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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Federal Defendants, and OCOTILLO EXPRESS LLC Defendant-Intervenor.	No. 12-cv-1167-GPC **MEMORANDUM AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Date: January 18, 2013 Time: 1:30 pm Courtroom: 9 Judge: The Hon. Gonzalo P. Curiel

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The Ocotillo Wind Energy Facility Project ("OWEF" or "Project") is in the process of constructing 112 wind turbine generators, a substation, a switchyard, and other ancillary facilities on Bureau of Land Management ("BLM")-managed lands in Imperial County, California. OWEF-381. It will produce up to 315 megawatts ("MW") of electricity: enough to power 94,500 homes and offset approximately 288,000 metric tons of greenhouse gases annually. OWEF-110; OWEF-153. As a result of its extensive analysis and consultation efforts, the Department of the Interior ("Interior") concluded that the Project would "further [] the development of environmentally responsible renewable energy" and that the Project was in "the public interest." OWEF-115; OWEF-27. Notwithstanding these comprehensive analysis and consultation efforts, the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan") challenges Interior's decision as violating the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 ("NEPA"), the National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. §§ 470-470w, the Federal Land Policy & Management Act of 1976, 43 U.S.C. §§ 1701-1787 ("FLMPA") and the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm ("ARPA").

Interior's decision authorized BLM to offer Ocotillo Express LLC ("Applicant") a right-of-way ("ROW") grant to use 10,151 acres of public lands to site the Project, and it amended the California Desert Conservation Area ("CDCA") Plan 1980. OWEF-113. Before issuing the Record of Decision ("ROD"), BLM analyzed the expected environmental effects of the Project pursuant to NEPA, FLPMA, and other applicable authorities, and engaged in consultation pursuant to the NHPA and other Interior processes. *See generally id*. BLM consulted with the Quechan, and other tribes, pursuant to the NHPA and opened the NEPA process to the public, including the Quechan. *See* OWEF-132-37, OWEF-148-51. The NEPA analyses, NHPA consultations, and input from other parties, including Quechan, resulted in three Project redesigns; all of which reduced Project impacts. *See* OWEF-109-11. Originally the Applicant had proposed to construct 193 turbines, which proposal was reduced to 155 turbines, and then further to 112. The net result was, among other things, the removal of turbines that would block certain viewsheds important to tribes, and an amendment to the CDCA Plan designating approximately 2,285 acres originally proposed for development by the Applicant as unsuitable for future wind energy

development. Against this evidence, Quechan has not shown – and cannot show – that BLM's extensive analysis of the OWEF was arbitrary and capricious. Thus, this Court should grant summary judgment in favor of Federal Defendants.

RELEVANT STATUTORY BACKGROUND AND STANDARD OF REVIEW

I. FLPMA and the CDCA Plan

FLPMA "is primarily procedural in nature." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006). FLPMA has a multiple use mandate, requiring public lands to be managed in a manner that will protect, *inter alia*, the quality of historical, ecological, environmental, air and atmospheric, water resource, and archeological values. 43 U.S.C. § 1701(a)(8). FLPMA designated approximately 25 million acres of public land in southern California as the CDCA. *See* 43 U.S.C. § 1781(b), (c). To manage the 12 million acres of the CDCA under its jurisdiction, BLM adopted the CDCA Plan in 1980, amending it numerous times since then.[1] Consistent with FLPMA, the CDCA Plan emphasizes that "multiple use, sustained yield, and the overall maintenance of environmental quality are the context for the CDCA management . . . ." OWEF-5914.

The CDCA Plan allocates lands into four "multiple-use" classes. OWEF-5920. Class L lands, such as the ones at issue, "protect[] sensitive, natural, scenic, ecological, and cultural resource values . . . ." *Id*. The CDCA Plan does not, however, prohibit development on Class L lands, it simply states that they are to be managed "to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." *Id* (emphasis added). Resource development activities are allowed if the activities meet the guidelines specified in the Plan. OWEF-5921. Pursuant to these guidelines, wind, solar and geothermal electrical generation facilities are permitted on Class L lands so long as "NEPA requirements are met." OWEF-5922.

II. National Environmental Policy Act

Congress enacted NEPA to establish a consistent process for federal agencies to consider the

[1] From 1980 to 1999, the CDCA Plan has been amended 147 times. OWEF-5908.

consequences of their actions upon the environment. *See* 42 U.S.C. §§ 4321-4370. To ensure informed decision-making, NEPA requires agencies to analyze and to disclose significant environmental effects of a proposed action, but it does not require any particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA "does not impose any substantive requirements on federal agencies–it exists to ensure a process." *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (*en banc*) (citation and quotations omitted). When an agency proposes a "major Federal action[] significantly affecting the quality of the human environment," NEPA requires preparation of an EIS. 42 U.S.C. § 4332(2)(C).

III. National Historic Preservation Act

Section 106 of the NHPA requires federal agencies to "take into account the effect" a federal undertaking will have on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" and to "afford the Advisory Council on Historic Preservation [or ACHP]... a reasonable opportunity to comment with regard to such undertaking." 16 U.S.C. § 470f. The implementing regulations establish a four-step procedure to comply with Section 106. *See* 36 C.F.R. Part 800. First, the agency identifies "consulting parties," including the State Historic Preservation Office ("SHPO") and interested Indian Tribes. Second, the agency identifies historic properties that might be affected by the undertaking.[2] Third, the agency assesses whether there are adverse effects on those historic properties. Fourth, the agency endeavors to resolve any adverse effects. All of the aforementioned steps occur in consultation with the consulting parties identified by the agency. *See, e.g.*, 36 C.F.R. §§ 800.4(3), 800.5(a).

Notably, Section 106 does not prohibit the approval of undertakings that result in adverse effects, nor does it require such effects to be resolved prior to approval. Under the National Register of Historic Places ("NRHP"), the resolution of such effects is required only to the extent practicable given the

[2] By definition, "historic properties" must be included or eligible for inclusion on the NRHP. 36 C.F.R. § 800.16(l)(1). Determining a property's eligibility for listing on the NRHP for Section 106 purposes "is the responsibility of the agency and the SHPO and in absence of an abuse of discretion, their application of the regulations to the facts must be sustained." *Wilson v. Block*, 708 F.2d 735, 756 (D.C. Cir. 1983) (citation omitted); 36 C.F.R. § 800.4(c)

nature of the resource and the manner in which it is affected. *Wilson*, 708 F.2d at 755. The Section 106 process often culminates in a Memorandum of Agreement ("MOA"), which reflects the understanding of the agency, SHPO, ACHP and other signatories as to how adverse effects to historic properties are to be resolved, including any provisions for mitigation. *See* 36 C.F.R. §§ 800.6(c), 800.16(o). Execution and implementation of a MOA "evidences the agency official's compliance with section 106," and concludes the Section 106 process. *Id.* § 800.6(c).

IV. Review of Agency Action under the Administrative Procedure Act (APA)

Challenges to an agency's decision brought under the APA must, to succeed, show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *McNair*, 537 F.3d at 987; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Agency action will be upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and decision made. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). The scope of review is narrow, and Courts are not to substitute their judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1215 (9th Cir. 2008).[3]

ARGUMENT

I. Quechan Fails to Raise a Viable FLPMA Claim

FLPMA requires that public lands be managed in accordance with the applicable land use plans. 43 U.S.C. § 1732(a). Quechan's FLPMA argument is that the OWEF is inconsistent with the CDCA

[3] On November 15, 2012 this Court issued an Order denying Quechan's motion to supplement the administrative record, noting that the "focal point of review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Order Denying Plaintiff's Motion to Supplement the Administrative Record and Request for Judicial Notice*, ECF No 105 at 2-3 (citing *Camp*, 411 U.S. at 142). Quechan's motion contains - sixteen references to extra-record materials, none of which are admissible. Consistent with this Court's Order, Federal Defendants attempt to avoid any references to these inadmissible materials in this brief but address Quechan's reliance on them in support of its arguments to the extent necessary.

Plan because: (1) the Plan purportedly does not allow the siting of wind energy facilities on Class L Lands; (2) the Project will impermissibly and significantly diminish Class L lands; (3) the OWEF does not meet the purported Visual Resource Management ("VRM") Class II and III standards; and (4) the Project will cause unnecessary and undue degradation. As discussed below, all of these arguments fail.

A. The CDCA Plan Allows for Wind Energy Development on Class L Lands

The CDCA Plan emphasizes that "multiple use, sustained yield, and the overall maintenance of environmental quality are the context for the CDCA management . . . ." OWEF-5914. While recognizing the unique characteristics of the CDCA, the CDCA Plan by no means prohibits resource use or consumption within the CDCA. OWEF-5915 ("This does not mean that California Desert lands and resources cannot be used – far from it – but the use must sometimes take place in special ways.").

Of the CDCA Plan's four multiple-use classes, the Class L designation is not the most protective – Class C lands are. OWEF-5920 (designating Class C areas as lands that are formally designated as wilderness or are suitable for such designation). Class L lands, on the other hand, are managed "to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." *Id.* (emphasis added). As discussed above, *see supra*, electrical generation facilities, like wind energy facilities, are allowed on Class L lands after "NEPA requirements are met." OWEF-5922. The only strict prohibition is on Class C lands. *Id.*

Contrary to Quechan's claims that the CDCA requires protection of all Class L lands, the CDCA Plan specifically contemplates renewable energy development on Class L lands. It states that one of its multiple use goals is to "[i]dentify potential sites for geothermal development, wind energy parks, and power plants." OWEF-6000. In fact, the CDCA Plan expressly provides for amendments to the Plan to accommodate the siting of facilities, such as the OWEF, because all feasible wind power locations were not known at the time the CDCA Plan was adopted. OWEF-6001-02 ("Sites associated with power generation or transmission not identified in [the CDCA] Plan will be considered through the Plan

Amendment process.").[4] With respect to Class L lands specifically, the ROD for the CDCA Plan weighed the pros and cons of siting renewable energy projects on Class L lands, and ultimately the decision was made to allow them. OWEF-5759.

Taking CDCA Plan requirements out of context, Quechan contends that Class L lands permit only "lower intensity" uses. Pl.'s Summary Judgment Brief ("Br."), ECF No. 80-1 at 2. Quechan is mistaken. The CDCA Plan specifically states that "[p]ublic lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources . . . ." OWEF-5920 (emphasis added). It notably does not state that Class L lands must be exclusively managed for lower-intensity uses.[5] In fact, the CDCA Plan clearly contemplates activities in Class L areas that would not qualify as "lower intensity." OWEF-6002 (describing procedures for locating fossil-fuel and nuclear power plants); OWEF-5922 (allowing electric generation plants); OWEF-5923 (allowing distribution and communication sites); OWEF-5926 (allowing new roads). Nothing in the CDCA Plan prohibits wind energy development on Class L lands. To the contrary, the CDCA Plan expressly allows for it.

B. The OWEF Will Not "Significantly Diminish or Degrade" Resource Values

Recognizing that wind energy development is allowable in Class L lands, Quechan concedes as much and argue instead that projects like the OWEF will significantly diminish and degrade sensitive resource values and, for that reason, are impermissible on Class L lands. *See* Br. at 3, 12. While Quechan contends that "[t]he FEIS [] confirms that the OWEF Project will significantly diminish and degrade the sensitive resource values" within the Project site, Br. at 3, nowhere in the FEIS or, for that matter in the administrative record, does it state that the Project will "significantly diminish and degrade" sensitive resources as that term is used in the CDCA Plan. Indeed, Quechan fails to cite a

[4] The Plan further contemplated plan amendments, such as the one at issue here: "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." OWEF-6002.

[5] The CDCA Plan contains special designations for areas with sensitive cultural resources. For example, certain lands have been designated Areas of Critical Environmental Concern (ACECs). OWEF-5934. These designations were made in close coordination with tribes. *Id.* Fifty-two archaeological areas were included in forty-seven ACECs; the OWEF site is not one. OWEF-5929.

single source where BLM made such a finding, instead relying upon the erroneous assumption that any adverse impact will "significantly diminish and degrade" resources. This premise is false.

First, while the FEIS acknowledges that the Project may have some adverse impacts on resources, there is nothing in NEPA or FLPMA that prohibits an action from moving forward simply because adverse impacts may result. *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) ("NEPA is not designed to prevent all possible harm to the environment; it foresees that decision makers may choose to inflict such harm, for perfectly good reasons."); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008) (same); *In re Montana Wilderness Ass'n*, 807 F. Supp. 2d 990, 996 (D. Mont. 2011) (declining to find that FLPMA contains a "non-degradation standard").

Second, and contrary to Quechan's assertion, Federal Defendants directly dispute that the Project will "significantly diminish and degrade" sensitive resource values. As discussed above, mitigation measures to lessen and/or avoid impacts to resources are a cornerstone of the OWEF's ROW grant. *See, e.g.*, OWEF-264-84 (Historic Property Treatment Plan); OWEF-308-19 (Buried Sites Sensitivity Model and Buried Sites Testing Plan); OWEF-20498-530 (Burrowing owl mitigation and monitoring plan); OWEF-681-720 (Habitat Revegetation Plan); OWEF-723-799 (Golden Eagle Conservation Plan); OWEF-326-338 (NAGPRA Plan of Action); OWEF-376-416 (Environmental and Construction Compliance Monitoring Plan). Additionally, the Applicant significantly altered its wind turbine configuration reducing the number of turbines precisely to reduce and/or avoid impacts to cultural and biological resources. *See supra* at 1. These changes were made in response to BLM analysis and public comments and only further demonstrate that the FLPMA land management and NEPA processes worked as intended.

Third, Quechan glosses over the fact that the total area estimated for any disturbance by the OWEF is approximately 574 acres and that the permanent Project footprint after construction will be approximately 116.5 acres. OWEF-590. The impacts of the OWEF are miniscule in relation to the total Class L land area, which encompasses 5,883,000 acres. *See* OWEF-5920. Given the Project's total area of disturbance, the Project will not plausibly "significantly diminish" or "degrade" Class L lands and the

resource values contained therein. When the numerous mitigation plans that are a part of the OWEF are considered, Quechan's argument that the Class L lands will experience significant and irreparable degradation is even less credible.

To support its arguments, Quechan relies on O*regon Natural Resources Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007), but that decision is not applicable to the CDCA. The Northwest Forest Plan ("NFP") in *Brong* and the CDCA Plan are two very different and distinct land use plans. The NFP was specifically developed to address longstanding conflicts over logging in old-growth forests where the endangered northern spotted owl resides. *Id.* at 1126. As such, six designated land use allocations or "reserve areas" as set forth in the NFP prohibited logging. *Id.* In *Brong*, the project at the center of the litigation would have permitted logging in an area that was designated a "reserve area" and considered "the heart of the NFP's ecosystem-based conservation strategy for the northern spotted owl and other endangered species." *Id.*

The same land use restrictions are not present in the CDCA Plan. Unlike the NFP in *Brong*, the CDCA Plan, while having a conservation-focus, is primarily based on FLPMA's concepts of multiple-use and sustained yield. OWEF-5914 ("[M]ultiple use, sustained yield and the overall maintenance of environmental quality are the context for CDCA management . . ."). While the CDCA Plan recognizes the importance of the natural environment, the Plan gives equal consideration to the public's need for consumptive uses (e.g., mineral extraction, livestock grazing, renewable energy development). OWEF-5914-15 ("The goal of the Plan is to provide for the use of the public lands, and resources of the [CDCA], including economic, educational, scientific, and recreational uses, in a manner which enhances wherever possible – and which does not diminish, on balance – the environmental, cultural, and aesthetic values of the Desert and its productivity."). Nor is the Class L designation, which contemplates even nuclear energy development, in anyway comparable to the "reserve area" at issue in *Brong*. Far from restricting consumptive uses, Class L lands are open to a variety of activities including competitive motorized vehicle events, sand and gravel extraction, mining, removal of vegetation, and

renewable energy development. OWEF 5757-59. These land use plans are in no way similar, and therefore *Brong* provides no guidance to this Court on the matters at issue here.[6]

In sum, Quechan's assertion that the Project will "significantly diminish and degrade" resource values is not supported by fact or by law. There is no record support whatsoever for Quechan's position. In light of the significant modifications made to the Project to avoid adverse impacts and the on-going obligations of the Applicant to further mitigate and avoid impacts, BLM has ensured that impacts to sensitive resource values will be minimized consistent with FLPMA and CDCA Plan requirements.

C. The OWEF Is Consistent With BLM's Visual Resource Management Obligations

1. Visual Resource Obligations

As background, FLPMA identifies visual resources as one of the many resources for which public lands should be managed. 43 U.S.C. § 1701 (a)(8) ("[T]he public lands [should] be managed in a manner that will protect the quality of . . . scenic . . . values . . . ."); 43 U.S.C. § 1702 (c) (identifying scenic values as one of many resources under FLPMA's multiple-use mandate). It does not give those resources special status relative to other resources. BLM manages those values through its VRM policy, which sets forth a process to inventory and manage visual values.[7] This process is composed of a three step approach. The purpose of BLM's VRM policy is to inform its land-use planning and surface

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[6] Plaintiff also relies upon the decision in *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) granting plaintiff's preliminary injunction request to support its position that Class L lands strictly prohibit renewable energy development. Br. at 6. This decision is similarly unhelpful. As an initial matter, the *Quechan* case was not a ruling on the merits, and it involved an entirely different renewable energy technology in a different part of the CDCA. Moreover, the *Quechan* court, without any analysis, only stated that the FLPMA claim "at least raises 'serious questions' for purposes of injunctive relief," and did not expand further on the issue. Moreover, Plaintiff also conveniently ignores this Court's decision in *Desert Protective Council v. United States Department of the Interior*, No. 12-cv-1281 (S.D. Cal.), which is more directly on point and involves the OWEF. In *Desert Protective Council*, this Court found that plaintiffs failed to demonstrate a likelihood of success on the merits with respect to their claim that the OWEF does not comply with the CDCA Plan. The Court found that "[w]hile Plaintiffs contend that the OWEF Project exceeds intended limits of such projects on Class L lands, the current record indicates that BLM examined these limits in the FEIS, along with the environmental impact of the project, and authorized the project to proceed." This Court concluded that "Plaintiffs have not shown a likelihood of success on the merits of their claim that the OWEF Project is not permissible on Class L land." The outcome should be no different here.

[7] BLM's VRM "policy" is derived from a various BLM manuals, handbooks, and instruction memoranda. *See e.g.*, OWEF-1085-87; 5583; 5669-92; 5693-722; 5723-39.

disturbing activity decisions to ensure that visual resource values are considered. VRM is not intended to be a "method to preclude all other resource development," OWEF-5665, such as the "development of wind energy in areas with high wind energy resource potential," OWEF-35361.

The first step in the VRM process involves a determination of an area's visual values, or its present visual conditions, by conducting a Visual Resource Inventory ("VRI"). BLM will assign a VRI Class, ranging from VRI Class I (with the highest visual value) to VRI Class IV (with the lowest visual value), to represent the current visual landscape. OWEF-5678-79. VRI Class I designations are generally assigned to areas such as Wilderness Areas, while VRI Class IV designations are reserved for those areas that have already been developed. OWEF-5678. VRI classes "are informational in nature" and provide a "basis for considering visual values." OWEF-5678. They "do not establish management direction" or "a basis for constraining or limiting surface disturbing activities." *Id.*

After VRI Class designations have been made, the second step involves the establishment of VRM Classes for particular areas of public lands. BLM makes VRM Class designations by considering the visual values (i.e., the VRI Classes) in a given area against other resource values there, such as wind energy potential, as well as the BLM's current (or proposed) use of those resources. OWEF-5728. VRM Classes range from VRM Class I (preservation of the existing visual landscape) to VRM Class IV (allowance for major modifications) and are different and distinct from VRI Classes. VRI and VRM classes should not be confused. Unlike VRI Classes, which only document the present visual values of an area, VRM Classes set forth the way in which BLM will manage those values in light of its overall determination of how to manage the other resources in that area. OWEF-35361. As a result, VRM Class designations will not necessarily coincide with VRI Class designations because the intended use of the area may not necessarily align with the current visual values. For example, there could be an area with high visual values (e.g., VRI Class I or VRI Class II) that the BLM nevertheless determines should be available for mining. Such an area would likely receive a VRM Class IV designation despite its inventoried visual values.

Once a VRM Class designation has been made, the third step in the process requires BLM to determine if the proposed action conforms to the applicable VRM Class objectives. VRM designations

are established in one of two places. In BLM planning areas were VRM objectives already have been established as a component of the applicable land use plan, VRM Class designations are assigned as a component of the plan. For planning areas such as the CDCA, where no such objectives have been established but a project is proposed, BLM establishes an interim VRM Class, the geographic scope of which is limited to the immediate project area. OWEF-5679; OWEF-5696.

For the OWEF, BLM inventoried the Project area and designated certain sites as VRI Class II and VRI Class III because of their moderate to high visual quality. *See* OWEF-1088-1092. In establishing the interim VRM Class designations for the Project site, BLM initially designated the Project site as interim VRM Class III, but ultimately determined, as explained below, that an interim VRM Class IV was appropriate given the site's wind energy potential. OWEF 46246.

2. The OWEF Conforms to Interim VRM Class IV

The core of Plaintiff's argument is that the Project site is within VRM Class II and Class III areas and that BLM violated FLPMA by approving the Project, which can only conform to a VRM Class IV designation. Plaintiff's argument is fundamentally flawed. Nowhere in the record does it state that the Project site has been finally designated VRM Class II or Class III. Instead the record shows that the Project site has a final interim designation of VRM Class IV, and the Project conforms fully with that designation.

Plaintiff strains to demonstrate that the Project site is within VRM Class II and III areas, but the administrative record clearly shows that the Project area has been designated as interim VRM Class IV. *See, e.g.*, OWEF-1483 ("[T]he project site is located on BLM-administered lands managed under an Interim VRM Class IV designation, which permits a high level of change to the landscape, including activities that may dominate views."). To reach this erroneous conclusion, Plaintiff points to a variety of different sources, none of which supports Plaintiff's claim. First, Plaintiff contends that BLM conducted visual resource inventories for the CDCA that "designated the OWEF lands as Class III lands." Br. at 10. As discussed above, inventories or VRI Class do not dictate how visual resources are managed or what VRM Classes are assigned, they simply record the visual landscape as it is and nothing more. OWEF-5667; OWEF-5678. That BLM inventoried the Project site as Class II and III simply means that

the area has visual values; it does not mean that those lands must be managed that way.[8]

Plaintiff also argues that the OWEF site is within Class III lands because an entirely different project, using different technology, in a different part of the CDCA was managed in accordance with an interim VRM Class III designation. This argument should be disregarded because Plaintiff relies on extra-record materials that are not properly before this Court. Should this Court entertain Plaintiff's argument, it should be dismissed outright. Plaintiff fails to cite a single source to support the proposition that an interim VRM Class designation for a wholly separate project must be applied to the OWEF. The applicable BLM guidelines expressly state that interim VRM Classes are based on visual inventory specific to a given project area. OWEF-5696 (Interim [VRM] classes will be developed [based on a VRI] . . . limited to the area affected by the project ….” (emphasis added)). Thus, an interim classification on one project site does not dictate the classification in an entirely different area.

Plaintiff also takes issue with the changes made to the interim VRM Class designation between the Draft EIS and the Final EIS. Br. at 11. This, however, is entirely proper as addressed in *Southern Utah Wilderness Alliance (“SUWA”),* 144 IBLA 70 (1998). In *SUWA*, the Interior Board of Land Appeals (“IBLA”) found that the agency did not comply with FLPMA because the impacts resulting from the proposed project were inconsistent with the established VRM Class assigned to the project area. *Id.* at 86. Relevant to the present situation, however, is the IBLA's discussion with respect to what BLM should have done after realizing in the Draft EIS that the proposed project would not conform to the proposed VRM Class designation. Notably, the IBLA did not find that BLM was required to inflexibly hold fast to the VRM Class designation identified in the Draft EIS – something that Plaintiff suggests BLM was required to do here. Indeed, quite the opposite is true: the IBLA reprimanded BLM for failing to modify the VRM Class designation noting:

[8] Underlying Plaintiff's argument is the belief that BLM must adopt a VRM Class consistent with the VRI Class. *See* Br. at 11. That is simply not the case. OWEF-35361 (VRM Classes are designated “based on inventories of visual resources as well as management considerations for other potential land uses”) (emphasis added). BLM's policy expressly contemplates that VRM class can be different than inventoried VRI classes based BLM's determination of how an area should be used. *Id.*

> If it were assumed, as the Draft RMP/EIS explicitly stated, that under the RMP resource allocation decisions that 'visual contrast rating scores would exceed the VRM class objectives' for a number of areas, the proper response would have been to delineate those areas and expressly lower the VRM inventory rating to reflect the RMP's resource allocation decisions … More particularly, where acreage which had been inventoried as VRM Class II was thereafter determined to be best suited to leasing … and BLM realized that a result of this resource allocation decision would be an inability to manage that acreage as … VRM Class II, the VRM classification should have expressly been adjusted to at least VRM Class III. This was not done.

Id. at 85. In other words, the IBLA's criticism toward BLM was directed toward the agency's failure to adjust the VRM Class to accommodate its proposed action when it had an opportunity to do so. Instead, BLM opted to maintain the existing VRM Class designation. *Id.* at 86. Rather than supporting Plaintiff's suggestion that it was improper for BLM to modify the interim VRM Class designation during the NEPA process, the IBLA decision expressly recognizes BLM's discretion to modify VRM designations based on new considerations about how the resources in a given area should be managed, which is what was done here. OWEF 46246. There is nothing in the CDCA Plan or the Class L designation that limits or alters that discretion. Indeed, Plaintiff offers no authority to the contrary.

D. The OWEF Will Not Result in Unnecessary or Undue Degradation

BLM has broad discretion in determining how best to implement FLPMA's prohibition on "unnecessary and undue degradation" ("UUD"). *Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011). Moreover, FLPMA does not prohibit any and all degradation of public lands; it only prohibits "unnecessary and undue" degradation. The Ninth Circuit has upheld land management actions even though degradation of the public lands is likely to occur. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 724–25 (9th Cir. 2009) (finding that BLM did not violate FLPMA's UUD standard in approving mining projects despite finding that some facilities failed to meet applicable visual impact standards); *see also Sierra Club v. Clark*, 756 F.2d 686, 691 (9th Cir. 1985).

Quechan contends that allowing the OWEF would result in UUD because the Class L lands are specifically designated for the preservation and protection of resources. Br. at 12. As discussed *supra*, consistent with FLPMA's requirements the CDCA Plan is a multiple-use, sustained yield plan. Moreover, as previously discussed, *see supra* at 7, BLM has imposed extensive mitigation measures to avoid or reduce any adverse impacts. With these protections, BLM reasonably concluded that the

OWEF Project would not result in any UUD. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011) (finding that BLM reasonably concluded that mitigation measures would prevent UUD); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, No. 3:08-CV-00616-LRH-WGC, 2012 WL 13780, at *8 (D. Nev. Jan. 4, 2012) (concluding that BLM's mitigation measures were sufficient to avoid UUD).

Nor is there any merit to Quechan's contention that the Project will result in UUD because BLM could have considered alternate Project sites but chose not to. Br. at 13. BLM, in fact, considered a number of alternate Project sites but found that those areas were infeasible or impracticable for wind energy development because they were in specially designated wilderness areas or ACECs, or they had low-quality wind resources. OWEF-908. For example, BLM considered one alternate site with marginal wind resources, but eliminated it from consideration because it would have resulted in more impacts as the site needed more turbines for the same power output relative to the proposed site.[9] *Id.* The suggestion that BLM should have considered Project sites outside of Imperial County is equally without merit. As an initial matter, BLM is responding to the Applicant's application for a ROW grant in a specific area of Imperial County. BLM need not consider alternate project sites that are beyond the reasonable scope of the Applicant's proposal or beyond the jurisdiction of the El Centro Field Office. *See Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1522 (9th Cir.1992) (an agency is "entitled to identify *some* parameters and criteria-related to Plan standards-for generating alternatives to which it would devote serious consideration. Without such criteria, an agency could generate countless alternatives."). Quechan offers no other viable alternative but merely suggests that BLM should have considered potential sites on Class M and I lands within the 25 million acre expanse of the CDCA. Br. at 13. Quechan's broad proposal, however, does not take into consideration whether any area within Class M or Class I lands have high wind potential conducive to wind energy development or are located near

[9] In addition to considering alternate BLM-managed sites, BLM also examined private land alternatives. In each instance a detailed explanation of why an alternative site was eliminated from further review was provided. OWEF-907-08.

existing transmission lines and other infrastructure, which are some of the factors considered in the Applicant's search for a suitable site. OWEF-907. That BLM did not consider and eliminate every inch of the CDCA other than the Project site as a potential alternative location does not demonstrate that BLM violated FLPMA or NEPA, as neither statute requires such extreme breadth of analysis.

II. Quechan's NEPA Challenge Lacks Merit

Quechan argues that BLM failed to analyze: (1) all renewable projects in the CDCA in one EIS; (2) cumulative impacts across the CDCA; (3) growth-inducing effects of the OWEF; and (4) Project consistency with local laws. As discussed below, Quechan's argument lack factual and legal support and should be rejected.

A. Neither NEPA Nor Its Implementing Regulations Required BLM to Analyze All BLM Renewable Energy Projects Across 25 Million Acres of Land in a Single EIS

Quechan's argument that BLM violated NEPA because it did not consider every "priority" renewable energy project in a single EIS has been flatly rejected by a court in an analogous litigation.[10] In *La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee v. Interior*, No. 2:11-cv-395-ODW, 2012 WL 2884992 (C.D. Cal. July 13, 2012), the plaintiffs alleged that BLM violated NEPA by failing to analyze the Chevron Project, a solar energy project located in the CDCA, along with other "priority" renewable energy projects in a single programmatic analysis. *Id.* at *3-4. The court rejected this argument and found that under NEPA the government has the discretion to decide whether to prepare such a comprehensive NEPA analysis. The court went on to note that the government may exercise its discretion to prepare a single EIS "where the projects are 'connected,' 'cumulative,' or

[10] To the extent that Plaintiff suggests BLM is required to prepare a programmatic EIS, there is nothing in NEPA or NEPA's implementing regulations that require BLM to prepare such an analysis or to consider in one EIS the myriad of disparate renewable energy projects spread out over 25 million acres. *See Kleppe v. Sierra Club*, 427 U.S. 390, 413–14 (1976); *see also Nevada v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006) ("The decision whether to prepare a programmatic EIS is committed to the agency's discretion."). Indeed, NEPA and its implementing regulations are completely silent as to when to conduct a programmatic EIS. All the regulations state is that a pending programmatic EIS does not preclude or delay other project-specific analyses. 40 C.F.R. § 1506.1(c). In all events, BLM prepared one for wind energy development, *see* OWEF-19070-20453.

'similar' actions under the regulations implementing NEPA." *Id.* at *4 (citation omitted). Plaintiffs there failed to establish that any of the so-called "priority" projects were connected, cumulative, or similar, and their conclusory assertion that the Chevron Project was part of the "priority" solar-energy projects in the area was insufficient to establish whether preparation of a single EIS covering these various projects was necessary. *Id.* So too here. Quechan's conclusory statements about a single EIS fail to establish that any of these "priority" projects are connected, cumulative, or similar.

B. BLM Considered Potential Cumulative Impacts

Quechan argues that BLM's cumulative impact analysis is "incomplete" and "inadequate" because BLM failed to properly consider the cumulative impacts of approving multiple projects on Class L lands. Br. at 16. Quechan's assertion that all alternative energy projects falling within the CDCA's broad area must be included in BLM's analysis of cumulative effects is wrong and assumes that Quechan, not the agency, determines the appropriate scope of analysis.[11] *See Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (determination of the scope of analysis "is a task assigned to the special competency of the appropriate agencies"). The Court should defer to BLM's determination of the appropriate scope of analysis for each resource analyzed in Chapter 4 of the Final EIS.[12] *See infra* n. 13.

In determining the scope of the project to be evaluated under NEPA, Council for Environmental Quality regulations require an agency to consider cumulative impacts, or the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. As noted above, the "determination of

[11] This analysis applies to the two examples cited by Plaintiff relying on extra-record evidence -- Ocotillo Sol Project and Granite Mountain. Br. at 16. As explained *supra*, Plaintiff's reliance on extra-record evidence is improper and provides grounds for disregarding this argument altogether. In all events, as evident in the record, both projects are not within the area of analysis for cultural resources for the Project. OWEF-1246. As such, Plaintiff has not shown, nor can it show, that BLM failed to consider current or reasonably foreseeable projects in its extensive cumulative impacts analysis.

[12] As one component of the CDCA, Class L lands are not a single undifferentiated area of land but are ecologically and geographically diverse and managed in accordance with 19 identified Multiple Use Class Guidelines. *See supra* at 2. Because of the disparate uses permitted and managed within the different areas composing the CDCA (and the Class L lands within the CDCA), the geographic scope of the agency's analysis varied with the particular type of resource being evaluated. OWEF-929.

the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." *Kleppe*, 427 U.S. at 414; *see Churchill Cnty. v. Norton*, 276 F.3d 1060, 1077-80 (9th Cir. 2001) (deferring to agency decision on cumulative impacts analysis); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002) (same); *Inland Empire Pub. Lands Council*, 88 F.3d at 763-65 (same).

Here, the FEIS devotes approximately 109 pages to a detailed discussion of the past, present and reasonably foreseeable cumulative impacts of projects and development in the vicinity of the OWEF across 19 impact categories.[13] OWEF-1158-1180. For each potentially impacted resource, BLM specifically explained the basis for its determination of the appropriate geographic scope for the cumulative effects analysis. This analysis is entitled to substantial deference. Indeed, Quechan provides no credible basis as to why Class L lands (as opposed some other management unit), which encompass nearly six million acres, is the appropriate geographic analysis area. OWEF-5920.

Second, Quechan contends that BLM failed to consider and discuss the cumulative effects resulting from the Project together with cumulative effects from other past, present and reasonably foreseeable projects on protected resources and, in particular, cultural resources. Br. at 17-18. Not so. Across resource categories, BLM considered numerous projects and anticipated cumulative effects. OWEF-001162-1186. For cultural resources, BLM considered the Project area and the ten miles immediately surrounding it, which is an area equivalent to the Project's Area of Potential Effects ("APE") under the NHPA. OWEF-929; OWEF-0001832. In determining the area for purposes of cumulative impacts to cultural resources, BLM considered the unique nature of the resource. Cultural

[13] These impact categories include: air resources (OWEF-1196-1201); climate change (OWEF-1212-13); cultural resources (OWEF-1244-47); environmental justice (OWEF-1263); lands and realty (OWEF-1271-73); mineral resources (OWEF-1284-85); multiple uses (OWEF-1295-97); noise (OWEF-1317-20); paleontological resources (OWEF-1163-76); public health and safety (OWEF-1365-67); recreation (OWEF-1385-87); social and economic issues (OWEF-1400-02); soil resources (OWEF-1420-1421); special designations; transportation and public access (OWEF-1452-53); vegetation resources (OWEF-1472-77); visual resources (OWEF-1495-99); water resources (OWEF-1500-58); and wildland fire ecology (OWEF-1576-78).

resources are necessarily inanimate and static, and therefore potential impacts are generally not widely dispersed as compared to air quality or wildlife impacts. OWEF-929. Therefore, BLM properly determined the geographic scope of analysis for such effects. *Id.* Moreover, Quechan cites no authority for the proposition that BLM commits an abuse of discretion by not including in its cultural resources cumulative impact analysis: a solar project that is over 130 miles away (Blythe) from the OWEF or a solar project that has been rescinded (Imperial Valley Solar).[14] Indeed BLM considered other renewable projects within the APE. OWEF-0001246.

Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003), is instructive. Plaintiffs in *Selkirk* similarly argued that the Forest Service violated NEPA by constraining the geographic scope of the EIS. *Id.* at 958. However, the Forest Service raised concerns that expanding the scope of the cumulative impacts analysis would actually dilute the magnitude of the cumulative impacts and would be improper. *Id.* at 959. The court found that "the Forest Service in this case took a 'hard look' at the activity in the [project area] and made a considered judgment that the EIS would be a more accurate document if it did not consider the [plaintiffs' suggested] activity in the EIS's cumulative impacts analysis." *Id.* Here, BLM determined that the geographic scope for the cumulative impacts analyses should be done on a resource-by-resource basis and concluded that the most reasonable cumulative impacts area for cultural resources was the Project's APE. This determination is reasonable and entitled to deference.[15]

Third, Quechan's argument that BLM's approval of the Project is "in direct conflict" with the

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[14] BLM's analysis of the cumulative effects of the OWEF and several other projects on cultural resources within the APE is well documented and demonstrates careful consideration. Specifically, the FEIS discusses the cumulative impacts arising from ten current and reasonably foreseeable projects in the surrounding area. OWEF-1245-46. It describes the relevant tribal concerns in detail and acknowledges that projects in the surrounding area such as the Sunrise Powerlink transmission line will contribute to changes in visual conditions, modify traditional landscapes, and/or limit traditional uses of an area. OWEF-1247. Based on this analysis, the FEIS concludes that the OWEF's impacts, when combined with impacts from past, present and reasonably foreseeable projects "contribute in a small but [meaningful] way to the adverse impacts for cultural resources." *Id.*

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

CDCA plan lacks a legal or factual basis. Quechan fails to offer any support from the CDCA plan itself — or elsewhere — for its proposition that the CDCA plan requires BLM to engage in a CDCA-wide cumulative effects analysis whenever the agency contemplates approving multiple projects within the CDCA. Indeed, broad statements within the CDCA Plan EIS describing different resource classes cannot credibly be read to divest BLM of its discretion to determine the appropriate geographic scope of analysis for cumulative impacts. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002) does not dictate a different result. There, the court found simply that road density amendments proposed in successive timber sales on the same National Forest should have been considered together. *Id*. at 895-897. *Dombeck* does not stand for the proposition that all cumulative effects of any action within a National Forest unit must be considered forest-wide, so it cannot support an argument that BLM should have analyzed the cumulative impacts to all resources over the entire 25 million-acre CDCA.

While the approach an agency may employ in assessing cumulative impacts may vary widely from project to project, it always remains true that the agency's selected approach is a matter left to the sound discretion of the agency. *League of Wilderness Def.*, 549 F.3d at 1218. The cases cited by Quechan do not derogate from that principle. As a purely procedural statute, NEPA does not require anything other than evaluation and disclosure, which the agency did here. In short, Quechan has failed to show that BLM's analysis of cumulative effects was arbitrary and capricious.

C. BLM Considered Potential Growth-inducing Effects of the Project

Contrary to Quechan's argument (Br. at 20), BLM adequately analyzed "growth inducing effects." 40 C.F.R. § 1508.8(b). The EIS discusses such effects concerning jobs, housing, population, land use, and other socio-economic factors. *See* OWEF-001638-1639. As the EIS explains, growth in the Project area is expected to occur even without the Project, which can be viewed as a timely response to such growth. OWEF-001639 ("the project would serve projected growth of the region while working towards achieving the goals of the [Global Warming Solutions Act of 2006]."). To the extent that Quechan complains that the Project will induce other wind energy projects in the area, that argument is vague and highly speculative and beyond the scope of analysis required under NEPA. *See Marsh v. Sierra Club*, 769 F.2d 868, 868 (1st Cir. 1985); *Allison v. Dep't. of Transp.*, 908 F.2d 1024, 1031 (D.C.

Cir. 1990) ("It is not required by the pertinent CEQ regulations to consider projects that are neither related to nor dependent upon the [project at issue]."); *Life of the Land v. Brinegar*, 485 F.2d 460, 469-70 (9th Cir. 1973) (claim that tourism increase from Honolulu airport expansion would increase permanent population too speculative for NEPA purposes). An analysis of growth-inducing impacts need not be perfect, only "reasonably thorough." *Stop H-3 Ass'n v. Dole*, 740 F. 2d 1442, 1461-62 (9th Cir. 1984); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F. 3d 517, 525 (9th Cir. 1994) (same). The EIS here meets that standard.

D. BLM Fully Analyzed Project Consistency with Local Laws

Quechan's argument that BLM failed to consider whether the Project would conform to local laws (Br. at 25) ignores the substantial record in this case. Imperial County was the California Environmental Quality Act lead agency on this Project and was actively involved in its environmental review, including an analysis of whether the Project was in conformance with local laws. OWEF-31605. Although, as Quechan notes, the Project falls within BLM's jurisdiction such that the CDCA Plan's requirements supersede Imperial County's plans, the fact that federal law trumps state law does not mean that BLM failed to consider Project conformity with local laws. OWEF-1266. The FEIS contains a robust discussion of such conformance across numerous resources. *See, e.g.*, OWEWF-0002669 (general CEQA conformity); OWEF-31884 (water); OWEF-31916-18 (wildlife); OWEF-920-21 (air); OWEF-965-67 (cultural); OWEF-977-79 (lands and realty); OWEF-31804 (recreation); OWEF-31823-26 (transportation and public access) and OWEF-31858-59 (vegetation). As result Quechan's bare assertions do not withstand scrutiny.

III. Quechan's Post-ROD Challenges Are Not Justiciable

A. Quechan Fails to Articulate a Cognizable Challenge to Post-ROD Conduct

Quechan challenges BLM's oversight of the Applicant's activities that occurred after the ROD was signed. *See* Br. at 24 (alleging violations of NHPA, and NAGPRA[16] as part of NHPA, after ROD

[16] Quechan does not assert a standalone NAGPRA claim, but rather are part of its NHPA claim.

approval); *id* at 25 (alleging failure to enforce ROW approvals). None of Quechan's challenges to post-ROD activities are legally cognizable. First, oversight activities are not "final agency actions" subject to judicial review. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004) (SUWA). Second, and relatedly, such actions, even if final, are committed to the agency's discretion and are not reviewable under the APA. *Id.*; *Heckler v. Chaney*, 470 U.S. 821, 834-835 (1985).

Judicial review under the APA is limited to "final agency action" under Section 704. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003). While the APA also provides a cause of action to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), the Supreme Court has made it clear that the types of "agency action" subject to this provision are limited to the types of agency action that can be reviewed when final. *SUWA*, 542 U.S. at 62-63. A claim brought under the APA must challenge one of "five categories of decisions made or outcomes implemented by an agency – 'agency rule, order, license, sanction [or] relief.'" *Id.* at 62 (quoting 5 U.S.C. § 551(13)). Furthermore, "'failure to act,' is [] properly understood as a failure to take an agency action -- that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13)." *Id.*

Quechan has failed to explained how any of these post-ROD oversight and enforcement actions amount to "final agency actions" reviewable by this Court, or how these action are "properly understood as a failure to take agency action." *Id.* With respect to the former, this Court lacks jurisdiction over Quechan's claims challenging post-ROD activities because they are not a "rule, order, license, sanction, or relief" as those terms are defined in the APA. Rather the post-ROD activities constitute the necessary steps to complete a duly-authorized project, not final agency actions as that term is properly understood. *See Nat'l Parks Conservation Ass'n*, 324 F.3d at 1237 (district court lacked jurisdiction because National Park Service's failure to discontinue the private occupancy of structures was not final agency action); *see also Bennett v. Spear*, 520 U.S. 154, 178 (1997). With respect to the latter, the post-ROD activities cannot credibly be the basis of a "failure to act" challenge. In *SUWA*, the Supreme Court concluded that a plaintiff can only compel agency action if it can assert that the agency "failed to take a discrete agency action that it is required to take." *SUWA*, 542 U.S. at 62-64. Enforcement of the Applicant's implemen-

tation activities do not amount to "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof," and thus are not a discrete agency action that BLM is required to take. As Quechan currently formulates its claims, these activities are not subject to APA review.

Second, even assuming there was an "agency action" before this Court, Quechan challenges unreviewable discretionary enforcement decisions. The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. "An agency decision to act or not to act is entitled to significant deference." *Franco v. U.S. Dep't of the Interior*, 2012 WL 3070269, *9-10 (E.D. Cal. 2012); 5 U.S.C. § 701(a)(2). In *Heckler*, the Supreme Court held that because the APA excludes decisions "committed to agency discretion by law" from its scope, agency refusals to investigate or enforce alleged violations are generally unreviewable and outside a court's jurisdiction.[17] 470 U.S. at 843. Such a decision is unsuitable for judicial review because it "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831. The only exception is where the substantive statute provides guidelines for the agency to follow in exercising its enforcement powers. *Id.* at 832-33. No such guidelines exist under FLPMA with respect to ROW implementation. Quechan does not argue otherwise.

Based on the foregoing, Quechan's post-ROD implementation claims fail under the standards articulated in both *SUWA* and *Heckler*. Accordingly, this Court lacks jurisdiction over these claims.[18]

B. BLM Fully Complied with Section 106's Procedural Requirements

Quechan argues that BLM failed to identify all historic properties prior to approving the Project

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[17] "It is uncertain in light of recent Supreme Court precedent whether these threshold limitations are truly jurisdictional or are rather essential elements of the APA claims for relief." *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). The Court need not reach this question here, though, because under either approach BLM's decisions were unreviewable. *See id*. at 92.

[18] For the reasons discussed *supra*, Quechan's challenge to BLM's ROW approvals is meritless. Even assuming *arguendo* that Quechan could challenge ROW compliance decisions — which it cannot —Quechan's argument is based on excluded extra-record materials, *see supra* at n.3, that show nothing more than mere disagreement with how the agency is exercising its enforcement powers over the implementation of the Project. Br. at 25. Moreover, the record shows extensive oversight by BLM as demonstrated by the 3,563 documents lodged with this Court as part of the post-ROD administrative record.

and that the agency arbitrarily limited the Project boundaries. Contrary to Quechan's bare conclusions, the record demonstrates robust identification efforts coupled with significant mitigation measures. The NHPA requires an agency to take the following actions prior to approving a federal undertaking: "make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the [NRHP] . . . ; assess the effects of the undertaking on any eligible properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (citations omitted). Quechan challenges the first step of the NHPA review process. Br. at 22. But as explained below, BLM fully complied with all Section 106 and government-to-government requirements. *See S. Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102, 108 -115 (D.D.C. 2004).

As background, the Project's archeological consultant, Tierra Environmental Services, Inc. (Tierra), commenced an archaeological resource survey (ARS) in late September 2010 and, in May 2011, prepared a Preliminary Historical Resources Reconnaissance Survey/Evaluation for the project. OWEF-39822-848. The surveys included two components: a Class III intensive heritage resources survey of the 8,000-acre "direct impact" APE[19] and a Class II sample survey of 20 percent, or 1,400 acres, of the 7,000-acre "indirect impact" APE.[20] OWEF-38961. Among other things, the surveys identified and documented all significant prehistoric and historic resources in the project area, focusing on the delineation of the boundaries of identified archeological sites. *Id.* In light of this robust process, there was not, as Quechan suggests, an arbitrary delineation of site boundaries. Rather, Tierra, with BLM's authorization, reasonably focused survey work on areas of direct impact and the surrounding buffer areas. *See* OWEF-38959. In addition, 24 sites that did not fall within direct impact or buffer areas were still recorded in an addendum report. OWEF-28388-89. The agency's decision to focus

[19] The direct impact APE consists primarily of areas around corridors where lines of wind turbines, access roads, and/or transmission lines are to be placed, as well as other project infrastructure like the substation – i.e., they are areas where direct physical disturbances could occur OWEF-38985.

[20] The indirect APE is the area of the Project that may be subject to indirect (i.e., non-physical) impacts. OWEF-38961.

historic survey work on areas that might be affected by project activities is precisely the kind of expert decision to which significant deference is due. *Lands Council*, 537 F.3d at 1000.

Moreover, despite Quechan's bare assertions to the contrary, tribal monitors also participated in the ARS inventory process and BLM's third party cultural resources contractor, Environmental Science Associates ("ESA"), periodically audited the work that was being done to confirm its adequacy. OWEF-58446-48. In total, 11,332 acres were surveyed in 1,000 foot-wide corridors. OWEF-28230. The ARS documented a total of 287 archaeological sites within the Project's APE. [21] OWEF-1605. During this same time period, the California Native American Heritage Commission conducted a sacred sites records search and reported that no sites considered spiritually significant or sacred by California Native Americans were reported within the Project vicinity. OWEF-28230-1. This robust procedure is what the NHPA requires. Quechan's argument that the agency must scour every acre for historical properties is neither required by NHPA nor any authority. *Summit Lake Paiute Tribe of Nev. v. Bureau of Land Mgmt.*, No. 11-cv-70336, 2012 WL 5838155, at *2 (9th Cir. Oct. 22, 2012) (BLM made good faith effort under NHPA to identify historic properties through survey work) (attached as Exhibit A).

As a result of these survey efforts, BLM worked with the Applicant to redesign the Project to avoid direct physical impacts to identified resources, including all archaeological sites identified as part of the Class II and Class III ARS. OWEF-268; *see also* OWEF-847. In total, 43 turbines were eliminated from the original proposed action to avoid historic properties. In addition to avoidance, the MOA imposed a number of additional protection measures to minimize or mitigate the impact of the Project, including a robust Plan for Archaeological Monitoring, Post-Review Discovery, and Unanticipated Effects. OWEF-25687-25692. Moreover, the Plan sets forth specific procedures to follow if or when additional resources are encountered during construction or operation. *Id.*

[21] Quechan contends that "dozens of new cultural sites" have been identified. Br. at 22. This statement is impermissibly based on extra-record material and alleged post-ROD conduct that cannot be the barometer of the reasonableness of the agency's decision to approve the Project. *See supra*. Moreover, the MOA, to which the SHPO and the Advisory Council are signatories, contemplated post-ROD discoveries and provided a protocol for such discoveries. OWEF-25687-92. The identification of a cultural artifact does not give rise to a NHPA violation.

Based on these surveys, and the mitigation measures developed to avoid and protect known cultural resources, BLM submitted a MOA reflecting those measures to the California SHPO and ACHP, noting that there would be unmitigated adverse effects but that all currently identified historic resources would be avoided. *See* OWEF-28390. The MOA and the attendant plans—including the NAGPRA Plan of Action (OWEF-23797)—were also shared with the tribes, including Quechan. OWEF-23627-23811. Quechan, along with other tribes, commented on the MOA. OWEF-23627. Their comments were duly considered and incorporated as appropriate. OWEF-23627-29. Finally, the SHPO and the ACHP both signed the MOA. OWEF-238. The MOA concludes the Section 106 process and reflects a determination that impacts to historic resources have been resolved to the extent practicable. 36 C.F.R. § 800.6(c). Quechan has pointed to no evidence to the contrary. When this occurs, "[w]hile the plaintiffs may disagree with the conclusion, they have no recourse under Section 106." *Neighborhood Ass'n of the Back Bay v. FTA*, 393 F. Supp. 2d 66,76 (D. Mass. 2005). In sum, BLM has fulfilled its obligation to "make a reasonable and good faith effort" to identify historic properties potentially affected by the Project. 36 C.F.R. § 800.4(b)(1); *Norton*, 326 F. Supp. 2d at 108-15.

C. BLM Engaged in Robust Consultation with Plaintiff and other Tribes

Quechan's argument that BLM failed to consult with the Tribe and gave short shrift to tribal values discounts how closely BLM worked with Quechan and other tribes to understand the effects of the Project on cultural resources. BLM held four site visits with tribal representatives and dozens of in-person tribal consultation meetings with all interested tribes, in addition to the extensive correspondence and other outreach that occurred related to the project. *See e.g.*, OWEF-30342-43; OWEF-2810; OWEF-29117-140; OWEF-29164-202; OWEF-29430-33; OWEF-29458-62; OWEF-29480 (providing dates for two upcoming Section 106 meetings); *Summit Lake*, 2012 WL 5838155 at *1 (BLM's four meetings with Tribe were sufficient consultation effort). The MOA that resulted from a two-year consultation process reflected input from all consulting parties, including the tribes, the ACHP, and the SHPO. Although certain adverse effects could not be avoided, BLM fully considered and acknowledged those impacts as demonstrated by its approval of the Refined Project, which eliminated over 25% of the turbines (43 of the 155 turbines) analyzed under the Proposed Action. OWEF-2810. In response to

information about the spiritual and cultural significance of the Project site, the Refined Project eliminated turbines from around the Spoked Wheel Geoglyph and Coyote Mountains to preserve viewsheds that tribes, including Quechan, claimed to be important to them. Similarly, based on these concerns, the Project's ROD amended the CDCA Plan to make unavailable for wind development 2,300 acres within the original proposed action area. As discussed *supra*, the SHPO and the ACHP agreed with the proposed mitigation plans for historic and cultural resources, and the parties entered into the MOA, which became effective on their signature, as the regulations do not require tribes to sign the MOA. 36 C.F.R. § 800.6(c)(1).

Despite this robust process, Quechan nonetheless argues that BLM failed to engage the Tribe in government-to-government or Section 106 consultation.[22] Quechan presses two arguments to prove this point: (1) the Tribe never met with the actual decision-maker; and (2) consultation happened too late to be meaningful. Both arguments fail.

As an initial matter, Quechan's contention that consultation does not happen unless the Secretary of Interior personally meets with the Tribe is meritless. The BLM manual on tribal consultation is clear: the Secretary may delegate that responsibility to others, which is what happened here. BLM Tribal Manual 8120- Tribal Consultation Under Cultural Resources (Dec. 3, 2004), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.80216.File.dat/8120.pdf. BLM policy dictates that field managers conduct consultation. *Id.* Here, in addition to field manager involvement, the State Director as well as Department-level officials

[22] Plaintiff conflates Section 106 and government-to-government consultation throughout their briefing. BLM addresses both issues concurrently because Plaintiff, in government-to-government consultation, raised Section 106-related issues. Section 106 creates procedural obligations, providing that "[c]onsultation should commence early in the planning process." 36 C.F.R. § 800.2(c)(2)(ii)(A)). The basis for government-to-government consultation include various orders— which by their terms do not create judicially-enforceable rights— and general policies: President Clinton's May 14, 1998, and November 6, 2000, Executive Orders, "Consultation and Coordination With Indian Tribal Governments," Exec. Order No. 13084, 63 Fed. Reg. 27655, Sec. 7 (May 14, 1998), Exec. Order No. 13175, 65 Fed. Reg. 67349, Sec. 10 (Nov. 6, 2000); President Obama's November 5, 2009, "Memorandum on Tribal Consultation," 74 Fed. Reg. 57881; Interior's "Policy on Consultation with Indian Tribes" (proposed) 76 Fed. Reg. 28446–01 (May 17, 2011).

also met with the Tribes that requested such a meetings. *See, e.g.*, OWEF-26362; OWEF-29442-29457. Tribal concerns were fully considered at all levels of Interior, and played a material role in informing its decision on the Project.

Furthermore, Quechan's argument that BLM's Section 106 and government-to-government consultation was too late and too limited also misses the mark. Plaintiff was notified of the Project's ROW application two years before the ROW grant was signed. OWEF-30353; OWEF-24792. BLM met with the Tribe's Cultural Committee on July 20, 2010 to discuss the Applicant's ROW applications, OWEF-30342-43, and invited them to consult shortly thereafter, OWEF-30319, a request that was reiterated on March 9, 2011. OWEF-30224-31. The BLM met with the Cultural Committee again on April 6, 2011. OWEF-29524. Starting in April 2011, BLM repeatedly (both in formal written correspondence and via email) consulted with the Quechan about the OWEF and attempted to establish monthly meetings about the OWEF and other projects. OWEF-30196; OWEF-30122; OWEF-30080; OWEF-30047; OWEF-29688; OWEF-29480; OWEF-29357. Despite these efforts, the next meeting did not occur until January 31, 2012. OWEF-28101. Similarly, the BLM invited the Quechan and others to comment on the archeological resources survey methodology and to send monitors to observe the survey in 2010, yet the Quechan elected not to participate. OWEF-30224-31; *see also* OWEF-29524 (noting that from April 6, 2011 to January 10, 2012 requests to be added to Council's meeting agenda had not been successful). Notwithstanding Quechan's pattern of non-responsiveness, BLM continued to provide the Quechan with the same information and updates as all other consulting parties. *See supra.* In other words, Quechan was not "deprived of information" but received it at the same time as the other parties, and was given the same opportunities to participate. For example, the former Historic Preservation Officer for Quechan did attend many of the group Section 106 consultation meetings, sites visits, and other meetings related to the Project. *See* OWEF-1658-1670.

Nonetheless, Quechan argues that consultation did not begin until January 2012, when the Tribes met with certain BLM officials. Br. at 23. Quechan's argument has no merit. The ACHP guidance on consultation with Tribes explains that every meeting, phone conversation, letter or email sent to the Tribes constitutes consultation. OWEF-53241. As outlined above, BLM sent Quechan numerous letters

and emails, attended government-to-government meetings, and gave the Quechan many opportunities to participate in, and comment on, the Project. *See supra*. Accordingly, Quechan's claim that BLM failed to consult is premised on a limited view of consultation that cannot be squared with the regulations or controlling ACHP guidance.

Nor is there any merit to Quechan's bald assertion that their comments "were ignored" or that they were not consulted concerning the identification of historic and pre-historic properties or the assessment of adverse effects. Br. at 24. As discussed above, as early as July 2010, BLM provided to Quechan for comment a copy of the Class II and III Archaeological Inventory and Research Design and Work Plan and also asked Quechan to identify any issues or concerns they might have with the Project. OWEF-24792. In that letter, BLM specifically requested that the Quechan apprise them of their concerns so that the inventory could be adapted accordingly. OWEF-24793. The Quechan and other tribes were also invited to participate in the fieldwork and provide feedback on the results of the inventory. *Id.* During the Section 106 process, BLM continued that effort by sending follow-up informational letters and conducting Project visits to the site generally and the cultural resources identified within. *Id.* As result of these efforts, the Applicant redesigned the Project to avoid direct physical impacts to historical resources. *Id.* To the extent that Quechan complains that "new discoveries" found during construction should involve additional consultation (Br. at 24), when and whether additional consultation occurs is governed by the MOA, OWEF-23732; OWEF-23713; OWEF-0023737, consultation beyond that is not required.

Finally, Quechan's reliance on *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, is misplaced. In *Quechan*, the Court, in the context of a preliminary injunction motion, emphasized that BLM did not meet with the Tribe to discuss sensitive sites in the relevant project area until after project approval. *Id*. at 1118. Here, as discussed above, BLM invited the Quechan to engage in consultation two years prior to the Project approval. *See supra*. Moreover, both the BLM's Field Manager and California State Director engaged in consultation at different points, as did the BLM's Lead Archeologist and Associate Field Manager responsible for the Project. Moreover, the BLM attended at least four meetings on the Quechan's reservation while review of the

OWEF was underway. *See supra*. Although the tribes (including the Quechan) were asked to review documents in sometimes compressed timeframes, this request was imposed on all parties and, to the extent practicable, deadlines were extended. OWEF-30047-48; OWEF-29480-82. *Quechan* is simply inapposite.

Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior, 608 F.3d 592, 609 (9th Cir. 2010) is instructive. There, the Court found that BLM's consultation was timely and adequate because BLM provided the Tribe with a sufficient "opportunity to identify its concerns about historic properties" as provided by 36 C.F.R. § 800.2(c)(2)(ii)(A). *Id.* at 609. So too here. As in *Te Moak*, Quechan does not identify any new information that they would have brought to BLM's attention had consultation been earlier, or in their view, with less compressed timeframes for review. *Id.* (holding that plaintiffs "fail to show or even argue that early consultation would have prevented any adverse effect on any yet-to-be identified [resource or]… to demonstrate how early consultation with the Tribe might have affected the BLM's determination"). In short, BLM neither violated its obligation to engage in the government-to-government consultation nor the procedural requirements of Section 106.

IV. Plaintiff's ARPA Claim Is Without Merit

ARPA does not require the issuance of a permit in this case, and the BLM has not violated ARPA because the statute only requires a permit when a person acts with a purpose to excavate or remove an archaeological resource.[23] 43 CFR § 7.5(a); *see also San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 888 (D. Ariz. 2003) ("No ARPA permit is required to conduct activities on public lands when those activities are entirely for purposes other than the excavation or removal of archaeological resources."); *Franco*, 2012 WL 3070269, at *10-11 (same). Consistent with these holdings, BLM APRA regulations specifically state that:

> No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeo-

[23] It should be noted that Quechan's challenge under ARPA is a challenge to a different final agency action– the issuance of the ARPA permit –that is separate from its challenge to the ROW grant.

> logical resources, even though those activities might incidentally result in the disturbance of archaeological resources….

43 C.F.R. § 7.5(b)(1); *see also* 16 U.S.C. § 470kk(a).

A duly-issued ROW grant authorizes the OWEF, and its purpose is to provide a reliable source of wind energy, not to excavate or remove archaeological resources. *See* OWEF-849. Although no permit was required under ARPA, BLM issued ARPA permits throughout the course of the Project's design and construction, *see* POSTROD-12081-87; POSTROD-12088-94; POSTROD-863-908. The ARPA regulations do not require consultation whenever a permit issues.[24] Moreover, the permits at issue do not give rise to a mandatory duty to consult particularly where, as here, no ARPA permit was required. BLM has wide discretion in determining whether a particular ARPA permit necessitates consultation. Consultation is required only if BLM determines that permit issuance may result in harm to or destruction of any Indian tribal religious or cultural sites. 16 U.S.C. § 470cc(c); 43 C.F.R. § 7.7(a). If consultation has already occurred pursuant to Section 106 of the NHPA with respect to the proposed archaeological work, BLM need not consult separately under ARPA. BLM Manual 8150.13A2e (Rel. 8-78) (Dec. 3, 2004) ("Notification shall not be required when . . . [t]he tribe has already been consulted about the proposed archaeological work pursuant to Section 106 of the [NHPA]….."), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.18440.File.dat/8150.pdf (last visited Dec. 4, 2012).

In sum, BLM has no affirmative duty to issue an APRA permit for the OWEF, but voluntarily chose to do so. To the extent any consultation duty exists, BLM has fully complied because the work under such ARPA permit was already the subject of Section 106 consultation. *See supra.*

CONCLUSION

For the reasons stated above, this Court should enter summary judgment in favor of Federal Defendants and deny Quechan's Motion for Summary Judgment.

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[24] Separate and apart from whether a permit is required, the Quechan has made no showing that BLM failed to follow the applicable procedures in issuing such permits.

DATED: December 10, 2012

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CERTIFICATE OF SERVICE

I, Marissa Piropato, hereby certify that, on December 10, 2012, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

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

Dated: December 10, 2012

/s/*Marissa Piropato*
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