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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE ADVISORY COMMITTEE; CALIFORNIANS FOR RENEWABLE ENERGY; ALFREDO ACOSTA FIGUEROA; PHILLIP SMITH; PATRICIA FIGUEROA; RONALD VAN FLEET; and CATHERINE OHRIN-GREIPP,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in the official capacity of Secretary of the United States Department of the 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-395-ODW (OPx)

PLAINTIFFS' CONSOLIDATED OPPOSITION TO FEDERAL DEFENDANTS' AND DEFENDANT CHEVRON ENERGY SOLUTIONS COMPANY'S MOTIONS TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Hearing Date: July 2, 2012
Hearing Time: 1:30 p.m.
Courtroom: 11
Judge: Hon. Otis D. Wright II

I. INTRODUCTION

Federal Defendants and Defendant Chevron Energy Solutions Company ("Chevron") move to dismiss Plaintiffs' Second Amended Complaint. The Second Amended Complaint ("SAC") asserts six causes of action. Federal Defendants move to dismiss the Third, Fourth, and Fifth Claims. Defendant Chevron moves to dismiss Plaintiffs' Third and Fifth Claims.

Defendants also move to dismiss Plaintiffs' claim under the American Indian Religious Freedom Act ("AIRFA"). Plaintiffs' removed the AIRFA claim in the Second Amended Complaint. *See* SAC ¶¶ 8(A)(summarizing challenge under National Historic Preservation Act ("NHPA"), no reference to AIRFA); 19 (allegations under NHPA, no reference to AIRFA), 20 (summarizing harm under NHPA, no reference to AIRFA); Prayer A(1) (no reference to AIRFA); and A(2) (no reference to AIRFA). Plaintiffs inadvertently missed removing one reference in the Prayer in Section A(3). During the April 16 conference of counsel, Plaintiffs acknowledged that the reference in the Prayer was a mistake.[1] Plaintiffs are happy to remove the reference to AIRFA in the Prayer with any other needed amendments that result from the motions to dismiss. Because the motions to dismiss the First Claim focus entirely on AIRFA, this issue will not be addressed further.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 8(a)(2), a complaint needs to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In deciding a motion to dismiss, the Court must accept all factual

[1] The reference in Paragraph 16 of the Second Amended Complaint is an intentional reference, but, because it does not invoke a cause of action under AIRFA, is not grounds for a motion to dismiss.

allegations as true. *Id*. at 555. As discussed in more detail below, Plaintiffs' allegations meet the criteria to survive a motion to dismiss.

III. ARGUMENT AND ANALYSIS

A. Plaintiffs Have Stated a Valid Third Claim

In the Third Claim, Plaintiffs contend that Defendants violated NEPA by failing to prepare a programmatic environmental impact statement ("EIS"). Claims that an agency violated NEPA are reviewed under the Administrative Procedure Act ("APA"). *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). Defendants argue that Plaintiffs do not meet the final agency action requirement under the APA because a programmatic EIS is not required but is merely encouraged. However, the failure to prepare a programmatic EIS is justiciable. *See, e.g., Fund for Animals v. Clark*, 27 F. Supp. 2d 9, 13-14 (D.D.C. 1998) (holding that agency violated NEPA by failing to prepare single environmental document that considered three related federal actions taking place in same geographic area).

For "every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment," NEPA requires the responsible official to include a detailed statement on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between the local short-term uses and maintenance of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C). The Supreme Court has ruled that "when several proposals for [related] actions that will have cumulative or synergistic environment impact upon a ***region*** are pending concurrently before an agency, their environmental consequences must be ***considered together***. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added).

Kleppe has been interpreted to require a two-part test for determining whether to prepare a single environmental document for a large-scale plan. First, the "document must contain a 'proposal' [--] that is, a goal toward which the responsible federal official intends to direct his energies." *Environmental Defense Fund v. Adams*, 434 F. Supp. 403, 406 (D.D.C. 1977). Second, the "proposal must have well-enough defined geographic, temporal and subject matter limits so that the official can meaningfully address the questions posed in 42 U.S.C. § 4332(2)(C)." *Id.* The Ninth Circuit has held that an agency must prepare both a programmatic EIS and a site-specific EIS "[w]here there are large scale plans for regional development" and "several foreseeable similar projects in a geographical region have a cumulative impact." *City of Tenakee Springs v. Clough*, 915 F.3d 1308, 1312 (9th Cir. 1990).

The SAC includes allegations that there is a coordinated proposal in the region. In particular, Paragraph 28 of the SAC reads (with emphasis added):

> The Project is a major federal action, and ***together with other*** major solar-electricity generation projects it constitutes broad action by Defendants. The Chevron Project was approved ***with other*** "priority" or "fast-track" solar-electricity generation projects ***in the region***. Most of the projects in the "priority" or "fast-track" program, ***as well as other similar*** projects, included amendments to the CDCA Plan. The projects have a variety of cumulative impacts, including without limitation adverse impacts on Native American cultural resources, land use, and plants and animals.

Paragraph 29 of the SAC goes on to allege that the "priority" or "fast track" program is designed for ***projects of the same subject matter*** and are to be reviewed ***in the same period of time***. These allegations demonstrate that the "priority" or "fast-track" program is itself a "proposal" under NEPA and that a programmatic EIS covering the entire proposal needed to be performed because the Chevron Project, part of the larger proposal, was moving forward.

Defendants argue that "although BLM is in the process of preparing a programmatic EIS for the Solar Energy Development in Six Southwestern States (the

"Solar Energy Development PEIS"), because the agency has not yet completed the Solar Energy Development PEIS, it is not a 'final agency action' reviewable by this Court." Fed. Mtn. Dismiss, p. 10, lns. 3-18. Plaintiffs do not allege any deficiencies with the Solar Energy Development PEIS in this proceeding.[2] However, the preparation of the Solar Energy Development PEIS may have some implications to the Chevron Project. If the argument is that the Solar Energy Development PEIS underway rectifies Plaintiffs' concerns in this proceeding, it is worth noting that while work on a required programmatic EIS is in progress, agencies are not to undertake in the interim any major Federal action covered by the program unless certain conditions are met. 40 C.F.R. § 1506.1(c). In other words, while Plaintiffs are not challenging the adequacy of the Solar Energy Development PEIS in this proceeding, the preparation of the PEIS also does not render Plaintiffs' challenge of the lack of a PEIS for solar energy development in the region before the approval of the Chevron Project moot or otherwise not justiciable.

Because Plaintiffs' allegations state a claim that is plausible on its face, the motions to dismiss the Third Claim should be denied. Plaintiffs' entire point is that the programmatic EIS should have been prepared ***before*** the Chevron Project was approved.

B. Plaintiffs Have Stated a Valid Fourth Claim

Plaintiffs' Fourth Claim arises under the Federal Land Policy and Management Act of 1976 ("FLPMA"). Defendant Chevron does not move to dismiss this claim. However, Federal Defendants have decided to move to dismiss this claim despite the identical claim going unchallenged in the initial Complaint, which Federal Defendants challenged [Docket no. 25 (Federal Defendants' motion to dismiss initial Complaint)], and in the First Amended Complaint, which Federal Defendants also challenged [Docket nos. 43-44 (Federal Defendants' motion to dismiss First Amended Complaint]. The claim should not be dismissed now.

[2] How could they? The Solar Energy Development PEIS isn't done yet. That's why it was wrong to proceed with the Chevron Project.

The thrust of Federal Defendants' argument is that they are now suddenly concerned about the lack of specificity in the SAC. The Chevron Project is to be located on approximately 422 acres of public land. SAC ¶ 7. Plaintiffs are concerned about the "permanent impairment of the lands affected by the Project and allowing unnecessary and undue degradation of the land." SAC ¶ 8(D). FLPMA requires that in managing public land, the Secretary shall "take any action necessary to prevent unnecessary or undue degradation of the lands." SAC ¶ 34. Environmental quality is also a key factor in decision-making for projects within the CDCA Plan. *See* SAC ¶ 35. The Project will have adverse environmental impacts and degrade the land. *See* Tustin Decl., Ex. B, p. 67 (summarizing adverse impacts) (docket no. 56-2).

Plaintiffs did not add any additional detail to the Second Amended Complaint on the Fourth Claim because Defendants did not suggest that the allegations were in any way insufficient in the first two rounds of their motions to dismiss. A similar claim was dismissed with leave to amend to another case brought by Plaintiffs--in case number 2:11-cv-4466-JAK (Op) (C.D. Cal., Feb. 6, 2012) (docket no. 94)--and Federal Defendants have now decided to jump on the bandwagon. If the Court is inclined to grant the motion, Plaintiffs ask that the Court do so with leave to amend just as was done in the case that sparked Federal Defendants' newfound interest in this claim so as to allow Plaintiffs to be more specific.

C. Plaintiffs Have Stated a Valid Fifth Claim

Defendants assert that Plaintiffs' Fifth Claim under RFRA fails as a matter of law because Plaintiffs cannot assert a substantial burden on the exercise of their religion. Defendants rely largely on *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) ("*Navajo Nation*") and *Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission*, 545 F.3d 1207 (9th Cir. 2008) ("*Snoqualmie*"). Plaintiffs acknowledge that *Navajo Nation* and *Snoqualmie* are alluring precedent, but there are crucial factual distinctions.

In particular, the risk of sanctions differentiates this case from *Navajo Nation* and *Snoqualmie*. In *Navajo Nation*, the district court found ***following a bench trial*** that there wold be no resources with religious significance or religious ceremonies that would be physically affected and that the "Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes." *Navajo Nation, supra*, 535 F.3d at 1063. The federal agency's Memorandum of Agreement, among other things, continued to allow the tribes access to the mountain for cultural and religious reasons. *Id*. at 1066. Determining that there was no substantial burden, the Ninth Circuit emphasized that the federal agency guaranteed that religious practitioners would still have access for religious purposes. *Id*. at 1070. Altogether, in *Navajo Nation* there was no allegation of loss of access and, consequently, no allegation that religious practitioners were forced to decide between practicing their religion and civil or criminal sanctions for trespass. Those allegations exist here. *See* SAC, ¶ 44.

Similarly, in *Snoqualmie*, although it was alleged that operation of the dam would deprive the tribe of access, the Ninth Circuit noted that the federal action did not "prohibit or prevent the Snoqualmies' access to Snoqualmie Falls, their possession and use of religious objects, or the performance or religious ceremonies." *Snoqualmie Indian Tribe, supra*, 545 F.3d at 1215. There is no mention of trespass or other sanction in that case, and it appears that there was ultimately a lack of evidence of deprivation of access. While evidence is not appropriate at this juncture, allegations certainly are; and allegations regarding lack of access, the risk of trespass, and the threat of arrest have been made. *See* SAC, ¶ 44.

The threat of sanctions presents a substantial burden under RFRA. The Supreme Court considered RFRA in a case where a religious sect from the Amazon Rainforest was receiving communion by drinking a sacramental tea, brewed from plants unique to the region, that contained a hallucinogen regulated under the federal Controlled Substances Act. *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006). The plaintiffs' religion required the sacramental tea, and the burden

was the threat of a "criminal sentence for possession" of a controlled substance. *Id*. at 425. The High Court went on to conclude that the federal government had failed to demonstrate a compelling interest in barring plaintiffs' sacramental use of the tea. *Id.* at 439. In the case at hand, Plaintiffs' religious practices require access to the Chevron Project's site, and the burden involves the threat of criminal sanctions for trespass. SAC ¶ 44. No case holds or even suggests that the threat of criminal prosecution for possession of a controlled substance necessary for a religious practice is different from the threat of criminal prosecution for trespassing on property necessary for a religious practice. Each threat qualifies under RFRA.

Plaintiffs' allegations about being denied a governmental benefit are also attacked. However, denial of a governmental benefit is not limited to denial of access to a public welfare program, as Federal Defendants suggest. Fed. Mtn. Dismiss, p. 16, lns. 25-17-27. RFRA's language is not so restrictive, and the denial element has not been applied in such a narrow manner. For example, in considering a RFRA claim by Rastafarian and Muslim inmates, whose religious beliefs forbid them from cutting their hair or shaving their beards, a district court found a substantial burden imposed by a grooming policy requiring short hair and shaving. *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 26 (D.D.C. 2002). Among the consequences for failing to comply with the grooming policy, the court noted, were the "loss of privileges such as visitation, commissary, and telephone." *Id*. If the loss of privileges in a prison amounts to denial of a government benefit under RFRA, then the loss of access to public land constitutes denial of a governmental benefit--especially where the policies governing the area recognize the importance of the land for Native American religious purposes like those that Plaintiffs can no longer pursue at the site of the Chevron Project.

Finally, Federal Defendants allege that Plaintiffs ignore that there is authority suggesting that BLM "to the extent practicable" is to accommodate access to and use of sacred sites. Fed. Mtn. Dismiss, p. 8-23. There are two problems with this argument. On the one hand, regulations and an executive order stating what *should* happen does not

necessarily reflect what is happening on the ground. If the right of way is supposed to allow access, Plaintiffs request leave to amend to allege that its terms are being violated because Plaintiffs are being denied access. On the other hand, it is up to Federal Defendants to prove that the regulations and executive order as applied to this situation represent the least restrictive means. Under RFRA, the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). As suggested above, the Supreme Court called upon the government to demonstrate a compelling interest in banning the use and possession of a controlled substance for religious purposes (and ultimately concluded that the government had failed to do so). *O Centro Espirita, supra*, 546 U.S. at 430-439.

Altogether, Plaintiffs have stated a valid claim under RFRA. The motions to dismiss should be denied on this ground.[3]

[3] Judge Wu recently denied the Federal Defendants' motion to dismiss Plaintiffs' RFRA claim in case no. 5:11-cv-1478-GW (SSx) (docket no. 75, p. 10-11).

IV. CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss. If the Court believes that any of the allegations are insufficient, however, Plaintiffs request leave to amend.[4]

Date: June 11, 2012.

Respectfully submitted,

BRIGGS LAW CORPORATION

By: s/ Cory J. Briggs

Attorneys for Plaintiffs La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee, CAlifornians for Renewable Energy, Alfredo Acosta Figueroa, Phillip Smith, Patricia Figueroa, Ronald Van Fleet, and Catherine Ohrin-Greipp

[4] For instance, Plaintiffs claim under FLPMA has not been subject to the prior motions to dismiss and Plaintiffs would be willing to add additional specificity if it is necessary at this juncture.

CERTIFICATE OF SERVICE

I, Cory J. Briggs, hereby certify that, on June 11, 2012, I caused the foregoing document to be served upon counsel of record through the Court's electronic service system.

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

Dated: June 11, 2012. s/ Cory J. Briggs