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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally recognized Indian Tribe, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; United States Bureau of Land Management; Ken Salazar, Secretary of the Interior; Robert Abbey, Director, Bureau of Land Management; Teri Raml, District Manager, BLM California Desert District; Margaret Goodro, Field Manager, BLM El Centro Field Office Defendants	Civil Action No. 12cv1167 WQH MDD PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT HON. WILLIAM Q. HAYES U.S. DISTRICT COURT JUDGE DATE: OCTOBER 29, 2012 TIME: 11:00 AM COURTROOM 4 NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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On May 11, 2012, Defendants executed a Record of Decision ("ROD") that authorizes development of a massive, utility-scale, wind energy project (the "OWEF") across 10,151 acres of public "Class L" lands that are designated for heightened protection and preservation within the California Desert Conservation Area ("CDCA"). The Tribe seeks summary judgment on all claims asserted in its First Amended Complaint (Dkt. #70) and an order vacating the OWEF ROD.

I. STATEMENT OF FACTS

Pursuant to this Court's Civil Pretrial & Trial Procedures Order, Plaintiff's motion for summary judgment is accompanied by a separate statement of undisputed material facts.

II. STANDARD OF REVIEW

The Administrative Procedures Act ("APA"), 5 U.S.C. § 706, governs review of agency actions. *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1124-25 (9th Cir. 2007). Under § 706, a court must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Actions that are approved "without observance of procedure required by law" must also be set aside. 5 U.S.C. § 706(2)(D). Agency action must be reversed as arbitrary and capricious under § 706 if:

> the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). The agency must engage in reasoned decision-making, consider the relevant factors, and articulate a rational connection between the facts found and choice made. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Brong*, 492 F.3d at 1125. A reviewing court must not "rubber-stamp" agency decisions. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005).

III. ARGUMENT AND AUTHORITY

A. Interior Violated FLPMA and the CDCA Plan By Approving the OWEF Project, Which Will Significantly Diminish and Degrade Sensitive Resource Values on Class L Lands.

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq. ("FLPMA") mandates a comprehensive planning system for the use of public lands managed by BLM. In

FLPMA, Congress expressly designated public lands of the California desert as the "California Desert Conservation Area" and mandated development of a comprehensive management plan for these unique desert lands. 43 U.S.C. § 1781. Interior developed the California Desert Conservation Area Plan ("CDCA Plan") in 1980. OWEF 5905. Compliance with a land use plan developed under FLPMA is a substantive obligation. *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). "Once a land use plan is developed, [a]ll future resource management authorizations and actions . . . shall conform to the approved plan." *Id.;* 43 U.S.C. § 1732(a) (requiring Secretary to manage public lands in accordance with land use plans developed under FLPMA); 43 C.F.R. § 1601.0-2 (plans are designed to guide and control future management actions).

1. The CDCA Plan divides 12.1 million acres of BLM-administered California desert lands into four land-use classes, known as Classes C, L, M, and I, which provide a hierarchy of permissible land uses and development.

The 1980 Record of Decision approving the CDCA Plan explains that the Plan "controls and directs the type and degree of land use and resource management activities according to resource sensitivity and public demand by means of four Multiple-Use Classes: Controlled, Limited, Moderate, and Intensive." OWEF 5752. The division of CDCA lands into four separate classes based on resource sensitivity is a central component of the CDCA Plan. *Id.,* OWEF 5920. The Plan states:

> Multiple-Use Class L (Limited Use) protects sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.

Id. Class L areas "are by definition resource-sensitive." OWEF 5756. On Class L lands, consumptive uses are allowed, but "only up to the point that sensitive natural and cultural values might be degraded." OWEF 5928. In contrast, Class M (Moderate Use) lands provide for "higher intensity use" such as "mining, livestock grazing, recreation, energy, and utility development." OWEF 5920. Class I (Intensive use) lands allow intensive development and provide for "concentrated use of lands and resources to meet human needs." *Id.* While resource protection takes precedence over development on Class L lands, Classes M and I prioritize resource development, only requiring "mitigation" of impacts as appropriate. OWEF 5920 (directing BLM to "mitigate damage" to desert resources on Class M lands and stating that, on Class I lands, "mitigation of impacts . . . will occur

insofar as possible"). Nearly four million acres (31.6% of BLM CDCA lands) are Class M or I lands designated for moderate to high-intensity energy/utility developments like the OWEF Project. *Id.*

The Class L land designation does not prohibit all use or development. In fact, many of the same *types* of uses that are permissible in Classes M and I, such as livestock grazing, mining, road development, off-road vehicles, etc., are also permitted in Class L. OWEF 5922-27. The purpose of the four multiple-use classes is to differentiate between the permissible "degree" and "intensity" of use and to locate the moderate and high-intensity projects in less sensitive areas. OWEF 5752, 5920.

The CDCA Plan does not prohibit all development of wind and solar energy on Class L lands. OWEF 5922. However, energy developments (like all other uses of Class L lands) are permissible on Class L lands only if they are consistent with the substantive limits of the CDCA Plan and the Class L designation. To comply with the CDCA Plan, BLM must ensure that any proposed development on Class L land does not "significantly diminish" or "degrade" the sensitive resource values that are intended to be protected by the Class L designation. OWEF 5920, 5928. While impact "mitigation" is permissible on Class M and I lands, resource protection is required on Class L lands. OWEF 5920.

Interior's FEIS confirms that the Class L lands proposed for development here have sensitive natural, scenic, and cultural values. *See e.g,*. OWEF 944-60 (cultural); 1064-76 (vegetation) 1085-93 (scenic); 1126-51 (wildlife). The FEIS also confirms that the OWEF Project will significantly diminish and degrade the sensitive resource values with its development of 112 massive wind turbines, 42 miles of new roads, and infrastructure spread across 10,151 acres of public lands. Interior's EIS confirms that OWEF, even after implementation of all mitigation measures, would have adverse impacts on air quality, cultural resources, noise, paleontological resources, vegetation resources, visual resources, and wildlife resources. OWEF 832-40. Interior's analysis confirms that, even after mitigation, "construction and O&M activities would result in permanent unavoidable adverse impacts to the setting of an identified TCP [Traditional Cultural Property] assumed to be eligible for the National Register of Historic Places as a result of the conversion of a natural desert landscape to a landscape dominated by industrial character." OWEF 834. "Adverse impacts to historic viewsheds and indirect impacts to cultural resources would be unavoidable." *Id.* Even after mitigation, "construction and O&M activities would result in temporary and permanent unavoidable

impacts to sensitive vegetation communities and special status plant species. OWEF 838. Regarding visual resources, Interior confirms "adverse and unavoidable impacts from the conversion of a natural desert landscape to a landscape dominated by industrial character." OWEF 839. Interior predicts "long term land scarring following project decommissioning due to the large impact area and long recovery time for desert vegetation." *Id.* Regarding wildlife, Interior confirms that, even after all mitigation, "construction and O&M activities would result in temporary and permanent unavoidable impacts to suitable (unoccupied) PBS [peninsular bighorn sheep] habitat; burrowing owl burrows and foraging habitat, special status raptor and migratory bird species (collision), and special status bat species due to collision." OWEF 840. Thus, even after implementation of all prescribed mitigation, Interior's analysis confirms this Project will significantly diminish resources on these Class L lands.

Unfortunately, the Court should not assume that the mitigation required on paper will actually occur on the ground. Since its approval, the Project has repeatedly violated terms and conditions of its right-of-way with no action taken by BLM. *See* Declaration of John Bathke, ¶¶ 55-60.

2. <u>Interior has unlawfully and arbitrarily disregarded the substantive limitations applicable to Class L land management in the CDCA.</u>

The issue presented in this case is whether the CDCA Plan imposes any substantive limit on the approval of wind and solar energy projects on Class L lands. Interior's position is that the Plan imposes no such limit. Interior's position is that any wind or solar energy project is permissible on Class L lands no matter how destructive to protected resources. Interior arbitrarily limits its focus to Plan language that says wind and solar energy developments may be allowed, while ignoring its substantive obligation to "protect sensitive . . . resource values" on Class L lands. OWEF 5920. Interior contends that its only obligation is to study or take into consideration the impacts that would occur. OWEF 141. Yet, even if studies confirm a project would destroy the resource values intended to be protected by the Class L designation, Interior's position is that it may proceed to authorize the energy development on Class L lands. Interior's position is that the Plan requires only conformance with procedure, and contains no substantive protection. Interior's position is grossly inconsistent with the language and intent of the CDCA Plan and the Class L land designation – a designation that requires BLM to "protect" and "ensur[e] that sensitive values are not significantly diminished."

In this case, Interior never actually addressed the relevant question of whether the OWEF Project would result in significant diminishment to the resource values designated for protection, because Interior evaluated OWEF under the incorrect premise that any wind energy development is permissible on any Class L land regardless of impact. In the ROD, Interior incorrectly asserts that its only obligation is to take "into consideration the sensitive natural and cultural values that might be degraded." OWEF 141. The CDCA Plan requires more than just "consideration" of the values that might be degraded. On Class L lands, Interior must actually "protect" and "ensur[e] that sensitive values are not significantly diminished." OWEF 5920. The Plan imposes a substantive, not merely procedural, obligation on Interior to protect the resources within Class L lands. *Brong*, 492 F.3d at 1125, 1127 (requiring BLM management decisions to substantively conform to land use plan). Here, Interior not only failed to comply with its substantive obligation – it failed to even analyze the relevant question of whether significant diminishment to the sensitive resources would occur.

Interior fails to recognize that not all renewable energy developments are equal in size, scale, and scope of impact. The fact that some wind or solar energy may be appropriate on some Class L lands does not mean (as Interior irrationally contends) that all renewable energy projects, no matter how large, intensive, or destructive are permissible on all Class L lands, no matter the level of impact. Here, it is undisputed that sensitive natural and cultural values will be significantly diminished and degraded by the OWEF Project, rendering its approval unlawful under the CDCA Plan.

The *Brong* case is analogous. 492 F.3d 1120 (9th Cir. 2007). *Brong* involved the Northwest Forest Plan (NFP) that, like the CDCA Plan, divided the managed land into different classes or hierarchies of protection. *Id.*, at 1126. BLM proposed to authorize the logging of 1,000 acres of land after a forest fire – a "salvage" project. However, the proposed action was within an area that the NFP required to be managed "to protect and enhance conditions of late-successional [LSR] and old-growth forest ecosystems, which serve as habitat for . . . the northern spotted owl." *Id.* Although the NFP permitted salvage logging in this area in "limited circumstances," the Plan required that "salvage operations should not diminish habitat suitability now or in the future." *Id.* at 1127. Salvage operations were not prohibited under the Plan, but the Court found "the NFP clearly prioritizes the preservation of LSR ecosystems over commercial benefits." *Id.* at 1127. The Court found BLM's

authorization of the salvage project as "inconsistent with the NFP's clear direction." *Id.* At minimum, BLM was required to further explain its view of how the salvage project "is compatible with the NFP's direction to protect and enhance late-successional ecosystems." *Id.* The Court affirmed the injunction, declining to give deference to Interior's decision, which was clearly inconsistent with the intent of the applicable land use plan. *Id.* Similarly here, Interior has authorized a land use action that is plainly inconsistent with the substantive limitations of the CDCA Plan. Interior's unlawful interpretation of the CDCA Plan is not entitled to deference. *Id*.

Considering Interior's current policy zeal for development of large-scale renewable energy projects in the California desert, acceptance of Interior's position in this case will have devastating consequences for the "sensitive, natural, scenic, ecological, and cultural resources values" that the Class L designation has protected since 1980. For example, in another recent case, Interior approved a solar energy project (the IVS Project) that proposed construction of 30,000 individual solar energy collectors, along with associated roads, buildings, and energy infrastructure across 6,500 acres of Class L lands just a few miles away from the OWEF Project. *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1106-07 (S.D. Cal. 2010). The Class L lands proposed for the IVS Project contain 459 identified cultural sites in addition to sensitive biological resources and habitat. *Id.* Interior's EIS confirmed that the project "may wholly or partially destroy all archaeological sites on the surface of the project area." *Id.* at 1107. Despite the anticipated destruction of all resources that would result, Interior's position in that litigation, as now, was that there are no substantive limits in the CDCA Plan that apply to solar energy development on Class L lands. *See* Case No. 10cv2241-LAB (CAB), Dkt. #22. The Court granted the Tribe's motion for preliminary injunction, finding "the FLPMA claim [relating to approval of the IVS Project on Class L lands] at least raises 'serious questions' for purposes of injunctive relief." *Id.* at 1120. Here, Interior approved the OWEF Project on Class L lands despite being on notice from its previous litigation with the Tribe that there were "serious questions" about the legality of such approval.

3. <u>The history of the CDCA Plan, and purpose of the Class L designation, refute Interior's attempt to ignore the substantive limits applicable to Class L lands.</u>

Congress mandated land use planning to avoid piecemeal and harmful development of public

lands. 43 U.S.C. § 1701(a); 1781(a). A major impetus for establishing the CDCA and development of the CDCA Plan were the pressing demands, including energy, of a growing population in Southern California, which threatened the desert and required planning to avoid a "reactive" (site by site) management approach. 43 U.S.C. § 1781(a); OWEF 5805. Congress and Interior recognized that an unprincipled, case-by-case, approach to development of the desert would result in loss of significant sensitive resources, especially if "major demand for energy development" in the desert materialized. OWEF 5805. The CDCA Plan was developed and implemented to provide a comprehensive, long-range plan that would protect desert resources and avoid the exact kind of "desert sprawl" that is occurring now under Interior's program of renewable energy development.

In accordance with FLPMA's multiple use mandate, the CDCA Plan set some desert lands aside for moderate and high intensity development (Class M and I) while prioritizing resource protection on Class L and C lands. Millions of acres of lands are set aside for industrial-scale energy development in the CDCA, and Interior, over the past 24 months, has approved many such projects on tens of thousands of acres of Class M lands. Amnd. Complaint, Dkt. #70, ¶ 87. Sensitive resource values on Class L lands, however, are intended to be protected under the Plan. OWEF 5824, 5859-63.

The 1980 EIS for the CDCA Plan plainly refutes Interior's current effort to remove any distinctions between Class L, M, and I management. In 1980, Interior said the "principal difference" among the alternatives considered in developing the CDCA Plan "is expressed in terms of the relative acreage of public lands in the more protection-oriented Multiple-Use Classes C and L and those in the more consumptive use-oriented Multiple Use Classes M and I." OWEF 5821, 5862; OWEF 5860 ("the Proposed Plan provides a significant increase of lands protected in Class L and C"). Regarding protection of wildlife resources, the EIS for the CDCA Plan states: "Multiple-Use Classes C and L . . . will provide protection for wildlife resources in a greater degree than the existing situation throughout the CDCA. Large portions of the nine wildlife desert ecosystems will have extensive areas protected in Classes C and L." OWEF 5852. Regarding protection of visual resources, "the degree of protection for visual resources is directly related to the multiple-use class allocation in each alternative." OWEF 5864. Regarding cultural resource protection: "Management under Classes C and L allow greater levels of direct action to be taken to protect sensitive [cultural] resource values."

OWEF 5860. *See also* OWEF 5861 (noting that culturally sensitive areas falling outside the boundaries of designated "Areas of Critical Environmental Concern" would remain protected under Classes C and L). Regarding protection of Native American values, such as sacred spiritual, ceremonial, and funerary areas, the EIS for the CDCA Plan states at OWEF 5861-62:

> The basis for analyzing impacts is the number of acres of land containing known Native American values which would be exposed to risk of potential impact by actions under Class M or I. . . . Numerous specific activities can impact Native American values. Generally, where these value exists [sic], any surface-disturbing impact can be predicted to have an adverse impact. . . . Under the Proposed Plan a majority of identified Native American resource values would be protected through multiple-use class and special implementation guidelines. Only about 20 percent of identified sensitive resource values occur within Classes M and I.

The 1980 EIS for the CDCA Plan identified "potential irretrievable loss of historic, cultural, and Native American resources and values" as a "major concern." OWEF 5797. The CDCA Plan EIS also advised, at OWEF 5824, that the majority of identified sensitive areas of cultural resource and Native American values would remain protected under the Class C and L designations, stating:

> About 74 percent of highly sensitive and 78 percent of very highly sensitive cultural resources receive the protection of Classes C and L, thereby significantly reducing the risk of adverse impacts. An estimated 85 percent of identified areas of Native American traditional values occur in Class C and L, which will reduce potential for disturbance or desecration of these values.

"Highly sensitive [cultural] areas fall within Classes C and L in the majority of cases." OWEF 5823.

The specific Class L lands proposed for development of the OWEF contain uniquely sensitive scenic, Native American, and cultural values. In 1980, Interior described these specific Class L lands, in the OWEF Project Area, as "concentrated, sensitive areas of traditional Native American secular and religious use" and as part of a "cultural resource area of . . . sensitivity and significance which are most vulnerable to negative impact." Bathke Decl., Exh. 1. The significance of these specific Class L lands, and the surrounding area, to local Indian tribes and the public at large has been repeatedly confirmed in this administrative process. *See, e.g.*, OWEF 28354, 28209, 28013, 25776, 24920, 24891, 24775. Interior's consultant reported "the existence of a remarkable number of cultural resources in the project area." OWEF 28897. While the FEIS discloses only 287 archaeological sites, Interior's consultant actually discovered "between 400 and 600 new sites." *Id.*

These sites are very large in area and contain tens of thousands of individual artifacts. OWEF 950-57. As of August 6, 2012, at least 37 additional sites and hundreds of artifacts had been discovered during construction. Bathke Decl., ¶ 34. The OWEF lands are arguably some of the most sensitive Class L lands, in terms of Native American and cultural values, in the entire CDCA. OWEF 24893.

Interior may not, consistent with the CDCA Plan, permit projects that will significantly diminish or degrade sensitive natural, scenic, and cultural values on Class L lands. In contrast to the millions of acres of Class M and Class I land within the CDCA, the Class L land designation requires BLM to "protect sensitive, natural, scenic, ecological, and cultural resource values" and "ensur[e] that sensitive values are not significantly diminished." OWEF 5920. Interior's analysis confirms that the OWEF Project will significantly diminish numerous sensitive resource values intended to be protected by the Class L designation. *See, e.g.*, OWEF 832-40. Approval of the OWEF Project on these Class L lands was substantively unlawful under the CDCA Plan and the ROD must be vacated.

B. Approval of OWEF Is Not Consistent With Visual Management Standards.

FLPMA requires that the public lands be managed in a manner that will protect the quality of scenic values. 43 U.S.C. §§ 1701(a)(8); 1702(c); 1711(a); 1765(a); 1781(a)(1). One purpose of the Class L designation in the CDCA Plan is protection of scenic values and BLM must "ensur[e] that sensitive [scenic] values are not significantly diminished" on Class L lands. OWEF 5920. Interior protects the scenic values of public lands, including CDCA lands, through implementation of Visual Resource Management (VRM) classifications. OWEF 5727-28, 5678-79, 5700-01 (VRM policies); OWEF 1086, 2411-45. Development of VRM classifications, as on all BLM lands, is required in the CDCA. 43 U.S.C. § 1711(a); OWEF 5673, 1087. "VRM Class designations set the level of visual change to the landscape that may be permitted for any surface-disturbing activity." OWEF 1086.

"[O]nce the visual resource management classes are established, however, they are more than merely guidelines. Rather, having been developed through the [resource management planning (RMP)] process, meeting the objectives of each of the respective visual resource classes is as much a part of the RMP mandate as any other aspect of the resource allocation decisions made in the RMP." *Southern Utah Wilderness Alliance, et al.*, 144 IBLA 70, 85 (May 20, 1998). Like all other elements of a BLM management plan, VRM classifications are binding on the agency and must be complied

with when evaluating discretionary management activities. *Id.* at 86[1]; *Brong*, 492 F.3d at 1125.

In 2008 and 2010, Interior conducted visual resource inventories for the CDCA that designated the OWEF lands as Class III lands. OWEF 46311; 46578. According to Interior, based on the 2008 inventory, "the land area encompassing the OWEF project area is to be managed in accordance with Interim VRM Class III objectives." OWEF 1092. Under Class III: "The objective is to partially retain the existing character of the landscape. The level of change to the characteristic landscape should be moderate or lower. Management activities may attract attention but should not dominate the view of the casual observer." OWEF 1086. Class III management for this area is consistent with the CDCA Plan, which requires Class L lands be managed to ensure "that sensitive values (including scenic values) are not significantly diminished." OWEF 5920.

Interior's site-specific evaluation for OWEF confirms "the land area encompassing the OWEF project area is to be managed in accordance with Interim VRM Class II or III objectives." OWEF 2443, 2412-16, 1092. The OWEF Final Plan of Development (May 2012) also states that OWEF is located in a VRM Class III area. OWEF 531-32. One month before approving OWEF, reviewing a nearby solar project, Interior also determined the Class III designation is appropriate for Class L lands in this area, stating: "BLM manages the scenic and visual resources of the project area in accordance with the Multiple Use Class guidelines of the CDCA Plan. . . . For Multiple Use Class L visual management prescriptions, the VRM Class with closely corresponding visual management objective is Class III." Declaration of Thane D. Somerville, Exh. 1, p. 2.

Interior's FEIS confirms that the OWEF, with its 112 massive wind turbines, does not meet the governing Class II or III VRM standards. In Appendix E-1 of its FEIS, Interior found that all Alternatives of the OWEF Project are "Not Consistent" with the Class III VRM standards (or the more restrictive Class II standards). OWEF 2412-16. In assessing the visual impact of a 105-turbine proposal (less than the 112 turbines approved): Interior says "The high level of change would not

[1] Decisions of the Interior Board of Land Appeals [IBLA] may be relied upon as persuasive authority where Circuit precedent does not exist on a question addressing BLM's implementation of its public land management authority. *Te-Moak Tribe of Western Shoshone of Nevada*, 608 F.3d 592, 600 (9th Cir. 2010).

meet the VRM Class III objective of a moderate (or lower) degree of visual change." OWEF 2416. Interior also concedes that "this level of (wind) development can only conform with Class IV standards," the least restrictive VRM classification. OWEF 1484, 1086. OWEF is also inconsistent with state and local management standards. OWEF 1093.

Interior's analysis and application of VRM standards in this case is the essence of arbitrary and capricious decision-making. In the June 2011 Draft EIS, Interior analyzed the Project in relation to the applicable VRM Class III designation and found that the Project was not consistent with that standard. OWEF 31867, 32244. Prior to completing the FEIS, Interior realized that the Project could not be approved unless it complied with the applicable VRM standards. OWEF 46245 (comment). But, instead of denying the Project or looking to site the Project elsewhere, BLM simply changed the applicable management standard. *Id.* (deleting Class III and inserting Class IV as standard). All studies and inventories identify this area as VRM Class III, but BLM, days before issuing the FEIS, and just 3 months before executing the ROD, changed the applicable standard for the sole purpose of facilitating approval of an otherwise non-compliant Project. *Id., See also* OWEF 31867 and 1092 (noting inconsistency with VRM in DEIS, but consistency in FEIS after BLM changed the standard).

Interior's approvals and analysis of VRM are arbitrary and capricious and violate the APA, as there is no "rational connection between the facts found and the conclusions made." *Brong*, 492 F.3d at 1125. BLM also failed to comply with the APA, with regard to its visual analysis, by offering "an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). All evidence shows that the applicable management standard is VRM Class III, but BLM arbitrarily changed the standard to VRM Class IV at the last minute solely to facilitate development of the Project.

Protection of the scenic viewshed in this case closely relates to protection of Native American values. As explained in a February 13, 2012 letter to Interior from the Tribe, found at OWEF 28015:

> The remaining turbines [in the 112-turbine proposal] would still obstruct the viewshed to Coyote Mountain from locations other than the Spoked-Wheel Geoglyph, such as from the Indian Hills location. Second, the [112-turbine] Alternative neglects the viewshed towards the East to AVII'SHPA/WII'SHPA (Mount Signal) . . . there is a spiritual connection between Coyote Mountain and WII'SHPA, and the imposition of any turbines between the two locations would not only interfere with this spiritual

> connection but it would detrimentally impact the ability of the Quechan people to spiritually interact and appreciate these sacred locations.

The OWEF Project will destroy the sensitive and protected viewshed that connects spiritual landmarks that are central to the Quechan Tribe's Creation Story and their spiritual beliefs. *Id.* Thus, in addition to violating VRM standards, Interior violated the CDCA Plan by failing to ensure that culturally sensitive scenic values on Class L lands are not significantly diminished. OWPI 5920.

C. OWEF Will Result in Unnecessary and Undue Degradation of the Public Lands.

Under FLPMA, BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b). The overarching duty to prevent such unnecessary or undue degradation ["UUD"] has been described as "the heart of FLPMA." *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 33, 42-43 (D.D.C. 2003). BLM has defined the term "unnecessary or undue degradation" by regulation as conditions, activities, or practices that: "fail to comply with . . . Federal and state laws related to environmental protection and protection of cultural resources" and that "fail to attain a stated level of protection . . . required by specific laws in areas such as the California Desert Conservation Area." 43 C.F.R. § 3809.5.

BLM's obligation to prevent UUD requires the agency to prevent irreparable harm to environmental and cultural values: "[BLM] will prevent all UUD, including UUD occasioning irreparable harm to scientific, cultural, or environmental resource values." *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 44 (D.D.C. 2003) (*quoting* BLM's brief to the court). The UUD standard is not limited to mere compliance with other laws; rather, the UUD standard protects affected resources above and beyond the requirements of other laws. *Center for Biological Diversity v. United States Dep't of the Interior*, 623 F.3d 633, 644-45 (9th Cir. 2010).

Development of OWEF will permanently and unnecessarily degrade culturally significant lands that qualify as a Traditional Cultural Property, a culturally significant scenic viewshed, and habitat for sensitive biological plants and species on lands that have been affirmatively designated for protection as Class L lands in the CDCA Plan. OWEF 832-40 (identifying permanent adverse impacts arising from the OWEF Project). The FEIS also identifies "long term land scarring following project decommissioning due to the large impact area and long recovery time for desert

vegetation." OWEF 839. This anticipated degradation is unnecessary because the CDCA Plan sets aside 4 million acres of BLM-administered land in the CDCA for moderate to high intensity projects like OWEF under Class M and I. BLM did not conduct or require any evaluation of whether Class M or I lands are available and/or suitable for the applicant's development. Instead, BLM prepared an EIS that narrowly limited its analysis to the exact Class L lands identified by the applicant. OWEF 864, 5262. The anticipated degradation is undue because OWEF is clearly inconsistent with the level of protection mandated by the CDCA Plan and applicable VRM standards. Interior's failure to enforce mitigation measures is also resulting in unnecessary and undue degradation of these lands.

In the ROD, Interior contends that it met its obligation to "take any action necessary to prevent UUD." OWEF 130-31. Interior's UUD analysis fails to consider substantive limitations that are applicable to Class L land management. Interior incorrectly asserts that the Project lands have "not been specifically designated for the protection of any other resource." *Id.* In fact, Class L lands are specifically designated to "protect[] sensitive, natural, scenic, ecological, and cultural resource values." OWEF 5920. Interior's assertion at OWEF 130 that the Project will "completely avoid or minimize impacts to biological, cultural, visual, and other resources" is plainly contradicted by its own EIS which confirms the presence of significant unmitigated impacts that will permanently impair and degrade protected resources. OWEF 832-40. Finally, Interior's assertion that it evaluated alternative project locations on BLM-managed land that would result in avoidance or minimization of impacts is unsupportable. The only alternatives evaluated in the FEIS are projects of varying (but considerable) size on the exact lands proposed by the applicant. OWEF 864, 5262. For those alternatives that BLM "considered but eliminated from detailed analysis," BLM arbitrarily limited the scope of its consideration to sites within Imperial County, omitting any consideration of potential sites on Class M and I lands within the broader CDCA. OWEF 908. Interior offers no explanation as to why the applicant, an international energy developer, could not pursue a project on Class M or I lands outside Imperial County. BLM conducted no evaluation of whether available Class M or I lands exist in the CDCA that could meet the purpose and need of this project. Instead, it narrowly focused on the lands proposed by the applicant, despite the documented sensitivity of those lands and the applicable protections of the Class L land designation.

D. Interior Violated NEPA By Failing to Analyze Its "Priority" Renewable Energy Projects in the CDCA in a Single EIS.

Pursuant to NEPA, 42 U.S.C. § 4332(2)(C), Interior must prepare an environmental impact statement and take a "hard look" at the potential impacts of its actions prior to making a final decision. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of the Interior*, 608 F.3d 592, 603 (9th Cir. 2010). NEPA "is intended to help public officials make decisions that are based on an understanding of the environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). To date, Interior has failed to comprehensively examine the cumulative impact of its renewable energy development approvals within the CDCA.

In October 2010, Interior approved six "priority" renewable energy projects on 26,397 acres of BLM-managed CDCA land. In 2011, Interior approved two "priority" renewable energy projects on 16,298 acres of BLM-managed CDCA land, and five other "priority" projects located on 7,319 acres of CDCA land that required BLM approval for transmission lines or access. In addition to OWEF, which is located on 10,151 acres of BLM-managed CDCA land, Interior has identified four other "priority" projects for 2012 that cover 13,412 acres of BLM-managed CDCA land with renewable energy. In just over two years, BLM has approved development of "priority" renewable energy projects covering nearly 75,000 acres of land in the CDCA. Somerville Decl., Exh. 2.

Interior has analyzed the environmental impact of these projects individually, e.g., site by site, without any comprehensive assessment of its renewable energy development approvals in the CDCA. These "priority" projects represent a discrete and small sub-set of the total applications for renewable development. BLM's failure to analyze its self-designated "priority" projects in a single EIS violates NEPA, which requires "cumulative actions" be analyzed in one EIS. 40 C.F.R. § 1508.25(a)(2), (3).

> Where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS. *See LaFlamme v. Federal Energy Regulatory Commission*, 852 F.2d 389, 401-02 (9th Cir. 1988). There, emphasizing the likelihood of future development, the court remanded to the agency for further consideration of cumulative impact because the agency had examined single projects in isolation without considering the net impact that all the projects in the area might have on the environment. *See LaFlamme*, 852 F.2d at 401-03.

City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990). These "priority" projects are located in the same management unit, are affirmatively identified by BLM as "priority" projects, are

undergoing simultaneous environmental analysis, and are all reasonably foreseeable. *Id.* Interior's failure to assess its aggressive renewable energy program within the CDCA in a single EIS is leading to piecemeal development without adequate assessment of the overall impact on CDCA resources.

E. Interior Violated NEPA By Failing to Take a Hard Look at the Cumulative Effects of OWEF in Conjunction With Past, Present, and Future Projects.

"NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with 'past, present and reasonably foreseeable actions.'" *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002); 40 C.F.R. § 1508.25(c)(3); 40 C.F.R. § 1508.7. The purpose of a cumulative impact analysis in a project-specific EIS is to examine the project in its larger context and to not let the agency minimize the interactive or synergistic adverse effects caused by multiple projects in the management unit. *Id.* at 897; *Klamath Siskiyou Wildlands-Center v. BLM*, 387 F.3d 989, 996-97 (9th Cir. 2004).

The Ninth Circuit Court of Appeals has considerable jurisprudence on the requirements of a project-specific cumulative effects analysis. Much of that jurisprudence addresses deficiencies in cumulative effects analyses prepared by BLM. *Te-Moak Tribe of Western Shoshone of Nevada*, 608 F.3d 592, 602-607 (9th Cir. 2010) (deficient cumulative effects analysis); *Brong*, 492 F.3d 1120, 1132-35 (9th Cir. 2007) (same); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971-74 (9th Cir. 2006) (same); *Oregon Natural Resources Council v. Bureau of Land Management*, 470 F.3d 818, 822-23 (9th Cir. 2006) (same); *Lands Council v. Powell*, 395 F.3d 1019, 1027-28 (9th Cir. 2005) (same); *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 997 (9th Cir. 2004) (same); *Native Ecosystems Council*, 304 F.3d 886, 895-97 (9th Cir. 2002) (same); *City of Carmel-By-The-Sea v. Dep't of Transportation*, 123 F.3d 1142, 1160-61 (9th Cir. 1997) (same).

> In a cumulative impact analysis, an agency must take a 'hard look' at all actions. An EA's analysis of cumulative impacts 'must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. "General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification why more definitive information could not be provided." "[S]ome quantified or detailed information is required. Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide." [internal citations omitted].

Te-Moak Tribe, 608 F.3d at 603 (9th Cir. 2010). The Ninth Circuit has clarified that agencies may

"aggregate" the environmental effects of the relevant individual past actions that contribute to the cumulative effect. *Ecology Center v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009). This clarification does not otherwise modify the agency duty to: (a) provide a sufficient detailed catalogue of past, present, and future projects; (b) analyze how these projects have impacted the environment; (c) provide "quantified or detailed information" in its analysis of cumulative effects; and (d) provide a "hard look" that consists of more than "general statements about possible effects and some risk." *Northern Plains Resource Council, Inc. v. Surface Trans. Board*, 668 F.3d 1067, 1076 (9th Cir. 2011) (summarizing requirements of cumulative impacts analysis); *Te-Moak Tribe*, 608 F.3d at 603 (same).

In this case, Interior failed to adequately assess the cumulative impact of the OWEF Project, in conjunction with past, present, and reasonably foreseeable projects on Class L lands within the CDCA. Interior purports to analyze the cumulative effect of large-scale renewable energy projects on Class L lands in Section 4.8.9 of the FEIS. OWEF 1295-97. Interior's cursory and conclusory "analysis" in that section is incomplete, misleading, and violates NEPA. *Brong*, 492 F.3d at 1134 (rejecting analysis that merely summarized cumulative effects in broad and general terms); *Te-Moak Tribe*, 608 F.3d at 604 (rejecting vague and conclusory analysis of cumulative effects).

First, Interior failed to identify all of the relevant past, present, or reasonably foreseeable projects located on Class L lands. *Brong*, 492 F.3d at 1133 (stating that description of the relevant projects is the first step in the cumulative effects analysis). Interior notably failed to evaluate the reasonably foreseeable development of other wind energy projects directly adjacent to OWEF, even though Interior specifically identified such projects on OWEF Project maps. OWEF 156. At least two other projects proposed for development on Class L lands (the Ocotillo Solar Project, proposed for 100 acres of Class L lands, and the Granite Mountain Wind Project, proposed for 2086 acres of Class L lands) also are not mentioned in Table 4.8-1 (OWEF 1296) or in Section 4.8.9. Somerville Decl., Exhs. 1, 4. Interior also failed to discuss its designation of "Solar Energy Zones" within the CDCA which will prioritize utility-scale solar development on 5,700 acres of Class L lands known as the Imperial East SEZ. *Id.*, Exh. 3. Other projects within the CDCA are identified on Interior's website as "2012 priority" projects (*Id.*, Exh. 2), yet no analysis or discussion of those foreseeable projects are included in the cumulative impacts discussion. Failure to identify foreseeable relevant

projects on Class L lands is a fundamental failure that invalidates the cumulative effects analysis. *Te-Moak Tribe*, 608 F.3d at 603-607 (failure to analyze effects of "reasonably foreseeable activity" results in defective cumulative effects analysis); *Dombeck*, 304 F.3d at 896-97. Without first identifying the relevant projects, it is impossible to conduct an analysis of their effects.

Second, Interior failed to adequately evaluate or discuss the cumulative effect of past, present, and reasonably foreseeable projects on the resources that are to be protected on Class L lands, including but not limited to cultural resources and Native American values. *Hankins*, 456 F.3d at 974. Interior "cannot simply offer conclusions. Rather, it must identify and discuss the impacts that will be caused by each successive [project], including how the combination of those various impacts is expected to affect the environment." *Id.* The projects identified by Interior in Table 4.8-1 (and those not identified) have, and could have, a significant impact on cultural resources on Class L lands in the CDCA. For example, the Blythe Solar Project will destroy 210 cultural resources. Somerville Exh. 5, p. 27. The IVS Project, as approved by Interior, would destroy 459 cultural resource sites. *Quechan Tribe*, 755 F. Supp. 2d at 1107. Developments in the prioritized Imperial East SEZ will further impact culturally sensitive areas. Somerville Exh. 3. Each of these projects standing alone cause significant damage to cultural resources that were intended to be protected and preserved on Class L lands. The cumulative loss of resources is enormous. Interior must adequately document and analyze the cumulative resource loss, either in a comprehensive EIS addressing its overall program of renewable energy development in the CDCA or in its project-specific EIS for the OWEF.

Interior vaguely reports, at OWEF 1295, that "cumulative impacts could result from the construction and operation of large renewable energy projects on MUC-designated lands" in the CDCA, but nothing in the FEIS actually quantifies what these cumulative impacts are or provides supporting data. Interior does not describe, or attempt to quantify, the aggregate cumulative loss of cultural resources resulting from the development of renewable energy projects on Class L lands throughout the CDCA. *Hankins*, 456 F.3d at 973 (rejecting analysis, due to Interior's failure to offer supporting data or quantify impacts of projects). Nor does Interior describe, or attempt to quantify, the total acreage of habitat lost for species on Class L lands. There is no "quantified or detailed information" about how the resources on Class L lands will be affected by the past, present, and

reasonably foreseeable developments. *Northern Plains Resource Council*, 668 F.3d at 1076 (stating requirement to provide "quantified or detailed information" about cumulative effects).

Interior states that "the potential for impacts to MUC-designated lands has recently increased due to the influx of applications for solar and wind energy facilities" (OWEF 1295); that "the proposed and approved solar energy projects would result in the conversion of thousands of acres of desert land that are currently designated for MUC land use activities" and that "there may be substantial long-term land use and recreation impacts during operation of the renewable energy projects." OWEF 1297. But without any supporting "quantified or detailed information" about what the cumulative effects are, this is nothing more than "general statements about possible effect and some risk" that the Ninth Circuit repeatedly rejects. *Brong*, 492 F.3d at 1134; *Te-Moak Tribe*, 608 F.3d at 604; *Hankins*, 456 F.3d at 973. Interior fails to discuss the "substantial long-term" cumulative impacts that will be suffered by cultural resources, Native American values, wildlife, plants, and other resources on Class L lands. OWEF 1296-97. The purpose of the cumulative effects analysis is to alert the public and the decision-makers of this cumulative loss. *Te-Moak Tribe*, 608 F.3d at 599, 605 (describing purpose of NEPA). This FEIS fails to do so, rendering it invalid under NEPA.

The FEIS contains resource-by-resource cumulative effects "analyses," but none of those analyses describe the cumulative effect that the numerous past, present, and foreseeable energy projects will have on Class L lands throughout the CDCA. These resource-specific analyses also fail to provide the required "quantified or detailed information" regarding cumulative effects. Section 4.4.9.2 of the FEIS, which purports to describe the "existing cumulative conditions" relating to cultural resources generically states: "In the past, cultural resources have sometimes been damaged or destroyed by development projects, resulting in the loss of potential knowledge" and "Development projects in the region have resulted in the damage or destruction of cultural resources." OWEF 1245. This is similar to the conclusory "analysis" rejected in *Te-Moak*, 608 F.3d at 604. No supporting data or "quantified or detailed information" is provided to allow a reader to ascertain the number, or type, of resources damaged by past or present activities in the analysis area. The discussion of the cumulative impacts to wildlife resources also lacks quantified or detailed information, either individually or in the aggregate about impacts from past or existing projects. OWEF 1614-16.

The cumulative impact on cultural resources resulting from renewable energy development on Class L lands is also in direct conflict with the CDCA Plan. Interior's 1980 EIS for the CDCA Plan explained that the vast majority of cultural resources and Native American values within the CDCA would remain protected by the Class C and L designation. OWEF 5823-24, 5860. From late 2010 to the present, Interior has repeatedly approved massive energy development projects detrimentally affecting, and in some cases permanently destroying, sensitive resources designated for protection on Class L lands. Many more projects are reasonably foreseeable, labeled by Interior as "priority" projects. Interior's aggressive push for energy development is resulting in unprincipled and damaging "desert sprawl" that comprehensive land use planning, via the CDCA Plan, was supposed to prevent. Interior, not satisfied with limiting utility-scale energy development to available Class M and I lands, has failed to comply with the CDCA Plan. NEPA mandates that the cumulative effect of its actions on CDCA lands be presented to the public and decision-makers and fully analyzed in the FEIS.

Native Ecosystems Council v. Dombeck, 304 F.3d 886, 897 (9th Cir. 2002) is analogous:

> The Forest Service argues that it need not consider the other road density amendments within the Darroch-Eagle EA because the amendments are spread throughout the Gallatin National Forest. We disagree. The national forest was the geographic unit within which the Forest Service chose to set forth binding road density standards in the Forest Plan. All of these sales are proposed within the Gallatin National Forest and will necessarily have additive effects within that management unit. Unless the cumulative impacts of these amendments are subject to analysis even though distantly spaced throughout the Forest, the Forest Service will be free to amend road density standards throughout the forest piecemeal, without ever having to evaluate the amendments' cumulative environmental impacts. NEPA does not permit this. . . .

Similarly here, Interior is proceeding to approve numerous individual utility-scale energy developments, each of which independently have significant impacts on resources within the CDCA. With each development approved, a certain number of resources are lost or impaired. This piecemeal development approach is irreparably impairing the resources and values, especially cultural and Native American values, that the public and Interior agreed would be protected on Class L lands in the CDCA Plan. Thus, it is imperative, for the protection of Class L lands and the resources that the CDCA Plan was created to protect, that Interior, at minimum, thoroughly disclose and consider the cumulative effect of its energy development approvals on Class L lands throughout the CDCA.

F. Interior Failed to Examine the Indirect Growth-Inducing Effects of the Project.

Under NEPA, an EIS must thoroughly analyze indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Such indirect effects may include growth inducing and other effects related to induced changes in the pattern of land use. 40 C.F.R. § 1508.8(b). Development of OWEF is likely to lead to the development of additional wind energy developments adjacent to the OWEF site. Maps prepared by BLM identify "authorized Type II Wind Energy Projects" and "Pending Wind Energy ROW Applications" adjacent to the OWEF Project. OWEF 156. Violating NEPA, Interior failed to analyze whether the OWEF Project would induce development of these energy projects in this culturally sensitive area.

G. Interior Failed to Take a "Hard Look" At Whether the OWEF Project Would Conform to Local Law in Violation of NEPA.

The CDCA Plan Decision Criteria for Energy Production requires that energy projects (on Class L, M, or I lands) "conform to local plans wherever possible." OWEF 6000. Similarly, 40 C.F.R. § 1506.2(d) requires evaluation in an FEIS of any inconsistency that a Federal action will have with local land use plans and laws, and where an inconsistency exists, the FEIS must describe the extent to which the agency would reconcile the proposed project with local law. No such evaluation occurred in this case. Without analysis, Interior simply asserted that local law was inapplicable and superseded by federal law. OWEF 1266-67. Whether local law, in general, applies to federal lands is not the issue. Here, relevant federal law (the CDCA Plan) expressly requires conformance to local plans where possible. If Interior believes it is not possible for OWEF to conform with local law, it must at least provide its reasoning in the EIS and the ROD, and describe how it will attempt to reconcile any inconsistencies between the federal action and local law. Interior failed to do so here.

H. Interior Failed to Comply With Its Obligations Under the NHPA and NAGPRA.

The NHPA requires that Interior "shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. Like NEPA, the NHPA is designed to ensure that federal decision-makers thoroughly evaluate the impacts of their proposed

actions on NHPA-eligible resources prior to taking action. *Te-Moak Tribe*, 608 F.3d at 607.

Regulations implementing Section 106 of the NHPA require that, prior to approving a federal undertaking (such as the OWEF), the federal agency must engage in a three-part process. First, the agency must identify the historic properties within the affected area. 36 C.F.R. § 800.4. Second, the agency must evaluate potential effects that the undertaking may have on historic properties. 36 C.F.R. § 800.5. Third, the agency must resolve the adverse effects through the development of mitigation measures. 36 C.F.R. § 800.6. Throughout all of these processes, the agency must consult with Indian tribes that might attach religious and cultural significance to historic properties within the affected area, even if such area is outside of reservation boundaries. 36 C.F.R. § 800.3(f)(2); § 800.4(a)(4); § 800.5(c)(2)(iii); § 800.6(a); § 800.6(b)(2), etc.; *Quechan Tribe*, 755 F.Supp.2d at 1119-20 (S.D. Cal. 2010) (enjoining solar project on Class L lands based on failure to adequately consult Indian tribe). Interior approved OWEF without completing all required steps of the Section 106 process and failed to consult with the Quechan Tribe at each required stage of the Section 106 process.

1. <u>Interior failed to adequately identify all historic properties prior to approval.</u>

Interior did not identify all historic properties within the affected area prior to approving the undertaking. First, delineation of site boundaries was arbitrarily limited in order to accommodate the Project. OWEF 24776-77. Second, tribal monitors were not permitted to survey areas identified as "direct impact" areas. *Id.* When tribal representatives were finally allowed access to the "direct impact areas" in late April 2012, they found and notified BLM of new/unrecorded sites and isolates. OWEF 24920. Thus, BLM knew that the applicant's claim of "no direct impact" to cultural sites or resources is not credible. *Id.* Third, despite repeated requests, Interior did not conduct prehistoric trails or ethnography studies prior to approving the undertaking. OWEF 24893. Instead of conducting these studies prior to approving the undertaking, Interior is allowing the applicant to fund these studies after the Project is already built. California SHPO wrote on April 24, 2012: "The fact that an ethnographic study is proposed as mitigation comes too late in the planning and decision-making process in which affects [sic] cannot be fully realized to Native American traditional properties." OWEF 24773. *See LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988) (post-decisional data gathering violates fundamental purpose of NEPA). Fourth, cremation sites were not

adequately surveyed, as cremation sites continue to be discovered on site during project development. Bathke Decl., ¶ 36. Fifth, since Project approval, dozens of new cultural sites and hundreds of artifacts have been identified, many of which are located within direct impact areas. Bathke Decl., ¶ 34. Decision-makers lacked full information about the cultural resources within the area prior to approving the undertaking. Failure to adequately identify historic properties, the first step in the 106 process, impairs and invalidates the remaining steps of evaluation and mitigation.

2. Interior failed to adequately consult the Tribe prior to, and after, approval.

Interior also violated its duty to consult with the Quechan Tribe at each required step in the Section 106 process. "The consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the Federal Government and Indian tribes' and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.'" *Quechan Tribe*, 755 F. Supp. 2d at 1108-9; § 800.2(c)(2)(ii)(C). Agency action occurring without required consultation should be vacated. *California Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090-95 (9th Cir. 2011) (failure to consult is not harmless error; vacating agency action for failure to comply with statutory consultation obligation). A requirement to consult "reflects the desirability of the interactive process itself." *Id.* at 1092. "The consultative process . . . serves the purpose of permitting the [consulting party] to participate in the formulation of federal policy in an area of major interest to the [consulting party]." *Id.*, *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784-85 (D.S.D. 2006) (granting injunction due to United States' failure to consult).

In *Quechan*, the Court found that BLM failed to comply with consultation obligations arising under 36 C.F.R. Part 800. Those regulations "require the agency to consult extensively with Indian tribes [that attach religious and cultural significance to historic properties that may be affected]." 755 F. Supp. 2d. at 1109. "Section 800.4 alone requires at least seven issues about which the Tribe, as a consulting party, is entitled to be consulted before the project was approved." *Id.* Sections 800.5 and 800.6 require further consultation to resolve adverse effects. Under Section 800.2(c), Indian tribes are entitled to special consideration in the course of an agency's fulfillment of its consultation obligations. *Id.* "[B]ecause of the large number of consulting parties (including several tribes), the logistics and expense of consulting would have been incredibly difficult." *Id.* at 1119. However:

> government agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations. The required consultation must at least meet the standards set forth in 36 C.F.R. § 800.2(c)(2)(ii), and should begin early. The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The Tribe's consulting rights should have been respected. It is clear that did not happen here.

Id. The failure to consult rendered Interior's approvals "without observance of procedure required by law" under the APA. *Id.* at 1119-20. 5 U.S.C. § 706(2)(D).

BLM repeated the same mistakes here, failing to comply with consultation obligations prescribed by Section 106 regulations. Although BLM was aware of Quechan's concern about this area, the first meeting between BLM officials and any member of the Quechan Tribal Council did not occur until January 2012 (long after the siting decision was made; just weeks before release of the FEIS; and after development of critical cultural studies). OWEF 1670. The meeting was prompted by a December 9, 2011 letter from the Quechan Vice-President to BLM noting that "the El Centro BLM Office has not met once with the Quechan Tribal Government . . . to consult about the project." OWEF 28355. This violates the mandate that consultation is to commence early in the planning stages. 36 C.F.R. § 800.2(c)(ii)(2)(A). No meeting with the full Council ever occurred.

The Tribe was also deprived of timely information necessary to the consultation process. When information was provided, Interior demanded comments in a rushed time frame in order to achieve the arbitrary project approval deadline of May 2012. OWEF 24894. After the FEIS was finalized and published, Interior did a massive "document dump" providing the Tribe with the Revised Draft MOA, the Historic Properties Treatment Plan, the NAGPRA Plan of Action, the Long Term Management Plan, and the Archaeological Monitoring Post-Review Discovery Plan and demanding tribal input within approximately 30 days. *Id*. This was the first time that the Tribe had seen many of these critical documents (which were drafted without tribal input). According to Interior, these documents constitute "mitigation" for the OWEF Project and "resolution of adverse effects" pursuant to 36 C.F.R. § 800.6. Yet, the Tribe was not consulted in the development of the documents as required by 36 C.F.R. § 800.6(a). OWEF 24894.

Once documents were provided, the Tribe was requested to comment on all of the documents (containing hundreds of pages and detailed appendices) within a few weeks time. OWEF 24894.

When the Tribe commented, its comments were ignored. OWEF 25777. This is not meaningful government-to-government consultation. *California Wilderness Coalition*, 631 F.3d at 1088-90 (faulting DOE for refusing to share drafts of studies and underlying technical data with consulting parties); *Quechan*, 755 F. Supp. 2d at 1118-19 ("the Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted").

The management plans described above, which Interior puts forward as "mitigation" for Project impacts, also do not provide for consultation with the Tribe regarding any new discoveries that occur during construction. The Tribe is effectively cut out of any consultation with regard to new site discoveries. Since construction began, numerous sites have been discovered. In addition, other artifacts have been discovered that the Tribe believes should be designated as sites. Many of these sites and artifacts are within direct impact areas, yet the Tribe is not being consulted.

There are numerous other examples to show that BLM's consultation effort falls short of the mark set by 36 C.F.R. Part 800. For example, the Tribe was not consulted in the identification of historic and pre-historic properties, the preparation of archaeological reports, the determination of whether identified cultural resources should be deemed eligible for inclusion in the National Register, or in the assessment of adverse effects. 36 C.F.R. §§ 800.4(b); 800.4(c); 800.5(a). Nor was the Tribal Council, the governing body of the Tribe, ever granted a meeting with the actual decision-maker – precluding true government-to-government consultation from occurring. OWEF 24894. "Because the project was approved 'without observance of procedure required by [the NHPA],' the Tribe is entitled to have the BLM's actions set aside under 5 U.S.C. § 706(2)(D)."

Interior also failed to consult the Tribe on the NAGPRA Plan of Action, in violation of 43 C.F.R. § 10.3(c)(1) and 10.5. Since approval of the OWEF ROD, and during Project construction, Interior has failed to consult with the Tribe regarding the presence of possible prehistoric human remains discovered in the OWEF Project Area. Bathke Decl., ¶ 58. As of early September, BLM informed the Tribe that it would no longer consult at all due to the pending litigation. *Id.*, ¶ 60.

I. Interior Violated ARPA By Allowing Excavation and Removal of Artifacts Without a Valid Permit and By Issuing a Permit Without Consulting the Tribe.

Section 6 of ARPA, 16 U.S.C. § 470ee(a) prohibits any person from excavating, removing,

damaging, or otherwise altering any archaeological resource located on public lands unless such activity is in compliance with ARPA. 43 C.F.R. § 7.5 requires any person proposing to excavate and/or remove archaeological resources from public lands to obtain a permit and not begin work until a permit has been issued. Between May 11, 2012 and July 10, 2012, the project proponent excavated and removed dozens of archaeological resources from the OWEF Project Area without a valid permit. Bathke Decl., ¶ 56, Bathke Exhs 2-7. Prior to issuing a Notice to Proceed, Interior was aware of the proponent's intent to excavate and remove artifacts. Allowing the Project to proceed without valid permits in place is unlawful under the APA and ARPA. On July 10, 2012, Interior issued an ARPA permit authorizing future excavation and removal of archaeological resources (Somerville Decl., Exh. 8), but did so without complying with its obligation to notify and consult with the Tribe under 43 C.F.R. § 7.7. This violates both ARPA and the APA, and the permit must be vacated.

J. Interior Has Failed to Enforce Compliance With the Right-of-Way Approvals.

BLM argues that it has imposed significant mitigation measures on the Project. To date, BLM has failed on numerous occasions to require the applicant to comply with terms and conditions of the ROD, right-of-way, and mitigation measures. Bathke Decl., ¶ 55-60. BLM shares the applicant's interest in getting this Project operational, no matter the cost to the other affected resources. Given the Secretary's policy of renewable energy development at any cost, BLM lacks incentive to enforce mitigation measures that might slow or stop construction. BLM's failure to enforce compliance further violates its duty to protect resources on Class L lands, its duty to prevent unnecessary and undue degradation of public land, and is an arbitrary, capricious, abuse of discretion.

IV. CONCLUSION

Secretary Salazar's recent statement that Interior's program of renewable energy development is "on steroids" is an apt analogy. While steroids unnaturally increase muscle and strength, they do so only at the expense of other bodily functions. Similarly here, Interior is aggressively pushing to develop large energy projects on sensitive Class L lands at the complete expense of other resources critical to the health, public enjoyment, and Native American values of the desert, which are intended to be protected under the CDCA Plan. Based on the foregoing, the Tribe respectfully requests that the Court enter judgment in favor of the Tribe and vacate the Ocotillo ROD and Notice(s) to Proceed.

Respectfully submitted this 24th day of September, 2012.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

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