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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
* * * *

QUECHAN TRIBE OF THE FORT YUMA
INDIAN RESERVATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants, and

OCOTILLO EXPRESS LLC

Intervenor-Defendant

CASE NO.: 3:12-cv-1167 GPC-PCL

OCOTILLO EXPRESS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN RESPONSE TO
QUECHAN's SUMMARY JUDGEMENT
MOTION AND IN SUPPORT OF CROSS
MOTION TO DISMISS IN PART AND
FOR SUMMARY JUDGMENT

Date: January 18, 2013
Time: 1:30 pm
Courtroom: 9

Hon. Gonzalo Paul Curiel

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I. INTRODUCTION

Intervenor-Defendant Ocotillo Express LLC (“Ocotillo Express”) Opposes Plaintiff Quechan Tribe’s (“Quechan”) motion for summary judgment and moves the Court to:

1. Dismiss for lack of subject matter jurisdiction Quechan’s claims regarding events after the Department of the Interior (“Interior”) and Bureau of Land Management (“BLM”) issued the Record of Decision (“ROD”) and Right-of-Way (“ROW”) for the Ocotillo Wind Energy Facility (“OWEF” or the “Project”); and
2. Grant summary judgment for defendants on the remainder of Quechan’s claims, as Quechan cannot meet its burden of demonstrating that those actions were in any way arbitrary, capricious, or contrary to law.

II. FACTUAL BACKGROUND

Our nation, the State of California and Imperial County have all placed the highest priority on developing domestic renewable energy resources to boost energy security, reduce greenhouse gas emissions and improve our domestic economy. *See* OWEF 848-850, 859, 6664-65. OWEF, a 112-wind turbine project located on federal multiple-use lands in the Imperial Valley, advances all of those goals.

Interior, through BLM, completed an exceptionally thorough evaluation of all of OWEF’s potential impacts on environmental and cultural resources, reflected in a detailed Final Environmental Impact Statement (“FEIS”), OWEF 804-5123, and issued a detailed ROD, including findings supporting an amendment to the California Desert Conservation Area (“CDCA”) Plan for the Project. OWEF 103-455. BLM also went to extraordinary lengths to consult with tribes that expressed interest in the Project, including Quechan, even delaying the final decision almost three months to obtain more tribal input. *See* OWEF 1648-51. BLM and Ocotillo Express, the Project Developer, developed detailed and expansive mitigation to benefit wildlife and the culture of local Native American tribes, as well as the social fabric of local communities. OWEF 133, 271, 286-88, 1645-47, 8810. BLM also worked with Ocotillo Express to shrink and reshape the Project to avoid and reduce impacts to biological and cultural

1 resources. From an initial proposal for 244 turbines, the Project was repeatedly downsized in
2 response to tribal concerns, ultimately down to 112. OWEF 18,069 (244 turbines), 18,253 (193
3 turbines), 8810 (155 turbines), 864 (112 turbines). The changes made to the Project prompted
4 the Chairman of the Campo Kumeyaay Nation to comment near the close of the tribal
5 consultation process: “We appreciate the fact that Pattern Energy has taken many actions that go
6 beyond the level of cooperation we normally see from developers. . . . Restrictions and reduction
7 in the project footprint have been extraordinary.” OWEF 29,070.

8 The Ocotillo Valley has one of the highest quality wind resources in Southern California
9 and is one of the few such sites that has not been foreclosed to wind development. OWEF 1829,
10 1830. The Project site also is well suited for wind development. The Sunrise Powerlink, a 500-
11 kV transmission line constructed specifically to foster the development of renewable energy
12 projects, bisects the Project site. OWEF 851. The site is not pristine, as, in addition to the
13 Sunrise Powerlink, another 500-kV transmission line, Interstate 8, the Imperial Highway, State
14 Route 98, and the San Diego and Arizona Eastern Railway all run through the Project area.
15 OWEF 927, 1825. The Project site also is crisscrossed by a system of 27 roads and trails and is
16 currently open for “off-highway vehicle [] use and shooting,” among other things. OWEF 1026.
17 Throughout the site there are abandoned mines and mine infrastructure and several open and
18 closed mines are located within two miles of turbine locations. OWEF 941, 975-76, 982.

19 OWEF helps Interior achieve its statutory mandate to approve 10,000 megawatts of
20 renewable energy generating capacity on public lands by 2015. *See* § 211, Energy Policy Act of
21 2005, Pub. L. 109-58, (Aug. 8, 2005). It will help San Diego Gas & Electric (“SDG&E”) meet
22 the requirements of state law that it provide 33 percent of its power from renewable sources by
23 2020 (the State’s Renewable Portfolio Standard requirement, or “RPS”). *See* OWEF 850. It is
24 generating badly needed jobs in a county with 27 percent unemployment, highest in the nation,
25 and will generate enough electricity to power 125,000 homes while avoiding 360,000 metric
26 tons/year of greenhouse gas emissions. OWEF 6664-65. It also achieves these benefits while
27 temporarily disturbing less than 460 acres and having a final footprint of about 120 acres, out of
28 a 12,500 acre Project area. OWEF 503.

1 The remaining facts relevant to this motion are set forth in Ocotillo Express' separate
2 statement of undisputed facts, which also responds to Quechan's separate statement of facts.

3 **III. ARGUMENT**

4 **A. Quechan's Post-ROD Claims Should Be Dismissed Pursuant to Rule 12(b)(1)**

5 Quechan's First Amended Complaint asserts several claims that, in whole or in part,
6 object to the way in which Interior has overseen construction of OWEF after issuing the ROD
7 and ROW for the Project. Amended Complaint, Claims 8-11, ECF 70 at 27-33. Quechan alleges
8 (incorrectly) that: (1) during OWEF construction, Interior is not adequately implementing the
9 management plans incorporated into the Project MOA or consulting with Quechan (Complaint
10 ¶¶ 185, 200); (2) during OWEF construction, Interior did not enforce requirements of the
11 Archaeological Resource Protection Act ("ARPA") until July 10, 2012 (Complaint Claim 9); and
12 (3) during OWEF construction, Interior has not enforced conditions imposed by the Project's
13 ROW (Complaint Claim 11). Quechan also advances each of these claims in its motion for
14 summary judgment. *See* Quechan Mem. at 22, 24-25. These claims are groundless, as explained
15 below, but in any event the claims are not properly before the Court.

16 Quechan has acknowledged that these are all "failure to act" claims brought under
17 § 706(1) of the Administrative Procedures Act ("APA"). ECF 95 at 4 (citing 5 U.S.C. § 706(1)).
18 But only actions alleging agency failure to perform a discrete, non-discretionary duty may be
19 brought under § 706(1). *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64-65 (2004). All
20 of Quechan's post-ROD claims clearly involve discretionary decisions by Interior, and as such
21 are not reviewable under § 706(1). Moreover, even if reframed as agency action rather than
22 inaction, the APA does not grant the courts jurisdiction to review agency decisions that are
23 "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Since these claims are not
24 reviewable under the APA, the Court should dismiss them for lack of subject matter jurisdiction.
25 *See* Fed.R.Civ.P. 12(b)(1); *Heckler v. Chaney*, 470 U.S. 821, 830-33, 837-38 (1985); *Sierra Club*
26 *v. Whitman*, 268 F.3d 898, 906-07 (9th Cir. 2001). Interior's decision to enforce, or not to
27 enforce, applicable requirements is exactly the sort of decision committed to agency discretion,
28 and so not reviewable by the courts. *See* 5 U.S.C. § 701(a)(2), *Whitman*, 268 F.3d at 901.

B. Interior's Approval of OWEF Fully Complied With FLPMA**1. Interior Acted Consistent with FLPMA's Multiple Use and Sustained Yield Mandates**

The Federal Land Policy Management Act, 43 U.S.C. §§ 1701, et seq. ("FLPMA") governs BLM's management of federal lands under its jurisdiction, including the CDCA. FLPMA is primarily procedural in nature and agency compliance is reviewed pursuant to the APA. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006). Thus, agency decisions made under FLPMA "may be set aside if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 554 (9th Cir. 2006) (quoting 5 U.S.C. § 706(2)(A)).

Through FLPMA, Congress directs BLM to "manage the public lands [including the CDCA] under principles of multiple use and sustained yield." 43 U.S.C. §§ 1732(a) (generally), 1781(b) (within CDCA). Renewable energy projects like OWEF are entirely consistent with the principle of "multiple use" and "sustained yield." *See* 43 U.S.C. §§ 1702(c), 1702(h); *see also Norton*, 542 U.S. at 58 ("Multiple use management . . . describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . ."). With OWEF, BLM judiciously balanced the competing values of renewable energy development and resource protection, OWEF 110, 126, as reflected throughout the comprehensive administrative record, which confirms that "all practicable means to avoid or minimize the environmental harm" from OWEF have been made mandatory conditions of BLM's approvals. OWEF 128.

As particularly salient here, OWEF's scope was repeatedly reduced, including another 30 percent reduction in turbines made between the DEIS's Proposed Action and the FEIS's Refined Project, specifically to avoid and minimize visual and cultural impacts. OWEF 126-127. BLM also conditioned its approvals on 30 pages of stringent mitigation measures, all aimed toward eliminating and minimizing impacts wherever feasible. OWEF 421-455. In approving OWEF, BLM fulfilled FLPMA's multiple use mandate.

a) BLM Complied With the CDCA Plan

BLM adopted its management plan for the CDCA in 1980 ("CDCA Plan"). OWEF

1 5905-6073. FLPMA directed that the CDCA Plan “take into account the principles of multiple
2 use and sustained yield in providing for resource use and development, including, but not limited
3 to, maintenance of environmental quality, rights-of-way, and mineral development.” 43 U.S.C.
4 § 1781(d). The CDCA Plan satisfies this mandate by establishing a three-step structure for
5 identifying authorized uses, then resolving conflicts that inevitably occur between competing
6 uses. It begins by dividing CDCA lands into four multiple-use “classes.” OWEF 5920. It then
7 sets Guidelines that specify what uses are allowed within each of the four land classes. OWEF
8 5921-27. Finally, it sets Plan Elements to provide “more specific application, or interpretation,
9 of multiple-use class guidelines for a given resource and its associated activities.” OWEF 5928.

10 OWEF is situated on “Class L” lands. The CDCA Plan’s Guidelines expressly authorize
11 wind energy development on Class L lands, provided that NEPA requirements are met. OWEF
12 5922. In deciding to authorize renewable energy projects on Class L lands in 1980, the ROD for
13 the CDCA Plan acknowledged that impacts to other resources could occur but concluded that
14 renewable projects “clearly must be situated where the particular energy resources are favorable”
15 and that application of the Guidelines would result in “appropriate environmental safeguards”
16 being applied to individual renewable projects. OWEF 5750. The decision to permit such
17 development on Class L lands provided that NEPA requirements were met was made in 1980,
18 and cannot be challenged in this proceeding.¹

19 Notwithstanding the CDCA Plan’s explicit authorization, Quechan claims that wind
20 energy development is somehow “inconsistent” with the Class L designation. This claim is
21 wrong on its face: a use that is authorized by the Guidelines for Class L lands is necessarily
22 consistent with the CDCA Plan’s Class L criteria. *See also Order, Desert Protective Council v.*
23 *U.S. Dep’t of the Interior*, Case No. 12-cv-1281 WQH MDD, Dkt. 54 at 15-16 (S.D. Cal. Sept.
24 28, 2012) (identical arguments unlikely to succeed on the merits where CDCA Plan conditionally
25 allows wind projects on Class L lands and BLM examined limits of approval in the FEIS).

26
27
28 ¹ Challenges to FLPMA management plans are subject to a six-year statute of limitations. *Shasta Res. Council v. U.S. Dep’t of Interior*, 629 F. Supp. 2d 1045, 1054 (E.D. Cal. 2009).

1 Quechan's argument – that all land use decisions should be made based only on the
2 CDCA Plan's descriptions of the land classes – also fails because it entirely ignores the
3 mechanism that the CDCA Plan created to resolve conflicts between authorized land uses, which
4 BLM closely followed in this case. The Plan Elements detail how conflicting or competing uses
5 that are permitted for the same lands under the Guidelines are to be balanced. OWEF 5928; *Am.*
6 *Motorcyclist Ass'n v. Watt*, 534 F. Supp. 923, 927 (C.D. Cal 1981) (“Where such uses conflict,
7 the conflicts – the major issues of the [CDCA] Plan – are addressed in twelve Plan Elements.”).
8 BLM properly applied the CDCA Plan Elements to evaluate and resolve the competing interests
9 central to Quechan's claims. OWEF 141-47.

10 **b) BLM Acted Consistent with the CDCA Plan Elements**

11 As relevant to this case, the CDCA Plan's Plan Elements include Cultural Resources,
12 Native American Values, and Energy Production and Utility Corridors. OWEF 5929-932
13 (Cultural Resources), 5933-33 (Native American), 6000-03 (Energy Production). BLM properly
14 applied the criteria from each of these plan elements to OWEF and documented its decision.
15 OWEF 141-42, 146-47. The CDCA Plan also sets out six factors BLM must analyze in
16 connection with any Plan amendment. OWEF 6026. Here, BLM also documented its
17 consideration of each of those six factors. OWEF 145-46.

18 The interests Quechan seeks to protect are addressed by the Cultural Resources and
19 Native American Elements of the CDCA Plan. The Cultural Resource Plan Element provides for
20 implementation of its objectives through the NHPA Section 106 consultation process. OWEF
21 5931. The Native American Plan Element sets goals of giving “full consideration to Native
22 American values in land use planning and management decisions, consistent with statute,
23 regulation and policy,” and to “manage and protect Native American values wherever prudent
24 and feasible.” OWEF 5933. As discussed elsewhere in this brief, BLM fulfilled this obligation
25 by consulting extensively with Native American representatives – including Quechan – in its
26 consideration of OWEF. BLM considered each of these criteria in its ROD. It concluded that
27 the MOA developed through NHPA consultation satisfied the Cultural Resource and Native
28

1 American Plan Elements, and that Native American cultural resources had been “preserved and
2 protected to the extent practicable.” OWEF 141-42.

3 The Energy Production and Utility Corridor Plan Element includes nine decision criteria,
4 including “avoid sensitive resources wherever possible.” OWEF 6000. BLM concluded through
5 the NEPA review process that the Project had been planned and designed to avoid all sensitive
6 resources “to the fullest extent possible” as documented in the FEIS. OWEF 146-47.

7 **c) BLM Satisfied the Requirements of the Plan Amendment Process**

8 CDCA Plan Chapter 7 (Plan Amendment Process) describes in detail the remaining
9 considerations that BLM must satisfy prior to approving a wind project on CDCA lands. BLM
10 has followed this process to the letter. The Plan Amendment process requires BLM to make six
11 determinations. OWEF 6026. These criteria have been met (OWEF145-46), and again the
12 Quechan do not dispute this. Having acted consistently with the CDCA Plan’s Guidelines and
13 each of the relevant Plan Elements, as well as the Plan’s amendment criteria, BLM’s approvals
14 were made “in accordance with” the CDCA Plan and complied with FLPMA.

15 **d) Quechan Would Require BLM to Act Contrary to FLPMA and**
16 **the CDCA Plan**

17 Rather than address the actual requirements of the CDCA Plan, Quechan’s reading of the
18 Plan begins and ends with the Plan’s definitions of the four land classes. Quechan argues that
19 the Plan’s description of Class L lands – which by its nature vests BLM with broad discretion –
20 and a passing characterization of Class L in the introduction to the Plan Elements are controlling,
21 providing the only method for resolving competing uses. Quechan asks that BLM and this Court
22 disregard the Guidelines and the Plan Elements, instead using a vague description as a rigid test
23 to exclude otherwise-authorized uses from Class L lands. Quechan Mem. at 1-9. But Quechan
24 ignores the CDCA Plan’s direction that the Guidelines, not the class descriptions, be used to
25 identify authorized uses in each land class, OWEF 5921, and its direction that the Plan Elements,
26 not the class descriptions, be used to resolve conflicts between competing uses. OWEF 5928.

27 Not surprisingly, Quechan cites no legal authority for its view that BLM should make *ad*
28 *hoc* decisions based on a vague standard (“significantly diminish”) while ignoring the Guidelines

1 and Plan Elements, despite the Plan provisions to the contrary. Quechan also makes an
 2 unsubstantiated leap from the FEIS acknowledging unavoidable impacts on certain resources to
 3 the false assertion that BLM acknowledged OWEF would “significantly diminish” the resources
 4 important to Quechan. Quechan Mem. at 3-4, 9. Contrary to Quechan’s claims, the FEIS
 5 concludes that the MOA and mitigation measures “ensure that preservation and protection of
 6 Native American cultural and religious values associated with cultural resources is accomplished
 7 in accordance with the CDCA Plan MUC Guidelines.” OWEF 1288. It is Quechan’s argument,
 8 not BLM’s decision, that has failed to conform to the CDCA Plan.

9 2. BLM Complied with Applicable Visual Resource Management Standards

10 Quechan also claims that BLM arbitrarily changed the visual resource management
 11 (VRM) classification for the Project site from Class III to Class IV, since wind projects cannot
 12 meet VRM Class III criteria. Quechan Mem. at 9-12. However, Quechan fundamentally
 13 misconstrues the nature of BLM’s VRM policies. Visual resources are managed so as to reduce
 14 impacts, but never to override land use decisions. *See* OWEF 5727 (“VRM objectives shall
 15 result from, and conform with, the resource allocation decisions made in RMPs.”). The CDCA
 16 Plan permits wind development on Class L lands, and so necessarily contemplates VRM
 17 classifications that permit such use.

18 BLM’s VRM program is the product of agency guidance documents² rather than specific
 19 statutory requirements. FLPMA’s only specific directives to BLM regarding visual resources are
 20 to prepare and maintain an inventory of scenic values on federal lands and to adopt terms and
 21 conditions in right-of-way permits to minimize scenic impacts. 43 U.S.C. §§ 1711, 1765(a). All
 22 other details have been left to the agency’s discretion, subject only to general statutory
 23 instructions to protect scenic values. *See* 43 U.S.C. § 1701(a)(8); 42 U.S.C. § 4331(b)(2).

24 BLM has established a system with four visual resource classes (Class I-IV), which are
 25 used to inventory existing visual resources and in identifying visual management objectives.
 26 OWEF 5677. Inventory classes (VRI Classes) describe existing conditions, “are informational in
 27

28 ² BLM Manual Section 8400 (OWEF 5723-739); H-8410-1 (Visual Resource Inventory (VRI))
 (OWEF 5669-692); and H-8431-1 (visual contrast analysis) (OWEF 5693-5722).

1 nature” and “do not establish management direction and should not be used as a basis for
2 constraining or limiting surface disturbing activities.” OWEF 5678. Management classes (VRM
3 Classes) are based on land management decisions made in resource management plans. *Id.*

4 Not all resource management plans include VRM classifications. Indeed, the CDCA Plan
5 simply provides that VRM will be “commensurate with” the Plan’s MUC Guidelines. OWEF
6 5979. When the applicable plan does not include approved VRM Classes, then BLM sets
7 Interim VRM Classes when reviewing a project under that plan. OWEF 5727. BLM’s Interim
8 VRM determinations are different from plan-imposed VRM designations in two important
9 respects. First, they are limited to the area affected by the project. OWEF 5696, 5727. Second,
10 Interim VRM Class designations “must conform with the land use allocations set forth in the
11 RMP which covers the project area.” OWEF 5727; *see also* OWEF 5679, 5696.

12 Quechan ignores these important distinctions, and thus its visual resource argument is
13 fundamentally flawed. Quechan mistakenly equates VRI survey results (OWEF 46311, 46578)
14 with Interim VRM Classes. Quechan Mem. at 10-11. However, existing conditions (VRI) do
15 not dictate the VRM Class. *See* OWEF 5678.

16 Quechan’s theory that OWEF is bound to an Interim VRM Class III is based on a
17 comment in the FEIS describing VRI results and past actions unrelated to OWEF (OWEF 1092),
18 not any interim VRM designation made for OWEF. Interim VRM designations are case-by-case.
19 OWEF 5696, 5727. Indeed, in the adjacent column, the FEIS notes that the OWEF site is to be
20 managed as Interim VRM Class IV. *Id.* The FEIS’s discussion of the Project’s effects on the
21 environment also is clear that Interim VRM Class IV applies. OWEF 1483.

22 Quechan also points to various documents preceding the FEIS that suggested assigning
23 interim VRM Class III to the Project while acknowledging that OWEF would not satisfy Class
24 III requirements. Quechan Mem. at 11-12. Quechan ignores the fact that BLM’s land use
25 decisions that drive VRM classification, not vice versa – particularly for interim VRM classes.
26 *See* OWEF 5696, 5727. There is no dispute that the CDCA Plan authorizes wind projects on
27 Class L lands, and that all wind projects require VRM Class IV. *See* OWEF 1484. Indeed, the
28 FEIS points to exactly these factors in explaining the decision to apply interim VRM Class IV to

1 OWEF. *Id.* The various documents cited by Quechan simply reflect the process by which BLM
2 came to that conclusion, all the while attempting to apply the most stringent VRM standard
3 feasible. As one of the agency commenters stated on a draft of the FEIS, “Just because we are
4 managing for Class IV objectives does not mean that we should not try to mitigate to minimize
5 project impacts.” OWEF 46246. BLM correctly applied VRM standards to OWEF.

6 3. BLM Prevented Unnecessary and Undue Degradation of Public Lands

7 Quechan’s final FLMPA argument is that OWEF will result in unnecessary and undue
8 degradation (“UUD”) of public lands. Quechan Mem. 12-13. FLPMA requires BLM to prevent
9 UUD in all of its activities. 43 U.S.C. § 1732(b). In this case, BLM prevented UUD the same
10 way it complied with the multiple use mandate: by mitigating the Project’s impacts to the
11 maximum possible extent. *See* OWEF 129-131 (ROD UUD determination).

12 Courts have left the precise definition of UUD to BLM’s reasonable discretion. *See*
13 *Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011) (citing *Norton*, 542 U.S. at 66-67). Even
14 where a proposed use might cause environmental degradation, it is at BLM’s “discretion to
15 decide how to remedy such harm and manage the lands in accordance with [FLPMA’s] multiple-
16 use directive [and] to choose appropriate measures to address the environmental
17 degradation.” *Id.* BLM easily satisfied that standard here by requiring mitigation measures
18 affecting every aspect of the Project. *See* OWEF 421-455.

19 BLM’s UUD decisions have been upheld where BLM has required appropriate mitigation
20 measures. *See Gardner*, 638 F.3d at 1223-24; *Theodore Roosevelt Conservation P’ship v.*
21 *Salazar*, 744 F. Supp. 2d 151, 156-59 (D.D.C. 2010); *S. Fork Band v. U.S. Dep’t of Interior*, 643
22 F. Supp. 2d 1192, 1211 (D. Nev. 2009) (UUD avoided where BLM had “implemented
23 monitoring and mitigation” and “made reasonable attempts to . . . minimize the [short-term and
24 permanent] visual impacts of the project”), *aff’d in relevant part* 588 F.3d 718, 725-26 (9th Cir.
25 2009). BLM’s UUD determination in this case must be upheld for the same reasons.

26 Finally, Quechan cites 43 C.F.R. § 3809.5 for a definition of UUD. That rule applies
27 only to hardrock mining. *See* 43 C.F.R. § 3809.1. But even if BLM applied the same UUD
28 definition to wind energy projects, it would be easily satisfied here, as Quechan has not objected

1 to any impacts that are not inherent in construction of a wind project. *See Mineral Policy Ctr. v.*
2 *Norton*, 292 F. Supp. 2d 30, 41-43 (D.D.C. 2003).

3 **C. Defendants’ Adherence to the Letter and Spirit of NEPA Is Exemplary and a**
4 **Model of NEPA Compliance.**

5 Both BLM and Ocotillo have done everything right and responsibly in complying with
6 NEPA.³ The following discussion of Quechan’s NEPA claims begins by providing the broader
7 picture of BLM’s NEPA compliance and then rebuts Quechan’s unsuccessful attempts at
8 “flyspecking” the Project’s EIS.

9 **1. An Agency’s Determinations Under NEPA Are to Be Upheld Unless They**
10 **are Found to Be Arbitrary or Capricious**

11 BLM’s and OWEF’s commitment to full NEPA compliance is documented in BLM’s
12 EIS. NEPA is a procedural statute; it does not dictate the results of agency decisionmaking.
13 *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-51 (1989). Instead,
14 NEPA sets out a process whereby an agency must prepare an EIS before undertaking a “major
15 federal action.” 42 U.S.C. § 4332(2)(C). An EIS must (1) properly identify the purpose and
16 need for the project; (2) identify and evaluate the environmental consequences of the project;
17 and (3) identify and evaluates alternatives to the project. *Id.*; *see also* 40 C.F.R. §§ 1502.1-
18 1502.25 (implementing regulations specifically addressing elements of EISs); *League of*
19 *Wilderness Defenders - Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d
20 1060, 1068-69 (9th Cir. 2012) (briefly summarizing EIS requirements).

21 Preparation of an EIS “necessarily calls for judgment and that judgment is the
22 agency’s.” *Westlands Water Dist. v. United States*, 376 F.3d 853, 866 (9th Cir. 2004) (citation
23 omitted). The agency’s actions must be upheld unless the Court finds them to be arbitrary and
24 capricious. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989). Review under this

25 _____
26 ³ To ensure the fullest compliance with NEPA’s requirements, Ocotillo brought onto its
27 permitting team legal counsel who was formerly the General Counsel of the White House
28 Council on Environmental Quality (“CEQ”) and who was the principal draftsman of the CEQ
NEPA Regulations, 40 C.F.R. parts 1500-1508, the government-wide regulations governing
implementation of the statute and to which “substantial deference” is due. *See Andrus v. Sierra*
Club, 442 U.S. 347, 357-58 (1979).

1 standard is highly deferential, with a presumption in favor of finding agency actions valid.

2 *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (citations omitted).

3 As explained below, BLM's EIS properly (1) identified the purpose and need for the
4 Project, (2) identified and evaluated the Project's environmental consequences, and (3)
5 identified and evaluated alternatives to the Project. Quechan offers nothing more than
6 impermissible flyspecking.⁴ Accordingly, Quechan's NEPA claims must fail.

7 2. BLM Properly Defined the Purpose and Need for the Project

8 An EIS must "briefly specify the underlying purpose and need" for the project at issue.
9 40 C.F.R. § 1502.13. The courts have "afforded agencies considerable discretion to define the
10 purpose and need of a project." *League of Wilderness Defenders*, 689 F.3d at 1069; *see also*
11 *Westlands*, 376 F.3d at 866 (quoting *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066
12 (9th Cir. 1998)). A statement of purpose and need must be upheld so long as the objectives
13 defined therein are reasonable. *See, e.g., Citizens Against Burlington v. Busey*, 938 F.2d 190,
14 196 (D.C. Cir. 1991) (Thomas J.) ("We uphold an agency's definition of objectives so long as
15 the objectives the agency chooses are reasonable.").

16 The statement of Purpose and Need for OWEF easily meets that standard. It provides a
17 clear statement of purpose from (each of) the BLM, the Corps of Engineers, the Applicant, and
18 the California Environmental Quality Act (*i.e.*, the State of California). OWEF 113-15; 848-
19 51. Moreover, it explicitly recognizes the statutory, regulatory, and policy mandates guiding
20 renewable energy development, including (a) the Energy Policy Act of 2005, which directs the
21 Secretary of the Interior to approve 10,000 MW of renewable energy capacity on public lands
22 by 2015; (b) a Presidential directive to increase the production and transmission of energy in a
23 safe and environmentally sound manner; (c) Interior directives establishing "development of
24 renewable energy as a priority for the Department"; (d) State of California requirements that

25 _____
26 ⁴ As stated by the 9th Circuit: "The reviewing court may not flyspeck an EIS or substitute its
27 judgment for that of the agency concerning the wisdom or prudence of a proposed action." *Half*
28 *Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988)
(citations and quotation marks omitted); *see also* *Theodore Roosevelt Conservation P'ship v.*
Salazar, 661 F.3d 66, 75 (D.C. Cir. 2011) ("We have consistently declined to flyspeck an
agency's environmental analysis, looking for any deficiency no matter how minor.")

1 33% of electricity come from renewable resources by 2020; and (e) California’s prohibition on
2 the construction of greenhouse gas-intensive power plants. OWEF 848-853. These “purposes”
3 – development of renewable energy on federal land – could not be clearer and represent the
4 recognition by Congress, the President, and the Secretary of the Interior of the “need” for such
5 energy to which the Ocotillo wind project is a partial response.⁵

6 In short, the BLM’s statement easily satisfies the requirement to “briefly specify the
7 underlying purpose and need” (40 C.F.R. § 1502.13) and Quechan does not claim otherwise.

8 **3. The EIS Properly Identified and Thoroughly Evaluated All Potential** 9 **Impacts of the Project**

10 An EIS must identify and evaluate the potential environmental consequences of the
11 project at issue. *See, e.g.*, 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.16, 1508.8. An agency’s
12 analysis of environmental consequences is subject to the “hard look” test. *Robertson*, 490 U.S.
13 at 350. The “hard look” test is a “rule of reason standard” which simply requires that an EIS
14 “contains a reasonably thorough discussion of the significant aspects of [a project’s] probable
15 environmental consequences.” *League of Wilderness Defenders - Blue Mountains Biodiversity*
16 *Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). In other words, an agency’s analysis
17 must be upheld as long as it “considered the relevant factors and articulated a rational
18 connection between the facts found and the choice made.” *Id.* (quoting *Selkirk Conservation*
19 *Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9th Cir. 2003)).

20 BLM’s EIS easily clears that bar. The EIS properly identifies and evaluates all
21 reasonably foreseeable direct, indirect, and cumulative impacts of the Project. Among other
22 things, that evaluation includes (1) a detailed, 245-page description of current environmental
23 conditions (OWEF 913-1157); (2) more than 450 pages thoroughly analyzing the potential

24
25 ⁵ The FEIS Purpose and Need statement also includes the truism that BLM is responding to an
26 application to construct a wind project. OWEF 848-50. The D.C. Circuit recently upheld a
27 BLM statement of purpose and need containing language virtually identical to that found in the
28 statement of purpose and need for the Project. *See Theodore Roosevelt Conservation P’ship*, 661
F. 3d at 69-73; *see also Citizens Against Burlington*, 938 F.2d at 196 (“When an agency is asked
to sanction a specific plan the agency should take into account the needs and goals of the parties
involved” (citation omitted)).

1 environmental consequences of the Project (OWEF 1158-1639); and (3) nineteen technical
 2 reports providing comprehensive data on everything from traffic to bats to paleontology.⁶
 3 OWEF 2181-2625, 2726-3247, 5003-033. Put simply, the EIS provides an exceptionally
 4 thorough “hard look” at the potential consequences of the Project.

5 4. BLM Appropriately Considered Reasonable Alternatives to the Project

6 The “heart” of an EIS is an evaluation of reasonable alternatives to a proposed project.
 7 40 C.F.R. § 1503.14. A deferential “rule of reason” governs “both the choice of alternatives
 8 [and] the extent to which the [EIS] must discuss each alternative.” *City of Carmel-By-The-Sea*
 9 *v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (quoting *Citizens Against*
 10 *Burlington*, 938 F.2d at 195); *see also Westlands*, 376 F.3d at 868. The “rule of reason”
 11 standard provides that an EIS must evaluate sufficient alternatives to permit a reasoned choice,
 12 but need not analyze alternatives which are infeasible, ineffective or inconsistent with project
 13 purposes. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S.
 14 519, 551 (1978) (choice of alternatives “bounded by some notion of feasibility”); *Pac. Coast*
 15 *Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012) (EIS need only set
 16 forth “those alternatives necessary to permit a reasoned choice”).

17 BLM’s analysis of alternatives went well beyond the requirements of the “rule of
 18 reason.” The agency initially identified eighteen potential alternatives, including larger and
 19 smaller wind energy facilities, alternative sites for wind energy facilities (including sites both
 20 on and off federal land), alternative configurations of the Project site, alternative phasing
 21 options for development of the Project, alternative energy generation technologies, and the
 22 alternative of taking no action at all. OWEF 888-912, 1688-91.

23 BLM then evaluated each potential alternative for feasibility, consistency with Project
 24 purposes, and environmental considerations. OWEF 863-64, 1688-89. Other federal sites in
 25 the region with suitable wind resources are wilderness areas or critical habitat, and therefore
 26 cannot be developed. OWEF 908, 1830. The BLM encountered similar hurdles to siting the
 27

28 ⁶ For context, it is worth noting that NEPA’s implementing regulations contemplate that a thorough EIS will “normally be less than 150 pages.” *See* 40 C.F.R. § 1502.7.

1 project on private land: private sites suitable for wind energy generation (*i.e.*, having a suitable
2 amount of wind) are located in protected “Areas of Critical Environmental Concern,” and
3 therefore cannot be developed. OWEF 907-08. Throughout this analysis, the OWEF site
4 stood out as both (1) having a significant wind energy resource and (2) being located in BLM’s
5 multiple use lands available for wind development.

6 Ultimately, six alternatives were carried forward for detailed analysis in the EIS. OWEF
7 864-92. Those six alternatives represent a reasonable range of feasible ways to achieve the
8 purposes of the project, and the EIS provides a clear basis for choice among them. *See* OWEF
9 892-98 (comparing alternatives). Accordingly, BLM’s alternatives analysis satisfies NEPA.
10 *See, e.g., Pacific Coast Fed’n*, 693 F.3d at 1099-1101; *League of Wilderness Defenders*, 689
11 F.3d at 1070; *Westlands*, 376 F.3d at 868. Quechan does not claim otherwise.

12 **5. BLM’s EIS Process Resulted In Environmentally-Beneficial Changes To** 13 **The Project**

14 This project provides a stellar example of the EIS process functioning as intended. As
15 explained above, the BLM (1) defined the Project so as to further federal laws and policy
16 directives, (2) carefully considered the potential environmental consequences of the Project,
17 and (3) identified a range of reasonable alternatives to the Project. As a result of these
18 analyses, BLM — in consultation with agency stakeholders, Native American tribes, and
19 members of the interested public — was able to identify and impose enforceable measures
20 mandating avoidance or mitigation of environmental impacts. *See supra* at 1-2 (reductions in
21 Project size); OWEF 341-375 (mitigation requirements imposed in ROD). In short, although
22 NEPA imposes procedural requirements rather than substantive requirements, the BLM’s
23 NEPA process was so robust that it produced substantive environmental improvements to the
24 Project. This exemplifies the NEPA process at its best.

25 **6. Quechan’s Quarrels with BLM’s NEPA Process Lack Merit**

26 Quechan nonetheless claims that BLM violated NEPA. But its attempts to nitpick (or
27 “flyspeck”) the EIS are unsupported by the record or the law, and each of its arguments fails.

a) **Nothing in NEPA Requires BLM to Extract Its ‘Priority’ Renewable Energy Projects in the CDCA” and Examine Them in Yet Another EIS**

Quechan erroneously claims that BLM violated NEPA by failing to identify and evaluate “priority” renewable energy projects within the scope of a single EIS. But NEPA does not require anything of the sort. NEPA’s implementing regulations make it quite clear that federal agencies — not plaintiffs in litigation — have discretion to determine the proper scope of an EIS. *See* 40 C.F.R. § 1502.4(a). Indeed, the NEPA regulations use the most permissive of language on this issue, suggesting only that agencies “may find it useful” to evaluate the scope of a proposal in one of several ways (including geographically, generically, or by stage of development). 40 C.F.R. § 1502.4(c).

Quechan’s argument to the contrary elevates form over substance. What is important for NEPA compliance is a “hard look” at all project impacts; so long as the relevant agencies take a hard look, it does not matter whether they do so in the context of a site-specific EIS, a broadly programmatic EIS, or an EIS of some intermediate scope. Here, BLM chose to prepare both a programmatic EIS on wind energy development in seven western states (OWEF 19,070-20,453) and an individual, site-specific EIS for this Project (OWEF 804-5123). Those two EISs take a “hard look” at all impacts of the Project, including cumulative impacts. *Id.* The agency was not required to prepare a third, intermediate layer of EISs focusing solely on projects in the CDCA (as Quechan might have preferred).

Quechan’s argument bears a striking resemblance to that made before — and rejected by — the Supreme Court in an early landmark NEPA case, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, the Department of the Interior prepared a nationwide coal leasing EIS as well as individual EISs covering specific coal mining plans. *Id.* at 398-99. The *Kleppe* plaintiffs argued for a further, intermediate EIS on what they alleged was a regional program. *Id.* at 408-15. The Supreme Court rejected that argument, holding that determining what merits a separate EIS is a matter of agency discretion, not a plaintiff’s preference in litigation: “The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors [which] is properly left to the

1 informed discretion of the responsible federal agencies.” *Id.* at 412.

2 More recently, the plaintiffs in *Pacific Coast Federation* argued that a single EIS was
3 required for two agency actions, citing the same regulation on which Quechan now relies. *Pac.*
4 *Coast Fed’n*, 693 F.3d at 1097-99 (discussing 40 C.F.R. § 1508.25(a)(i)); Quechan Mem. at 14
5 (relying on § 1508.25(a)(i)). The Ninth Circuit rejected that argument, affirming the agency’s
6 choice of scope and holding that when one project might reasonably be completed without the
7 existence of the other, the two projects have “independent utility” and need not be evaluated in
8 a single EIS. *Pac. Coast Fed’n*, 693 F.3d at 1097-99.

9 The same rule applies in this case. The Project can be constructed on BLM land without
10 being dependent upon the existence of other BLM projects (“priority” or otherwise). In other
11 words, it has “independent utility.” Quechan points to nothing in the administrative record
12 showing otherwise. Quechan Mem. at 14-15. Thus, the argument must fail.

13 **b) BLM Took a Hard Look at the Cumulative Effects of OWEF with**
14 **Other Past, Present, and Reasonably Foreseeable Future Projects.**

15 Quechan argues that Interior violated NEPA by failing to conduct an adequate analysis of
16 cumulative effects. Quechan Mem. at 15. Its argument is unsupported by any factual showing
17 and refuted by the FEIS. Cumulative impacts are defined by the governing CEQ Regulations
18 as “the impact on the environment which results from the incremental impact of the action
19 when added to other past, present, and reasonably foreseeable future actions”. 40 C.F.R.
20 § 1508.7 (emphasis added).⁷ A wide range of “future actions” is conceivable, including
21 everything from a gleam in a developer’s eye to an undercapitalized project to one that stands
22 no chance of approval. But most of those future actions are not “reasonably foreseeable,” and
23 therefore not properly included in an EIS’ cumulative impacts analysis. *Id.*

24 Here, BLM made clear the criteria it was employing to isolate those future actions that

25 ⁷ When courts review agency action where the record shows conflicting scientific evidence, “the
26 agency must have discretion to rely on the opinions of its own qualified experts even if, as an
27 original matter, a court might find contrary review more persuasive.” *Marsh*, 490 U.S. at 378;
28 *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (“A court generally
must be at its most deferential when reviewing scientific judgments and technical analyses
within the agency’s expertise under NEPA.” (citation and internal quotation marks omitted)).

1 passed the “reasonably foreseeable” threshold from those that did not. OWEF 1162. BLM
 2 noted that there were 291 renewable projects pending in California, of which 18 were proposed
 3 in BLM’s Desert District. *Id.* The agency explained that projects compete for Power Purchase
 4 Agreements (PPAs) — agreements for the sale of power from an energy — essential to the
 5 project viability. *Id.* BLM noted that “Not all of the projects listed will complete the
 6 environmental review process...and not all projects will be funded and constructed.” *Id.*
 7 BLM’s discussion at OWEF 1161-62 of the FEIS makes clear how BLM reasonably exercised
 8 its judgment as to which projects were reasonably foreseeable. *Id.*⁸

9 After identifying reasonably foreseeable future actions, BLM took a detailed “hard look”
 10 at cumulative (and indirect) impacts. OWEF 1158 (explanation of direct, indirect, and
 11 cumulative impacts), OWEF 1161-180 (cumulative impacts, includes a 17 page chart
 12 explaining review of more than 100 potentially cumulative projects). The FEIS clearly and
 13 specifically identifies all past, present, and reasonably foreseeable future actions which could
 14 have a cumulative relationship with the Project. OWEF 1158-80. Table 4.1-1 of the FEIS
 15 provides a “comprehensive listing of all foreseeable projects that could contribute to a
 16 cumulative impact on the environment,” OWEF 1163-76, including those located on BLM-
 17 administered lands and/or private lands, other BLM actions/activities and projects identified by
 18 local governments, such as Imperial and San Diego Counties. *Id.*⁹ Table 4.1-2 specifies the
 19 projects with a potential contribution to cumulative impacts for each of the 20 resource types
 20 addressed in the EIS.¹⁰ OWEF 1161-62, 1177-180. BLM then considered the cumulative
 21

22 ⁸ BLM also makes clear that its scientific methodology conforms to the governing CEQ NEPA
 Regulations. 40 C.F.R. §§ 1502.24, 1508.7, 1508.8. FEIS at p. 4.1-1.

23 ⁹ Quechan cites to nothing in the administrative record for the proposition that there exists some
 24 other project that BLM ignored; instead, it relies upon an improper *post hoc* litigation declaration
 that has properly been excluded by the Court. ECF 105.

25 ¹⁰ Recognizing that resource impacts are felt (and have the potential for cumulative impacts) over
 26 different geographical areas, the BLM appropriately identified cumulative impact relationships
 27 on a resource-by-resource basis. *See* OWEF 1161-62, 1177-80. Of the impacts in which
 28 Plaintiff has expressed particular interest, the geographic areas where cumulative impacts are
 analyzed, BLM has used a 10 mile radius for cultural resource impacts (OWEF 1177); lands in
 Imperial County and Southeastern San Diego County for lands and realty (OWEF 1177); and for
 wildlife resources the area within which cumulative impacts are examined are broken down by

1 impact of those listed actions, together with the Project, for each of the 20 resources types.¹¹
 2 That was more than enough to satisfy NEPA's "hard look" test. *See Robertson*, 490 U.S. at
 3 350; *Allen*, 615 F.3d at 1130; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346,
 4 1357 (9th Cir. 1994); 40 C.F.R. § 1508.7.

5 With respect to cultural resources, an issue of particular concern to Quechan, BLM began
 6 by reviewing local and regional BLM lands under the CDCA Plans (e.g., a geographic area
 7 large enough to capture all relevant cumulative impacts). OWEF 1295-97. The Agency then
 8 evaluated cumulative impacts ten miles beyond the Area of Potential Effects ("APE") (a self-
 9 explanatory term under the NHPA, the primary federal statute governing cultural resource
 10 impacts). OWEF 1244; 36 C.F.R. § 800.4(b)(1). The agency reasonably determined: "This is
 11 a large enough area to encompass any effects of the OWEF on cultural resources that may
 12 combine with similar effects caused by other projects and provide a reasonable context
 13 wherein cumulative impacts could affect cultural resources." OWEF 1244. That is because
 14 cumulative impacts on cultural resources are linked to visual relationships, and an area
 15 extending 10 miles beyond the APE captures those relationships. *Id.* BLM then examined
 16 existing cumulative conditions and reasonably foreseeable projects. OWEF 1245-46. Included
 17 in the analysis are specific numbers of archeological sites, prehistoric sites, and historic
 18 resources. OWEF 1246. Additional detail (such as acreage) is provided in Tables 4.1-1 and
 19 4.1-2. OWEF 1163-180; *see* OWEF 1244-48. Cumulative impacts for Project phases

21 species (OWEF 1180). Plaintiff has pointed to nothing which would occasion the Court's
 22 second guessing the scientific methodology employed by the agency in making these
 23 determinations. *See Marsh*, 490 U.S. at 378 (the "agency must have discretion to rely on the
 24 opinions of its own qualified experts even if, as an original matter, a court might find contrary
 25 review more persuasive"); *Weldon*, 697 F.3d at 1051 ("A court generally must be at its most
 26 deferential when reviewing scientific judgments and technical analyses within the agency's
 27 expertise under NEPA." (citation and internal quotation marks omitted)).

28 ¹¹ OWEF 1196-99 (air quality), 1212-13 (climate change), 1244-48 (cultural resources), 1262-63
 (environmental justice), 1271-73 (lands/realty), 1284-85 (minerals), 1295-97 (federal lands),
 1316-1320 (noise), 1333-35 (paleontology), 1365-73 (public health and safety), 1385-89
 (recreation), 1400-04 (socioeconomic issues), 1420-21 (soil resources), 1432-34 (special use
 areas), 1452-54 (transportation and public access), 1472-79 (vegetation), 1495-99 (visual
 resources), 1550-62 (water resources), 1576-79 (wildland fire ecology), 1614-22 (wildlife
 resources).

1 (construction, operation and maintenance, and decommissioning) are separately broken out,
2 providing additional detail. OWEF 1246-47.

3 Quechan nonetheless complains that BLM did not examine the full range of projects
4 contributing to a cumulative impact. Quechan Mem. at 16. Quechan alleges that the EIS fails
5 to account for two projects — known as “Ocotillo Sol” and “Granite Mountain Wind” — in the
6 vicinity of the Project site. Quechan Mem. at 16. That is simply untrue. The EIS explicitly
7 addresses both Ocotillo Sol and Granite Mountain Wind. *See* OWEF 1172, 1175 (Table 4.1-1
8 specifically identifies Granite Mountain Wind and Ocotillo Sol projects); OWEF 1295-96
9 (projects identified in EIS Table 4.1-1 were considered in cumulative impacts analysis);
10 OWEF 3310-11 (explicitly addressing comments on Ocotillo Sol).

11 Quechan also alleges that the EIS fails to account for the cumulative impacts of a
12 proposal to create “solar energy zones” in the western United States. Quechan Mem. at 16.
13 But the creation of “solar energy zones” across the western part of the country does not, in and
14 of itself, have any cumulative impact relationship with the Project. What matters is whether
15 there are any reasonably foreseeable future solar projects which may impact the same
16 resources as the Project. And, as explained above, the BLM took a careful “hard look” at that
17 very issue. *See* OWEF 1158-80 (identifying reasonably foreseeable future energy projects).

18 Quechan also claims that the BLM failed to take a hard look at cumulative impacts on
19 Class L lands. Quechan Mem. at 17-19. Once again, the FEIS says otherwise. The document
20 explicitly evaluates all impacts to Multiple Use Classes (Class L lands are Multiple Use”). *See*
21 OWEF 1287-97 (full analysis), 1295-97 (cumulative impacts).

22 **c) BLM Took a Hard Look at the Indirect Effects of OWEF.**

23 Indirect impacts are those “which are caused by the action and are later in time or further
24 removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Indirect
25 effects may include growth inducing effects. *Id.* The FEIS discusses such indirect impacts in
26 detail, in conjunction with direct impacts. *See* OWEF 1158-1639 (FEIS Ch. 4). Quechan’s
27 sole objection is to a single indirect impact (growth inducing effects) and a single potential
28 aspect of that impact (encouraging additional wind projects). Quechan Mem. at 20. In support

1 of this claim, Quechan points only to a map that identifies the area where BLM authorized the
 2 wind testing that preceded OWEF. *Id.* (citing OWEF 156). But contrary to Quechan’s claim,
 3 BLM carefully considered the Project’s potential growth-inducing impacts. OWEF 1638-39.
 4 It also considered every other current and/or reasonably-foreseeable future energy project near
 5 the Project site. OWEF 1162-80. These analyses provided the required “hard look” at the
 6 Project’s potential indirect effects.

7 Some common sense is called for here. Building a highway in an undeveloped area may
 8 well induce growth – it opens up an area for development now facilitated by such access. But
 9 building one wind-farm does not facilitate or attract others.¹² Such facilities go where the wind
 10 is (and, in some measure, where transmission lines already exist to transport the power
 11 generated to market). It is hardly surprising, then, that Quechan cannot point to anything in the
 12 administrative record establishing that the Project will cause other wind farms to be built.

13 **d) Quechan’s Argument that the Agency Failed to take a “Hard**
 14 **Look” at Whether OWEF Would Conform to Local Law Lacks**
 15 **Merit.**

16 Quechan’s contention that BLM did not take a hard look at whether the OWEF would
 17 conform to local law is utterly without merit. Quechan has simply ignored the State of
 18 California’s analysis certifying that there are no inconsistencies between the Project and state
 19 or local laws. OWEF 475-76. Quechan also fails to address the portions of the FEIS reflecting
 20 a “hard look” at the Project’s relationship to local laws, including (a) an explanation of
 21 potentially relevant County land use plans and ordinances (OWEF 977-79); (b) a description of
 22 OWEF’s conformance with Imperial County’s General Plan (OWEF 1265-66); and (c) a
 23 technical appendix providing detailed analysis of OWEF’s consistency with the County
 24 General Plan and Ocotillo/Nomirage Community Area Plan (OWEF 2708-725). Moreover,
 25 Quechan conveniently omits that Imperial County (the local government) served as a co-lead
 26 agency for the EIS and certified that the document complies with the State of California’s
 27 environmental review laws. OWEF 19,000-19,069. There is no question that BLM took a hard

28 ¹² Indeed, the record shows a paucity of suitable wind-farm sites, so the construction of OWEF
 makes *less* likely the advent of other new wind-farms. OWEF 863-912, 1688-89.

1 look at OWEF's compliance with local land use laws.¹³

2 **D. Interior Satisfied All Applicable NHPA Requirements Before Approving OWEF**

3 The record amply demonstrates that BLM satisfied all requirements of the National
4 Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470, *et seq.*, including its obligation to
5 identify historic properties and to consult with Quechan and other tribes.

6 NHPA Section 106 requires federal agencies to "take into account the effect of [any]
7 undertaking on any district, site, building, structure or object that is included in or eligible for
8 inclusion in the National Register." 16 U.S.C. § 470f. Like NEPA, the NHPA is procedural in
9 nature, *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th
10 Cir. 2010), and the statute "imposes no substantive standards on agencies." *Nat'l Mining*
11 *Assoc. v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003); *see also San Carlos Apache Tribe v.*
12 *United States*, 417 F.3d 1091, 1097-98 (9th Cir. 2005) (explaining NHPA is "designed to
13 insure that the agency 'stop, look, and listen' before moving ahead"). Judicial review of
14 NHPA decisions is pursuant to the APA under the arbitrary and capricious standard. *Morongo*
15 *Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1998). This
16 standard is "highly deferential, presuming the agency action to be valid and affirming the
17 agency action if a reasonable basis exists for its determination." *Id.*

18 The NHPA Section 106 process requires the lead agency (here, BLM) to work with the
19 State Historic Preservation Officer ("SHPO") to: (1) determine the project's "area of potential
20 effects"; (2) make a "reasonable and good faith effort" to identify historic properties within
21 that area; (3) evaluate the historical significance of resources within the area to determine
22 whether those resources are eligible for listing on the National Register; and (4) determine
23 whether the project will affect eligible historic properties in the area. *See* 36 C.F.R. §§ 800.4,
24 800.5. If historic properties may be affected, the agency and the SHPO must determine if the
25 effects are adverse, and work to "develop and evaluate alternatives or modifications" that
26

27 ¹³ Quechan cites 40 C.F.R. § 1506.2, a section of the NEPA regulations encouraging federal and
28 non-federal agencies to coordinate their environmental review processes. That is precisely what
BLM and Imperial County did here.

1 “avoid, minimize, or mitigate” those adverse effects. *Id.* § 800.6. Here, BLM successfully
2 completed each of these steps.

3 **1. BLM Exceeded NHPA’s “Reasonable and Good Faith” Standard for**
4 **Identifying Historic Properties at the OWEF Site**

5 The NHPA required BLM to make a “reasonable and good faith effort” to identify
6 eligible historic and cultural properties prior to issuing the ROD for OWEF. *See id.*
7 § 800.4(b)(1).¹⁴ BLM’s more than satisfied this requirement. *See OWEF 1644-46; see also*
8 *OWEF 928-29, 941-960; 59,166-9425; 24,027-030.* At BLM’s direction, professional
9 archeological experts performed literature searches and exhaustive on-site pedestrian surveys.¹⁵
10 *OWEF 941-42, 944-45, 949.* Both BLM and its archeological consultants consulted with
11 various Indian tribes to identify properties of cultural and religious significance, including
12 Traditional Cultural Properties (“TCPs”), that may not have been identified by “traditional”
13 archeological surveys. *See OWEF 941-947; 24,027-030.* Tribal representatives were invited
14 to participate in all on-site survey activities and were present during the entire survey effort.
15 *OWEF 1645; 59,183-84; 59,211, 58,446-50.* Due to changes in the Project configuration,
16 BLM’s Class III intensive archeological survey (pedestrian survey) eventually encompassed
17 nearly the entire Project area – approximately 11,300 of the 12,436 acres within the OWEF
18 ROW. *See OWEF 59,175, 58,446.* These steps constituted a good faith effort to identify
19 historic properties and satisfy NHPA requirements. *See Narragansett Indian Tribe v. Warwick*
20 *Sewer Auth.*, 334 F.3d 161, 168-69 (1st Cir. 2003); *S. Utah Wilderness Alliance v. Norton*, 326
21 F. Supp. 2d 102, 110-115 (D.D.C. 2004).

22 Quechan levels a number of unsubstantiated claims that BLM’s identification efforts fell
23 short, including assertions that cultural resources have continued to be discovered following
24 Project approval. *See Quechan Mem.* at 21-22. As an initial matter, the claimed discoveries

25 ¹⁴ The NHPA does not, as Quechan suggests, require BLM to identify every historic or cultural
26 property prior to issuing the ROD. *See Quechan Mem.* at 21.

27 ¹⁵ The NHPA requires BLM to determine the “area of potential effects” for a project and, in
28 consultation with the SHPO and interested tribes, identify historical eligible properties within
that area. 36 C.F.R. § 800.4(b)(1). BLM employed all of the techniques listed in the regulation
to identify historical properties at OWEF.

1 following execution of the ROD are irrelevant to the NHPA analysis. Section 106 requires
2 BLM to make a reasonable and good faith effort to identify resources prior to project approval.
3 *See* 36 C.F.R. § 800.4(b)(1). Quechan cites no authority for its proposition that compliance
4 with this requirement may be judged by post-ROD discoveries, nor would that proposition be
5 consistent with the basic tenets of administrative law. Regardless, as demonstrated in Pattern’s
6 response to Quechan’s facts statement (filed herewith), Quechan’s claims are factually
7 incorrect and all NHPA-eligible archeological resources are being avoided.

8 Quechan raised many of the same concerns, including its arguments about the timing of
9 the prehistoric and ethnographic trails studies, to the ACHP before BLM approved the Project.
10 *See* OWEF 24,891-96; *see also* OWEF 23,819-820. BLM responded to those claims in detail,
11 explaining how it had considered each of the concerns raised by Quechan and the other tribes.
12 OWEF 24023-24128. After considering Quechan’s claims and BLM’s response to these
13 concerns, the ACHP elected to sign the MOA for OWEF. OWEF 23,944. And while the
14 SHPO expressed concerns regarding the future approval of other renewable energy projects,
15 OWEF 24,773-74, his decision to sign the MOA also evidences BLM’s compliance with its
16 NHPA responsibilities for OWEF. *See* OWEF 24774 (“I believe it is the correct choice given
17 what information has been provided for my consideration . . .”). *See S. Utah Wilderness*
18 *Alliance*, 326 F. Supp. 2d at 110-15, 117 (holding agency made reasonable good faith effort to
19 identify historic properties under Section 106 where ACHP and SHPO approved of agency’s
20 actions); *Pogliani v. U.S. Army Corps of Eng’rs*, 166 F. Supp. 2d 673, 700-01 (N.D.N.Y. 2001)
21 (upholding Section 106 compliance on basis of MOA because court was “unlikely to second
22 guess” the SHPO’s “expert and informed determination”).

23 2. BLM Adequately Consulted with Quechan and Other Tribes

24 The NHPA required BLM to afford consulting tribes a “reasonable opportunity” to
25 identify concerns about historic properties, advise on the identification and evaluation of
26 historic properties, articulate views on the undertaking’s effects on such properties, and
27 participate in the resolution of adverse effects. 36 C.F.R. § 800.2(c)(2)(ii)(A). NHPA
28 “consultation” requires the agency to seek, discuss, and consider the views of consulting

1 parties regarding the resolution of adverse effects, but the agency “has no duty to abandon or
 2 modify a project if the project is found to have an adverse effect that is not avoided or
 3 mitigated, but only to follow the mandated NHPA procedures.” *Coliseum Square Ass’n, Inc. v.*
 4 *Jackson*, 465 F.3d 215, 242 (5th Cir. 2006); *see also* 36 C.F.R. § 800.16(f) (defining
 5 consultation as “the process of seeking, discussing, and considering the views of other
 6 participants, and, *where feasible*, seeking agreement with them regarding matters arising in the
 7 Section 106 process” (emphasis added)).

8 BLM not only gave all of the consulting tribes, including Quechan, every reasonable
 9 opportunity to weigh in at each step in the NHPA process, but went out of its way to conduct
 10 an intensive dialogue with the consulting tribes over a six month period, even delaying its
 11 decision for three months solely for the purpose of discussing every aspect of the Project, its
 12 potential impact on archaeological resources, the nature of and impact on the claimed TCP, and
 13 mitigation of Project impacts. *See generally* OWEF 1644-673; OWEF 132-137.

14 In a disingenuous attempt to fit OWEF into the facts of an earlier case it brought against a
 15 solar project,¹⁶ Quechan asserts that BLM merely sent out form letters, failed to provide
 16 information necessary for consultation, and met with Quechan only when the meeting was
 17 initiated by the Tribe. These allegations are not true.¹⁷ The record shows that BLM sought
 18 and received Quechan’s input on various aspects of the Project from early on.

19 BLM formally initiated consultation with Quechan and other tribes on February 4, 2010.
 20 OWEF 30353-54. From that time forward, BLM made numerous offers for individual
 21 government-to-government meetings,¹⁸ which the Quechan chose not to accept until very late

22 ¹⁶ *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d
 23 1104 (S.D. Cal. 2010).

24 ¹⁷ *See* Ocotillo Express’ Counter-Statement of Undisputed Facts at ¶¶ 60-66.

25 ¹⁸ BLM sent nine emails and eleven formal letters to Quechan requesting a government-to-
 26 government consultation meeting to discuss the OWEF prior to the Tribe’s acceptance on
 27 January 24, 2012. OWEF 29625-631 (BLM emails to tribal officials on June 10, July 13, July
 28 21, September 6, September 29, December 1, December 2, and December 6, 2011, requesting
 government-to-government meeting with Quechan); OWEF 28293-94 (BLM email to tribal
 official on December 16, 2011, requesting government-to-government meeting); OWEF 1648-
 651, 1658- 672 (FEIS tbls. 5.1, 5.2, 5.3, 5.4)) (documenting letters to Quechan requesting
 government-to-government meetings on February 4, July 28, November 12, 2010, April 8, July

1 in the process. OWEF 28101. Quechan cannot now be heard to complain that BLM failed to
2 meet on a government-to-government basis at an earlier stage.

3 Quechan asserts that BLM failed to consult the tribe regarding the identification of
4 historic and cultural properties and the preparation of archeological reports. Quechan Mem. at
5 24. Yet BLM sought Quechan's assistance in designing the archeological survey effort,
6 invited tribal officials to participate in and inform the on-site survey, and hosted site visits
7 (which Quechan representatives attended) to discuss the preliminary site-survey results and to
8 identify properties with religious and cultural significance to the tribes. OWEF 942-44, 1647-
9 673. The record demonstrates that BLM did not ignore that input. For instance, when
10 Quechan and other tribes advanced the idea of an area-wide TCP, BLM agreed to assume the
11 TCP existed for purposes of evaluating the Project under NHPA. *See* OWEF 136-37, 1656;
12 *see also* OWEF 58543-563. BLM provided Quechan and other tribes with successive drafts of
13 the archeological survey report ("ASR") to for tribal comment and held follow-up tours of the
14 Project area to visit archeological sites requested by the tribes.¹⁹

15 Quechan's claim that BLM failed to consult with Quechan regarding the resolution of the
16 Project's adverse effects during the MOA process also does not withstand scrutiny. Quechan
17 submitted comments on multiple versions of the MOA, OWEF 23627-3811, and the record
18 demonstrates that BLM incorporated Quechan's input.²⁰ BLM provided an initial draft MOA
19 in November 2011, OWEF 29,688-691, 29,650-675, and held several meetings with the
20 Quechan and other consulting parties to solicit tribal input on the mitigation measures
21 proposed in the draft.²¹ In response to tribal concerns raised at these meetings, BLM circulated
22 a revised MOA in February 2012, OWEF 27,235-7330, and agreed to delay the ROD decision
23

24 15, August 11, September 14, October 5, November 18, November 23, 2011 and January 10,
25 2012).

26 ¹⁹ OWEF 23973 (documenting tribal site visits on April 11-13, 2012); OWEF 1649-650, 23,972-
27 73; *see also* OWEF 58,486-491, 58,378-380.

28 ²⁰ *See* OWEF 24,129-4223, 24,981-25,034, 26,880-6927; *see also* OWEF-24,023-24,128.

²¹ OWEF 1650-51 (recounting December 14, 2011, and January 5, February 9, 2012, meetings to
discuss mitigation in initial draft of MOA). Quechan representatives attended two of these
meetings. *See* OWEF 1664, 1670.

1 from February to May 2012 to allow for additional consultation. OWEF 29480-82. BLM held
 2 additional meetings and conference calls with tribes to discuss the mitigation proposed in the
 3 revised MOA – all of which Quechan’s tribal historic preservation officer attended.²² After
 4 considering tribal comments from these meetings, BLM released yet another revised MOA on
 5 April 3, 2012, to address tribal input and provided the tribes with additional time to comment
 6 on the new revisions. OWEF 23,973, 25,238-5407.

7 Quechan also asserts that BLM failed to consult with Quechan on the Native American
 8 Grave Repatriation Act (“NAGPRA”)²³ Plan of Action attached to the MOA. Quechan Mem.
 9 at 24. BLM provided this document to Quechan and other tribes for review and comment prior
 10 to Project approval. OWEF 27,235-39, 27,316-328. Quechan’s claim that BLM failed to
 11 consult on the NAGPRA Plan of Action is curious, given the fact that the Tribe’s Historic
 12 Preservation Officer John Bathke discussed the Plan with BLM officials at the March 12, 2012,
 13 Section 106 consulting parties meeting. *See* OWEF 58,964, 59,058-060, 59,077-083.

14 BLM’s consideration of tribal input (including Quechan’s input) during the MOA process
 15 is demonstrated by the fact that before signing the final version of the MOA, the ACHP
 16 required BLM to fully explain how BLM had addressed tribal concerns raised through
 17 consultation (including several of the same concerns raised in Quechan’s Motion). *See* OWEF
 18 23819-820. After being satisfied by BLM’s item-by-item response to tribal concerns, OWEF
 19 24,023-4128, the ACHP signed the MOA on May 8, 2012. OWEF 23,944. In doing so, the
 20 ACHP acknowledged that the agreement “fulfilled [BLM’s] responsibilities under Section
 21 106” and the NHPA regulations. *Id.* As the courts have recognized, under NHPA regulations
 22 an MOA “executed and implemented pursuant to this section evidences the agency official’s
 23 compliance with section 106.”²⁴ Moreover, ACHP approval of an MOA is viewed as a
 24

25 ²² *See* OWEF 23,957-58 (recounting attendance of Quechan’s tribal historic preservation officer,
 26 John Bathke, at Section 106 consulting parties meetings on February 9, March 7 and 12, 2012,
 and conference calls on April 10, 17, and 19, 2012); *see also* OWEF 23,971-73.

27 ²³ 25 U.S.C. § 3001 *et seq.*

28 ²⁴ 36 C.F.R. § 800.6(c); *see also Jackson*, 465 F.3d at 243 (executed MOA demonstrates NHPA
 compliance). *Cf. Tyler v. Cisneros*, 136 F.3d 603, 610 n.3 (9th Cir. 1988) (holding under prior

1 “judicially sanctioned . . . means of compliance” with Section 106.²⁵

2 Finally, Quechan’s argument that only high level government-to-government meetings
 3 should “count” as Section 106 consultation was rejected by the courts in 2008 when Quechan
 4 unsuccessfully challenged consultation on a federal land exchange. *See* 36 C.F.R. § 800.6(c);
 5 *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, 547 F.
 6 Supp. 2d 1033, 1048 (D. Ariz. 2008). Throughout consultation, Quechan has made clear that
 7 no amount of consultation or mitigation would convince the Tribe to allow OWEF to go
 8 forward. OWEF 29,480-82, 26381. However, “consultation is not the same thing as control
 9 over a project.” *Warwick Sewer Auth.*, 334 F.3d at 168 (NHPA does not provide a “tribal
 10 veto”). The record here demonstrates that BLM has provided Quechan with a “sufficient
 11 opportunity to identify [their] concerns about historic properties.” *See Te-Moak Tribe*, 608
 12 F.3d at 610 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)) (internal quotation marks omitted).

13 **3. BLM Has Continued Tribal Consultation During OWEF Construction,**
 14 **In Accordance With The MOA**

15 Quechan also claims that it and other tribes have not been consulted during OWEF
 16 Construction. The record demonstrates that this claim also is false. OWEF construction is
 17 proceeding under carefully designed protocols incorporated in the MOA for the continued
 18 identification and protection of historic and cultural resources that may be revealed during
 19 ground disturbance. *See* OWEF 226-31, 264-338. I also is occurring under the scrutiny of
 20 tribal monitors under the Tribal Participation Plan developed under the MOA, in which 15
 21 tribes were invited to participate. OWEF 24,225-75. Ten tribes have sent monitors to
 22 participate during construction. *See* POSTRODCC 215-22, 1494-507, 1508-22, 1523-31,
 23 1532-57, 1548-58, 1559-67 (documenting attendance of monitors from ten tribes).

24 The MOA and its Archeological Management Plan provide protocols that dictate the

25 version of NHPA regulations that Section 106 review process “is concluded when the Advisory
 26 Council accepts the Memorandum of Agreement”).

27 ²⁵ *Pres. Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Eng’rs*, 916 F. Supp.
 1557, 1566 (N.D. Ga. 1995); *see also Jackson*, 465 F.3d at 243-44 (agency compliance with
 28 Section 106 is demonstrated where SHPO and ACHP signed MOA); *Advocates For Transp.*
Alts., Inc. v. U.S. Army Corps of Eng’s, 453 F. Supp. 2d 289, 312-13 (D. Mass. 2006) (same).

1 response should previously undiscovered archaeological material be encountered during
2 prescreening or construction. OWEF 226-31, 289-95. Although a small number of
3 archeological resources have been discovered during construction, *see* POSTRODCC 215-22,
4 1494-507, 1508-22, 1523-31, 1532-57, 1548-58, 1559-67, Ocotillo Express and BLM have
5 strictly adhered to these protocols throughout. All archeological resources that have been
6 discovered have been evaluated pursuant to the protocols. *See id.* The Project footprint has
7 been continually redesigned to avoid impacts on all newly discovered archeological resources
8 to the maximum extent possible. *See, e.g.,* POSTROD 647; POSTRODCC 3332-41;
9 POSTROD 10,978, 11,719. The limited number of stone chips and other resources that could
10 not be avoided were evaluated under the NHPA, and none of those impacted by the Project
11 have been eligible for listing under the NHPA. *See, e.g.,* POSTRODCC 1699-702, 1703-06;
12 *see also e.g.,* POSTRODCC 1571-77, 1578-90, 1591-602, 1603-13, 1614-26, 1627-35, 1636-
13 43, 1644-53, 1654-64, 1665-74; POSTROD 8857-63.

14 BLM has kept the tribes informed regarding all aspects of the cultural resources
15 discovered during construction. *See, e.g.,* POSTRODCC 2855, 2932, 2935-38, POSTROD
16 7892-96, 9749-51. In addition to providing information through email updates, BLM also held
17 a series of meetings and calls to consult with the tribes to discuss recent developments and
18 obtain tribal input. *See, e.g.,* POSTROD 8387, 8245-386 (June 6, 2012, meeting sign-in sheet
19 and transcript), 8393-553 (June 13, 2012 meeting transcript), 8555-691 (June 26, 2012 meeting
20 transcript), 8809, 8695-808 (August 2, 2012 meeting sign-in sheet and transcript), 8813
21 (August 3, 2012, sign-in sheet for Section 106 consulting parties site visit to inspect cremation
22 site); *see also* POSTRODCC 1876-79; POSTROD 8811-12.

23 **E. Interior Complied With ARPA**

24 Quechan claims that archaeological field work occurred on the OWEF site between May
25 11, 2012 and July 10, 2012 without a required permit under ARPA, 16 U.S.C. § 470ee(a). This
26 claim is demonstrably false. On May 11, 2012, BLM issued an ARPA fieldwork authorization
27 for the OWEF project. POSTROD 12,155-57. It was issued to Tierra, which directed the
28 archaeological fieldwork during OWEF construction, based upon an ARPA permit that had

1 been issued to Tierra on August 31, 2010. See POSTROD 12,155-57, 12,081-87. Thus, to the
2 extent any approval was required under ARPA for the field work conducted between May 11
3 and July 10, 2012, that authorization was in place. Thus, Quechan's claim is refuted by the
4 record.

5 **F. If Court Reaches Quechan's ROW Enforcement Claims, It Fails For Lack Of**
6 **Evidence In Any Event**

7 The Court does not have subject matter jurisdiction over Quechan's claim that BLM has
8 not enforced terms imposed on construction of OWEF, as noted above in Ocotillo Express'
9 motion to dismiss. Moreover, Quechan's claim rests entirely upon allegations contained in an
10 extra-record declaration, Quechan Mem. at 25, and the Court has denied Quechan's motion
11 seeking to place those allegations in the record. ECF Dkt. 105. Thus, even if the Court were
12 inclined to consider this claim, defendants would be entitled to summary judgment because
13 Quechan has pointed to no evidence in the record that supports its allegations. The claims
14 would fail in any event, because BLM has put in place a robust compliance monitoring
15 program, including on-site third party compliance monitors. See OWEF 376-416
16 (Environmental and Construction Compliance Monitoring Plan). Through this program, BLM
17 has closely tracked compliance with all conditions applicable to the project. See, e.g.,
18 POSTROD 2116-3245 (Construction Monitoring Reports), 3844-3865 (Compliance Tracking
19 Logs), 3971-4131 (Weekly Project Updates).

20 **IV. CONCLUSION**

21 For the reasons identified above, Ocotillo Express respectfully requests this Court dismiss
22 Quechan's post-ROD claims for lack of subject matter jurisdiction and grant summary judgment
23 to the defendants on all of Quechan's remaining claims.
24
25
26
27
28

1 Dated: December 10, 2012.

Respectfully submitted,

2 /s/ S. Brandt-Erichsen

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5-5, I certify that on December 10, 2012, true and correct copies of the foregoing OCOTILLO EXPRESS' MEMORANDUM OF POINTS AND AUTHORITIES was served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Southern District of California.

/s/ Jeni Bonanno

Jeni Bonanno