish a substantial burden on their religion, Plaintiffs must be forced to choose between following their religion and receiving that benefit. *Navajo Nation*, 535 F. 3d at 1070; *see also Newdow v. Cong. of the United States*, 435 F. Supp. 2d 1066, 1077-78 (E.D. Cal. 2006) (no substantial burden where plaintiff did not sufficiently allege that the government conditioned the availability of benefits upon the willingness to violate a cardinal principle of his religious faith). Plaintiffs fail to make this required allegation.

Plaintiffs also repeat verbatim their allegation from the FAC that Defendants' approval of the Chevron Project will substantially burden Plaintiffs' exercise of religion because

> physical environs and objects that are essential to such exercise and that cannot be found anywhere else in the world (including but not limited to those specified in the preceding paragraph)8 will be permanently destroyed or otherwise made totally inaccessible as a result of the construction to be undertaken, equipment to be used, and activities to be conducted in connection with the Project. . . .
>
> Plaintiffs now face the decision of either no longer practicing their religion or suffering civil or criminal penalties for trespass.

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8 Plaintiffs amended their claim to allege that the "Salt Song Trails generally cover a large geographic area, but segments of the Salt Song Trails are of higher significance to some Native Americans than others based on where ancestors are likely to be buried, particular spiritual journeys, and other religiously important factors." SAC 12:3-6.

SAC 12:11-16, 18-20; *see also* FAC 12:2-6, 13-16. Again, Plaintiffs repeat the allegation in the FAC that "Defendants' approval of the Project and the burden it imposes on Plaintiffs will objectively prevent Plaintiffs from practicing their religion in a meaningful way because meaningful practice cannot occur if the essential physical environs and objects that will be destroyed or made inaccessible as a result of the Project are not in fact available to Plaintiffs." SAC 12:24-28, FAC 12:8-12.

This Court previously ruled that Plaintiffs failed to establish a substantial burden on their religion with these allegations. Order 10:1-8. The interference with the ability to practice religion is irrelevant as to whether the government is forcing them to choose between practicing their religion and receiving a government benefit or coercing them into exercising their religion under fear of civil or criminal sanction. Order 9:22-26 (citing *Snoqualamie Indian Tribe v. Federal Energy Regulatory Energy Comm'n*, 545 F.3d 1207, 1214 (9th Cir. 2008). Government actions that interfere with the ability to practice religion do not constitute a substantial burden under RFRA. *See Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 447-449 (1987) (a government plan that would "interfere significantly" with Indian tribes' ability to practice their religion and that would "cause serious and irreparable damage to the sacred areas" did not coerce plaintiffs into violating their religious beliefs); *see also Navajo Nation*, 535 F.3d at 1072 (even assuming the government action would "'virtually destroy . . . the Indians' ability to practice their religion,'" plaintiffs claims did not constitute a substantial burden).

Moreover, the Chevron Project does not prevent Plaintiffs from practicing their religion. Plaintiffs themselves allege that the Chevron Project only covers portions of the Salt Song Trails and that they would be unable to practice their religion in a "meaningful way." However, "the diminishment of spiritual fulfillment – serious though it may be – is not a 'substantial burden' on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1070.

V. CONCLUSION

For the reasons stated above, Chevron respectfully urges the Court to dismiss Plaintiffs' First Claim relating to AIRFA, Third Claim (regarding NEPA programmatic environmental impact statements), and Fifth Claim (regarding RFRA) in the Second Amended Complaint with prejudice.

Dated: April 23, 2012

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By: /s/ Robert D. Thornton
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