13-55704

United States Court of Appeals
for the Ninth Circuit

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA (No. 12-1167 GPC/PCL)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant Quechan Tribe of the Fort Yuma Indian Reservation is a federally recognized Indian Tribe. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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I. STATEMENT OF JURISDICTION

The District Court for the Southern District of California had jurisdiction pursuant to 5 U.S.C. § 702, 28 U.S.C. § 1331, and 28 U.S.C. § 1362, as this action arises under federal law, challenges actions of a federal agency, and is brought by a federally-recognized Indian tribe. The District Court entered final judgment on February 27, 2013. ER1. The Tribe filed its Notice of Appeal to this Court on April 26, 2013. ER38. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Whether the Department of the Interior (Interior) violated the Federal Land Policy and Management Act (FLPMA), the California Desert Conservation Area Plan (CDCA Plan), and the Administrative Procedure Act (APA) when it approved a right-of-way for development of the Ocotillo Wind Energy Facility on public lands designated for management as Class L - Limited Use under the CDCA Plan?

2. Whether Interior's management of visual resources in this proceeding violated FLPMA, the APA, and the CDCA Plan?

3. Whether Interior's cumulative impacts analysis violated NEPA?[1]

[1] The District Court's analysis and rulings regarding issues raised on appeal are found at ER15-18 (regarding Class L lands); ER18-23 (visual resources); and ER27-32 (cumulative impacts).

III. ADDENDUM OF PERTINENT LAWS

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are included within the addendum to this brief.

IV. STATEMENT OF THE CASE

The Quechan Tribe challenges Interior's approval of a massive, sprawling, wind-energy development, the Ocotillo Wind Energy Facility (OWEF), on 10,151 acres of public lands surrounding the town of Ocotillo, California. ER96. The affected lands are sacred to the Tribe. ER917-18. For over thirty years, Interior has recognized these lands as a culturally and spiritually sensitive area. ER1431-32. Hundreds of archaeological sites, thousands of individual artifacts, and multiple burial sites are documented on these lands. ER269-70. As a whole, the entire OWEF project area constitutes a Traditional Cultural Property (TCP) that is eligible for listing on the National Register of Historic Places. ER254-56. Interior's own analysis concedes that this energy development will have an un-mitigated and significant adverse effect on the TCP. ER177-78; 374-79; 1197-98.

The affected lands are governed by the CDCA Plan, developed by Interior in 1980 pursuant to FLPMA. ER99; 717-885. The lands are designated by the CDCA Plan as Class L-Limited Use. ER99. Under the CDCA Plan,

> 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.

ER732. Far from protecting the sensitive resource values present on these Class L lands, Interior's approval of a right-of-way for OWEF has resulted in significant diminishment of the resources designated for Class L protection. ER176-84; 1197. The existence of unmitigated adverse impacts is not disputed; rather, it is confirmed by Interior's own environmental analysis. *Id*. Scenic values (which are also culturally significant) are especially impacted by the 112 turbines, each standing over 400 feet tall. ER192; 450-55; 905.

OWEF is only one of many utility-scale energy projects that Interior has approved within the CDCA since late 2010. ER339; 349-50. Many more projects are under review for approval. ER337. Interior, in its frantic pursuit of energy development in the California desert, is ignoring and violating the substantive requirements of its governing land management plan. Specifically, Interior has failed to comply with its obligation to protect sensitive resources on lands designated as Class L–Limited Use. ER732. Interior's unprincipled rush to develop energy in the California desert has placed sensitive resources located on Class L lands at grave risk of harm and permanent loss. ER1198.

The Secretary of the Interior approved a right-of-way for OWEF in a Record of Decision (ROD) dated May 11, 2012. ER86-135. The Tribe filed a Complaint for Declaratory and Injunctive Relief in the District Court on May 14, 2012. Dkt.

#1. The Tribe sought a preliminary injunction, which the Court denied on May 22, 2012. Dkt. #48. The Tribe filed a motion for summary judgment on September 24, 2012. Dkt. #80. On December 10, 2012, the United States and the intervenor Ocotillo Express LLC filed cross-motions for summary judgment. Dkt. # 111, 115. The Court entered an order on February 27, 2013 denying the Tribe's motion for summary judgment and granting the United States and intervenor's cross-motions. Dkt. #129; ER2. The Tribe filed notice of appeal to this Court on April 26, 2013. Dkt. #131; ER38. The Tribe requests that this Court reverse the District Court, vacate the ROD, and direct entry of summary judgment for the Tribe.

V. STATEMENT OF FACTS

A. In 1976, Congress Mandated Protection of the California Desert.

In Section 601 of the Federal Land Policy and Management Act of 1976 (FLPMA), Congress created the California Desert Conservation Area (CDCA) and directed the Secretary of the Interior to "prepare and implement a comprehensive, long-range plan for the management, use, development, and protection of the public lands within the [CDCA]." 43 U.S.C. § 1781(d). In designating the CDCA, Congress found that: "(1) the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population; (2) the California desert environment is a total ecosystem that

is extremely fragile, easily scarred, and slowly healed; [and] (3) the California desert environment and its resources, including . . . numerous archeological and historic sites, are seriously threatened by . . . pressures of increased use, . . . which are certain to intensify because of the rapidly growing population of southern California." 43 U.S.C. § 1781(a). A specific purpose of the CDCA-planning obligation was to "preserve the unique and irreplaceable resources, including archeological values" of the desert. 43 U.S.C. § 1781(a)(6).

B. In 1980, the Department of the Interior Developed A Plan To Manage Land Use And Protect Sensitive Resources In the CDCA.

In December 1980, Interior developed and approved the California Desert Conservation Area Plan (CDCA Plan). ER561; 717. The CDCA Plan "controls and directs the type and degree of land use and resource management activities [within the CDCA] according to resource sensitivity and public demand by means of four Multiple-Use Classes: Controlled [Class C], Limited [Class L], Moderate [Class M], and Intensive [Class I]." ER573. Each of the four multiple-use classes "describes a different type and level or degree of use which is permitted within that particular geographic area." ER732.

In the CDCA Plan, Interior designated seventeen percent, 2.1 million acres, of the CDCA as Class C (Controlled Use), the most protective designation, which is reserved for wilderness and lands suitable for wilderness designations. *Id.* Interior designated nearly six million acres, 48.5% of the CDCA, as Class L

(Limited Use). *Id.* Class L lands, which are at issue in this case, are defined in the CDCA Plan as follows:

> 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.

Outside of the "protection-oriented" Class C and L areas, Interior designated the remaining four million acres of BLM-managed CDCA land as Classes M and I, which specifically provide for higher intensity uses and industrial developments, including energy. ER638; 732. 3.3 million acres (27.3% of BLM-managed lands in the CDCA) are designated Class M (Moderate Use). ER732.

> [Class M] is based upon a controlled balance between higher intensity use and protection of public lands. This class provides for a wide variety or [sic] present and future uses such as mining, livestock grazing, recreation, energy, and utility development. Class M management is also designed to conserve desert resources and to mitigate damage to those resources which permitted uses may cause.

Id. Nearly 500,000 acres are designated Class I (Intensive Use). *Id.* The purpose of this least protective designation "is to provide for concentrated use of lands and resources to meet human needs." *Id.* On Class I lands, "reasonable protection will be provided for sensitive natural and cultural values. Mitigation of impacts on resources and rehabilitation of impacted areas will occur insofar as possible." *Id.*

In 1980, Interior prepared an Environmental Impact Statement (EIS) to evaluate various alternative plans for management of the CDCA. ER593. In its EIS for the CDCA Plan, at ER611, Interior summarized the four land-use classifications in the proposed (and ultimately adopted) plan:

> Class C is designed to protect and preserve areas having wilderness characteristics described in the Wilderness Act of 1964. Class L protects sensitive natural scenic, ecological, and cultural resources, yet provides for low intensity multiple use that can be carefully controlled. Class M is designed to provide a wide variety of uses, yet mitigate damage to the most sensitive resources. Class I emphasizes development-oriented use of lands and resources to meet consumptive needs, yet provides appropriate mitigation and protection of sensitive, natural, and cultural values.

In analyzing the alternative plans for the CDCA, Interior explained:

> The principal difference between the impacts of alternatives, therefore, 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. ER638.
>
> The Proposed Plan responds to public issues and tends to balance demands for resource protection and use, resulting in beneficial impacts to most resources because 66 percent of the public lands have Class C or L designations. ER641.

C. The CDCA Plan Protects Cultural Resources and Native American Values Through the Class C and L Designations.

In preparing the CDCA Plan, the "potential irretrievable loss of historic, cultural, and Native American resources was a major concern, and much debate arose regarding the required level of protection for these resources." ER570. In

its 1980 EIS, Interior recognized that certain areas in the California desert required protection due to special spiritual and religious significance for Native Americans:

> Native American tribal groups have inhabited the California Desert Conservation Area for centuries and many continue to hold traditional religious and cultural values that are intertwined with this environment. . . . Those culturally and religiously significant areas which are identified in myth and oral narrative as particularly sacred can be highly sensitive to negative impact. Protection of these areas for centuries has depended on maintaining the secrecy of exact locations; in fact, these areas may be conspicuously lacking in archaeological remains which demonstrate prehistoric use of the land. ER652.

The 1980 EIS for the CDCA Plan found that cultural resources in the California desert "represent unique, non-renewable resources subject to a wide range of impacts" and the "condition of these resources is continually deteriorating due to impacts originating with human activity." ER674. Interior, in 1980, recognized that a significant risk to cultural resources in the desert is energy development and "the construction of new roads and the additional access provided in association with utility transmission facility construction." ER622; 674.

Interior determined that the CDCA Plan would slow the trend of deterioration and damage to cultural resources and Native American values in the CDCA "through a combination of placing known and predicted cultural/resource values [sic] in Multiple-Use Classes C and L and in ACECs, and establishing procedural requirements which would ensure that undue adverse impacts will be avoided." ER675. "Management under Classes C and L allow greater levels of

direct action to be taken to protect sensitive resource values and is considered a desirable tool for cultural and paleontological resource protection and management." *Id*. According to Interior's EIS, under the approved CDCA Plan, "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." ER641.

When developing and evaluating the CDCA Plan, Interior recognized the spiritual significance of certain areas and landscapes in the CDCA. ER676. "Impacts to Native American values from the Proposed Plan will affect not only physical resources but also, in some cases, adversely affect resources of spiritual value with little or no associated physical destruction." *Id*. Interior's EIS assessed risks to Native American values from the plan alternatives by comparing the amount of lands allocated to protection-oriented Classes C and L, as opposed to the development-oriented Classes M and I. ER677. "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." *Id*.

D. The Specific Lands At Issue Here Have Significant Cultural and Spiritual Value.

The lands at issue here are designated in the CDCA Plan as Class L. ER401. When developing the CDCA Plan, Interior identified these specific lands, now

occupied by OWEF, as "concentrated, sensitive areas of traditional Native American secular and religious use" and as part of a "cultural resource area[s] of known and predicted area[s] [sic] of sensitivity and significance which are most vulnerable to negative impact." ER1431-32.

In addition to Interior's pre-existing knowledge of the sensitivity of lands within the OWEF project area, the administrative record contains substantial evidence regarding the cultural and spiritual significance of these lands. For example, on December 9, 2011, Quechan's Vice-President informed BLM[2]:

> The Ocotillo Desert is part of the traditional Western Corridor for the Quechan Tribe and it is also an area of transition between the Quechan, Cocopah, Kumeyaay and Kamia/Desert Kumeyaay . . . . The area of the Ocotillo Desert holds tremendous spiritual essence for the Quechan Tribe. The [OWEF project area] lies at the bottom of the Coyote Mountain (Carrizo Mountain), which is an important cultural component to the Quechan cosmology. The importance of that mountain is recounted and held sacred in our Creation Story, songs, and other oral traditions. To allow a project of such magnitude to be erected next to one of our sacred sites – which helps form our identity as Quechan – would be a desecration of our culture and way of life.

ER917-18. In a subsequent letter, dated April 23, 2012, Quechan's Historic Preservation Officer notified BLM that the OWEF project area "is the richest, in terms of cultural resources, of any other renewable energy application in the Southern California Desert." ER893.

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[2] BLM is the agency within the Department of the Interior responsible for public lands management. References to "Interior" and "BLM" are used interchangeably herein.

Local Indian tribes, including Quechan, and the Viejas and Manzanita Bands of Kumeyaay Indians, informed BLM that the OWEF project area, in its entirety, constituted a Traditional Cultural Property (TCP) eligible for listing and protection under the National Historic Preservation Act.[3] ER254-56; 892; 922; 1184-85. The tribes informed BLM "that there is a TCP that encompasses the Project area and that the Project, should it be constructed, would ultimately cause the TCP to be desecrated." ER1184. The Southern California Tribal Chairman's Association (SCTCA), representing 19 Indian nations, passed a resolution opposing OWEF, because it "lies within a rich landscape that is culturally and religiously significant to the SCTCA member tribes and, if constructed, the proposed project will cause irreparable harm to those tribes and resources of great cultural value to them." ER908. BLM's own evaluation assumed that the TCP was eligible for listing on the National Register and determined that "a decision to approve any build alternative of the Project would be an adverse effect on the TCP." ER1185; ER94.

[3] Pursuant to 36 CFR § 800.16(l) and the National Park Service (NPS) Bulletin, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, a TCP is "defined generally as one that is eligible for inclusion in the National Register [of Historic Places] because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." ER929; 1184. The NPS Bulletin's author, Thomas F. King, PhD, filed comments regarding OWEF's significant impacts to the cultural landscape. ER1076.

The applicant's archaeological survey documented 287 individual archaeological sites within the OWEF project area. ER1314. The applicant's archaeologist determined that 127 of these sites are eligible for listing on the National Register. ER1315. Each of these 287 archaeological sites, scattered throughout the OWEF project area, encompass large areas of land; for example, Site CA-IMP-008/H has dimensions of 4024 meters by 1610 meters; Site CA-IMP-103/H measures 1170 by 1180 meters; and Site CA-IMP-6988 measures 920 by 410 meters. ER262-69. The project area contains many types of archaeological sites including geoglyphs, petroglyphs, sleeping circles, milling features, agave roasting pits, ceramics, and pre-historic trail segments. ER258-60.

The Quechan and Kumeyaay view the entire project area as one sacred landscape. ER911; 915. The tribes "view the high density of archaeological sites within this area as interrelated and connected to each other as they are connected to the nearby sacred mountains and geography upon which they lie." ER1186. While each individual cultural site is significant, the tribes "view the entire desert landscape, including the plants, animals, prehistoric sites and natural geologic features as a complex whole that documents their cultural heritage." *Id*.

The sacred importance of the landscape as a whole, e.g., the entire TCP, was documented during the administrative process, and known to BLM. *Id*. A

December 27, 2011 letter from Anthony Pico, Chairman of the Viejas Band of Kumeyaay Indians, stated:

> The proposed project area is a culturally and religiously significant landscape valued by the Kumeyaay, Cocopah, and Quechan peoples. It is rich with evidence of our use and occupation, and we maintain a spiritual connection to the landscape, its plants, animals, views, and natural features which include not one but three spiritually significant mountains: Coyote Mountain, Signal Mountain and Sugarloaf Mountain.

ER915. Other studies in the record, including the Yuha-Jacumba Prehistoric Corridor Cultural Landscape study (2012) further confirm the cultural significance of this landscape. ER1181; 1202-1307.

Also present in the project area are pre-historic cremation/burial sites. Five cremation sites were identified in the applicant's original archaeological survey, with additional sites subsequently discovered. ER270; 886-87; 1151; 1192. Quechan informed BLM on December 9, 2011 that: "By virtue of the fact alone that cremation sites exist within the [project area] make the area sufficiently hallowed that any disturbance in that area would not only be improper but sacrilegious in nature. The history of our People is written in that land . . . ." ER918. BLM acknowledged that "there is a strong belief that disturbing sites containing human remains will trouble the spirits of the dead ancestors as well as the living and that areas containing human remains should be strictly avoided." ER1192. Given the traditional knowledge that the area was used as a burial

ground, the traditional cremation practices utilized by tribes, and the difficulty of identifying the presence of pre-historic cremations in surface archeological surveys, tribes expressed concern about the potential for additional cremations or burials throughout the project area. ER1192; 901.

E. The OWEF Project Results In Significant Diminishment To These Sensitive Class L Lands and Resources.

Quechan informed BLM of specific effects that would result from the OWEF, which would impact tribal members' use of the sacred area for traditional practices. ER889-918. BLM was informed that permitting this large-scale industrial energy facility in this location would desecrate a sacred landscape and burial ground. *Id.* The Tribe informed BLM that the TCP, and tribal members' ability to interact with the sacred area, would be harmed by noise pollution from the wind turbines. ER911. The Tribe also informed BLM that OWEF would obstruct the viewshed between sacred markers:

> the remaining [112] turbines would still obstruct the viewshed to Coyote Mountain from locations other than 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) . . . . The Quechan Tribe assert that 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.

ER905. BLM archaeologist Carrie Simmons summarized the tribes' viewpoint:

> Tribes believe that to place a wind project in the middle of a cultural (ethnographic) landscape, regardless of avoiding the physical manifestations of the individual sites, blocking the views towards sacred geologic places, negatively affecting the plants and animals which are to them are considered [sic] cultural resources in and of themselves, and turning what they consider a relatively pristine environment that still holds the essence of traditional spirituality into an industrial zone, will effectively diminish and ultimately desecrate the area and their traditional worldview. ER1188.

In February 2012, Interior published its Final EIS (FEIS) evaluating the impacts of the proposed OWEF. Interior's FEIS confirmed that the Class L land proposed for development has sensitive natural, scenic, and cultural values. ER256-72 (cultural); 285-97 (vegetation); 298-306 (scenic); 307-332 (wildlife). The FEIS reported that OWEF, even assuming the implementation of all mitigation, would have un-mitigated adverse effects on air quality, noise and cultural, paleontological, vegetation, visual, and wildlife resources. ER176-84.

Interior determined that, even after mitigation, "construction and O&M activities would result in permanent unavoidable adverse impacts to the setting of an identified TCP 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." ER178. "Adverse impacts to historic viewsheds and indirect impacts to cultural resources would be unavoidable." *Id.*

On April 12, 2012, BLM's archaeologist released a *Tribal Values Supplemental Report for the Ocotillo Wind Energy Facility Project.* ER1181.

"The purpose of this summary report is to ensure that the administrative record includes the traditional tribal values encompassed by the Project area and that it clearly documents that they *will* be significantly impacted by the Project, should it be approved." ER1197-98 (emphasis in original). The report added: "BLM acknowledges that no treatment measures or amount of Project redesign, short of selecting a 'No Action' alternative, will completely mitigate the effects of this Project." ER1198. The BLM report further found that OWEF would "severely affect" the cultural landscape of concern. *Id.* Despite this report, Interior approved the OWEF right-of-way one month later. ER86.

The FEIS also confirmed that other sensitive resources would be adversely impacted, even with mitigation. "Construction and O&M activities would result in temporary and permanent unavoidable impacts to sensitive vegetation communities and special status plant species." ER182. Regarding visual resources, Interior documented "adverse and unavoidable impacts from the conversion of a natural desert landscape *to a landscape dominated by industrial character*." ER183 (emphasis added). Interior predicted "long term land scarring following project decommissioning due to the large impact area and long recovery time for desert vegetation." *Id.* Regarding wildlife, Interior confirmed that, even after mitigation, "construction and O&M activities would result in temporary and permanent unavoidable impacts to suitable (unoccupied) [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." ER184.

On May 11, 2012, the Secretary of the Interior executed the Record of Decision (ROD) for OWEF. ER135. The ROD granted a right-of-way to occupy 10,151 acres of public lands and authorized construction of 112 wind turbines. ER92. Each turbine stands approximately 430 feet tall. ER192. The diameter of each turbine blade is approximately 371 feet. *Id*. The ROD also approved development of 42 miles of new access roads within the project area, a 23.5 acre switchyard, a 3.4 acre operation and maintenance facility, a 2.1 acre substation, and a 12 acre concrete batch plant/laydown area. ER97. In the ROD, Interior conceded that OWEF "will, even after implementation of the [mitigation] measures in the MOA, still have an unmitigated adverse effect on resources that are spiritually and culturally significant to the affected Tribes." ER94. BLM's archaeologist characterized these impacts in her April 2012 report as "significant" and "severe." ER1197-98.

F. Interior Has Recently Approved Numerous Large Energy Developments on Class L Lands in the CDCA.

Besides OWEF, Interior has approved rights-of-way and CDCA Plan amendments for numerous other large-scale renewable energy projects within the CDCA over the past three years. ER339; 349-50. This "frantic pursuit" of energy development on California desert lands began on March 11, 2009, when Secretary

Salazar established renewable energy development on federal public lands as an Interior Department priority in Secretarial Order 3285. ER449; 1129. The next year, in 2010, Interior approved rights-of-way for the Genesis, Blythe, Ivanpah, Imperial Valley, Lucerne Valley, and Calico solar energy projects. ER339; 349-50. Once constructed, these six projects alone would cover approximately 32,000 acres (50 square miles) of BLM-managed public land in the CDCA with solar panels and related infrastructure. *Id*. The Blythe (9,400 acres), Ivanpah (4,073 acres), and Imperial Valley (6,140 acres) projects are approved for development on Class L lands. ER410. Like OWEF, these projects are controversial due to impacts to cultural resources and sensitive areas. ER1129; *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) (granting preliminary injunction to enjoin development of Imperial Valley Solar Project). As of February 2012, 18 wind or solar energy projects on BLM land in the CDCA were in various stages of construction or review. ER337. Many other projects are under consideration on non-federal lands in the CDCA. ER338-51.

VI. SUMMARY OF ARGUMENT

Interior's approval of the right-of-way for OWEF on these culturally sensitive Class L lands violates the substantive requirements of the CDCA Plan. The CDCA Plan imposes a substantive obligation, requiring Interior to protect

sensitive, natural, scenic, ecological, and cultural resource values located on Class L lands. ER732. In managing Class L lands, Interior must ensure that sensitive resource values are not significantly diminished. *Id*. Under the CDCA Plan, moderate and high-intensity energy projects like OWEF, which significantly diminish sensitive resource values, must be located on Class M or Class I lands – not Class L. *Id*.

In this proceeding, Interior incorrectly interpreted the CDCA Plan as imposing only a procedural obligation to study the impacts of the proposed project prior to decision. Interior contends that, so long as it completes a study first under NEPA, it can approve any wind or solar energy project on any Class L lands, regardless of the damaging impacts that would result to sensitive resource values. Interior's interpretation is clearly wrong and inconsistent with the plain language of the CDCA Plan. While preparation of an EIS under NEPA is required prior to approving an energy development on Class L lands, that is not the only prerequisite. In addition to studying the potential environmental impacts under NEPA, Interior must also ensure that the project is consistent with the substantive requirements of the CDCA Plan and the Class L land designation. The study conducted under NEPA is meant to inform the substantive determination, not to displace it. In evaluating proposed uses of Class L lands, Interior has an overarching substantive obligation to protect sensitive resource values and to

ensure that such values will not be significantly diminished by proposed uses, such as large-scale energy developments. In approving OWEF, Interior ignored these substantive obligations, violating the CDCA Plan, FLPMA, and the APA.

Interior's management of visual resources in this proceeding also violates FLPMA, the CDCA Plan, and the APA. Interior has repeatedly determined that lands in the OWEF project area are subject to, at minimum, a Class III visual resource management standard. ER964; 973; 977-82; 146-47; 305. The site-specific visual resource analysis prepared by Interior in its FEIS also determined that Class III is the appropriate standard and that no alternative of the OWEF could satisfy that standard. ER451-55; 482. However, instead of denying the project due to its non-compliance with the applicable visual resource management standard, Interior changed the governing standard at the last minute for the sole purpose of allowing approval of the otherwise non-compliant project. ER966-68. This is the essence of arbitrary and capricious decision-making. Interior's visual resource management also violates the CDCA Plan, which requires Interior to protect sensitive scenic values on Class L lands and to ensure that such values will not be significantly diminished. ER732.

Interior also violated NEPA, because its FEIS fails to provide detailed analysis regarding the cumulative impacts of past, present, and reasonably foreseeable projects on Class L lands throughout the CDCA. ER409-11. A

thorough cumulative impacts analysis, as required by NEPA, is critical here, because of the rapid pace in which Interior is approving large energy projects throughout the CDCA. Unless the cumulative impacts of these energy projects are subject to analysis, even though distantly spaced throughout the CDCA, Interior will proceed to industrialize the sensitive Class L desert lands piecemeal, without ever considering or disclosing to the public the combined environmental impact of its aggressive program of energy development. NEPA does not permit this. The lack of detail regarding past and present projects is inexcusable, because Interior has direct knowledge and has completed, or is currently preparing, individual environmental impact statements for the relevant projects. Yet, Interior's FEIS fails to provide, even in aggregate form, any detail about the past, present, and reasonably foreseeable impacts to the lands and resources protected by the Class L designation throughout the CDCA.

VII. STANDARD OF REVIEW

This Court reviews Interior's compliance with FLPMA and NEPA *de novo*. *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1124 (9th Cir. 2007). Decisions that allegedly violate NEPA and FLPMA are reviewed under standards provided in the APA. *Id*., at 1124-25. Under the APA, the Court must hold unlawful and set aside agency action, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law." 5 U.S.C. § 706(2)(A). Actions approved "without observance of procedure required by law" must also be set aside. 5 U.S.C. § 706(2)(D).

> An agency determination will be reversed as arbitrary and capricious 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.

Northern Plains Resource Council, Inc. v. Surface Transportation Board, 668 F.3d 1067, 1074-75 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). The Court looks "to the evidence the agency has provided to support its conclusions, along with the materials in the record, to make this determination." *Id.* at 1075.

Applying the arbitrary and capricious standard, the Court will not substitute its own judgment for the agency, but the Court must "engage in a substantial inquiry" and conduct a "thorough, probing, in-depth review." *Brong*, 492 F.3d at 1125. To withstand review, the agency must present a rational connection between the facts found and conclusions made. *Id.* The Court will defer to an agency's decision only if it is "fully informed and well-considered." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007). 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).

Directives contained within a federal land use plan are reviewed in the same manner as regulations. *Siskiyou Regional Education Project v. U.S. Forest Service*, 565 F.3d 545, 555 (9th Cir. 2009). Where plan directives are ambiguous, "[a]gencies are entitled to deference to their interpretation . . . unless the interpretation is plainly erroneous or inconsistent with the directive." *Id.* at 554-55. "An agency's interpretation does not control, where . . . it is plainly inconsistent with the regulation [or plan] at issue." *Brong*, 492 F.3d at 1125 *(*quoting *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1069 (9th Cir. 1998). If the relevant language is not ambiguous, the Court need not afford any deference to the agency interpretation. *Siskiyou Regional Education Project*, 565 F.3d at 555.

The Court may direct that summary judgment be granted to either party based on its *de novo* review of the administrative record. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 778 (9th Cir. 2006).

VIII. ARGUMENT

A. Interior's Approval of a Right-of-Way for the OWEF Project on Class L Lands Violated FLPMA, the CDCA Plan, and the APA.

1. The CDCA Plan Establishes A Substantive Standard For Management of Class L Lands: BLM Must Ensure That Its Land Use Decisions Will Not Significantly Diminish Sensitive Natural, Scenic, Ecological, and Cultural Resource Values.

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. *Brong*, 492 F.3d at 1125. 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. ER717.

Compliance with a land use plan developed under FLPMA is a substantive obligation. *Brong*, 492 F.3d at 1125. "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).

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 types and degrees of land use within the CDCA. ER732. 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 [Class C], Limited [Class L], Moderate [Class M], and Intensive [Class I]." ER573. Division of CDCA lands into four separate classes based on resource sensitivity is the foundation of the

CDCA Plan and it provides the framework for Interior's implementation of FLPMA's multiple-use mandate in the CDCA. *Id.*; ER732.

The Class L designation, at issue here,:

> 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.

ER732. Class L areas "are by definition resource sensitive." ER577. The Class L designation provides "protective resource management which complement[s] many identified Native American values." ER746. Interior has determined the specific area at issue here is a sensitive cultural and spiritual area of significance to Native Americans. ER1431-32.

The CDCA Plan, through its definition of Class L lands and Class L land management, creates a substantive legal standard that is binding on BLM when administering Class L lands. ER732; *Brong*, 492 F.3d at 1125. The CDCA Plan imposes a substantive legal obligation on BLM to "protect sensitive, natural, scenic, ecological and cultural resource values" located on Class L lands. ER732. The Plan requires BLM to "ensure" that these "sensitive values are not significantly diminished" by a proposed use of Class L land. *Id*. The Plan states that some consumptive uses may be allowed on Class L lands, but "only up to the point that sensitive natural and cultural values might be degraded." ER740. Unlike Class M or I land, the priority on Class L land is resource protection.

ER732. Projects that significantly diminish sensitive resource values on Class L land are not consistent with, and thus not permissible under, the CDCA Plan.

Subject to the substantive standards identified above, the Class L land designation does not prohibit all use or development. In fact, many of the same *types* of use that are permissible on Class M and I land, such as livestock grazing, mining, road development, off-road vehicles, etc., are also permissible on Class L. ER734-39. The purpose of the CDCA Plan's four multiple-use classes is not to preclude categories of use, but rather to differentiate between the permissible "degree" and "intensity" of use and to locate the moderate and high-intensity projects in less sensitive areas. ER573, 732.

The CDCA Plan also does not prohibit all development of wind and solar energy on Class L lands. ER734. However, like all other uses of Class L lands, such energy developments are permissible on Class L lands only if they are consistent with the substantive limits of the CDCA Plan and the Class L designation. ER732. An energy development conforms with the Class L designation only if the project will not "significantly diminish" the sensitive resource values that are intended to be protected. ER732, 740. Energy projects of moderate or high intensity – and any that could significantly diminish sensitive resources – must be located on Class M or I lands, not Class L. *Id*.

2. Interior Unlawfully and Arbitrarily Disregarded The Substantive Limitations Applicable to Class L Management in the CDCA. Interior Incorrectly Interpreted Its Obligations Under the CDCA Plan As Purely Procedural.

Interior incorrectly contends that the CDCA Plan imposes only procedural obligations and does not impose any substantive limitations applicable to approval of wind and solar energy projects on Class L lands. ER123-24. Interior's interpretation of the CDCA Plan begins and ends with one sentence in the CDCA Plan's Multiple-Use Class Guidelines, which states that wind and solar energy facilities "may be allowed [on Class L lands] after NEPA requirements are met." ER734; 123. Thus, Interior contends that, so long as an EIS is prepared pursuant to NEPA in advance of project approval, any wind or solar energy project is permissible on any Class L lands regardless of the sensitivity of those lands or the impact of the specific project. ER123. This interpretation ignores plain language of the CDCA Plan which unambiguously imposes overarching substantive obligations on Interior to "protect sensitive . . . resource values" on Class L lands and to "ensure" that "sensitive values [on Class L lands] are not significantly diminished." ER732.

Interior's interpretation also fails to recognize the significant differences in Class L, M, and I land management established by the CDCA Plan. *Id.* Interior's interpretation, if affirmed, would allow approval of any wind or solar energy project on any Class L lands, no matter how damaging to resources located on the

Class L lands, so long as Interior studies the impact first under NEPA. This is grossly inconsistent with the language, intent, and purpose of the CDCA Plan.

Interior is correct that the CDCA Plan does not prohibit all renewable energy development on Class L lands, but this does not mean that all renewable energy projects, no matter how large, intensive, or destructive are permissible on all Class L lands. As the CDCA Plan states, on Class L lands, consumptive uses, such as energy projects, may be allowed, but "only up to the point that sensitive natural and cultural values might be degraded." ER740. In this proceeding, Interior narrowly focused on Plan language that conditionally authorizes wind energy development, while ignoring the applicable substantive limitations on that authorization where Class L lands are involved.

BLM's conduct in the *Brong* case is analogous. 492 F.3d 1120 (9th Cir. 2007). *Brong* involved the Northwest Forest Plan (NFP) which, like the CDCA Plan, divides the managed lands into different classes or hierarchies of protection. *Id.*, at 1126. BLM proposed to authorize 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 that area in "limited circumstances," the NFP required that "salvage operations

should not diminish habitat suitability now or in the future." *Id.* at 1127. Salvage operations were not prohibited by the NFP, but this Court found "the NFP clearly prioritizes the preservation of LSR ecosystems over commercial benefits." *Id.* at 1127. BLM's authorization of the salvage project was "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*. This Court declined to defer to BLM's decision, which was clearly inconsistent with the intent of the applicable plan. *Id.* Similarly here, Interior 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.*

Interior, throughout this proceeding and in its ROD, incorrectly states that the only prerequisite to developing wind and solar energy on Class L lands is compliance with NEPA, a statute that imposes only procedural obligations. ER123. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process"). Interior is correct that preparation of an EIS under NEPA is required prior to approving large energy projects on public lands within the CDCA. However, the purpose of NEPA is to inform and guide the ultimate determination of whether a specific project is environmentally

acceptable and compatible with specific Class L lands. *Center for Biological Diversity v. U.S. Dep't of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (purpose of NEPA is to ensure that agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts); 40 C.F.R. §§ 1500.1(c); 1502.1.

Since consumptive uses, such as energy development, are only conditionally allowed on Class L lands and only so long as sensitive resources are not significantly diminished, the CDCA Plan logically requires Interior to carefully study a proposed project's impacts before it makes any decision. However, NEPA review is not an end in itself. *Idaho Sporting Congress, Inc., v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000). Nor does compliance with NEPA supersede otherwise applicable substantive obligations. *Oregon Natural Desert Association v. BLM*, 625 F.3d 1092, 1109 (9th Cir. 2008) ("the considerations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis"). The purpose of requiring NEPA review is to provide the decision-maker with the information necessary to determine *whether* a proposed project is compatible with Class L lands and the substantive provisions of the CDCA Plan. *Id.* at 1100 ("the EIS is intended to be used to guide decision-making"). As stated in the EIS for the CDCA Plan, the Plan's "procedural requirements" are designed to "ensure that undue adverse impacts [to cultural resources and Native American

values on Class L lands] will be avoided." ER675. Interior's interpretation disregards the substantive requirements applicable to Class L management.

Interior's interpretation of the CDCA Plan, if affirmed, would mean that Interior could permissibly authorize any solar, wind, or geothermal energy project on any Class L lands, no matter how destructive or impactful the project to sensitive Class L resources, so long as it simply studies the impacts first pursuant to NEPA. This is wrong. The obligation to prepare an EIS is a procedural obligation that is independent and in addition to the governing substantive limitations on use of Class L lands found in the CDCA Plan. *Oregon Natural Desert Association*, 625 F.3d at 1100 (distinguishing procedural requirement to prepare EIS from "those of substantive land management statutes like the FLPMA"). It is the latter substantive limitations that Interior has disregarded here.

Other portions of the administrative record confirm Interior's erroneous interpretation of its legal obligations. In the ROD, Interior incorrectly states: "In Class L designations, the [decision-maker] is directed to use his/her judgment in allowing for consumptive uses *by taking into consideration* the sensitive natural and cultural values that might be degraded." ER124 (emphasis added). However, the language of the CDCA Plan actually states: "[I]n a Class L – 'Limited Use' – designation, . . . judgment is called for in allowing consumptive uses *only up to the point that* sensitive natural and cultural values might be degraded." ER740

(emphasis added). Interior's decision erroneously substitutes a purely procedural requirement (to take resources "into consideration") for the actual substantive limitation (to protect and ensure no significant diminishment of resource values) required by the CDCA Plan.

In addition to disregarding its substantive obligation to protect Class L lands, Interior's interpretation of the CDCA Plan removes any distinction between Class L, M, and I management in the context of renewable energy development. Under Interior's interpretation, so long as the procedural requirements of NEPA are satisfied prior to approval, any renewable energy project, regardless of associated impacts, is acceptable in all three land classifications. Interior's conflation of land use management under Classes L, M, and I is clearly inconsistent with the purpose and intent of the Plan, which is to "control and direct the type and degree of land use and resource management activities . . . by means of [the four distinct multiple use classes]." ER573. The 1980 EIS for the CDCA Plan, as well as the ROD for the Plan, confirm that the division of CDCA lands into four distinct multiple-use classes is the foundation of the Plan and the primary means by which Interior implemented FLPMA's multiple-use mandate in the CDCA, as well as Congress' mandate to develop a plan for the protection of California's desert lands. ER732, 638, 675-77. Failure to distinguish between Class L, M, and I is unlawful.

The 1980 EIS for the CDCA Plan shows that Interior intended and provided for clear differences in the management of Class C, L, M, and I lands. In that EIS, Interior stated that the "principal difference" among the alternatives being 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." ER638, 677; ER675 ("the Proposed Plan provides a significant increase of lands protected in Class L and C . . ."). 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 C and L lands. Nearly four million acres of land managed by BLM in the CDCA (over 30% of all BLM lands in the CDCA) is specifically set aside for moderate and high intensity industrial-scale developments like OWEF. ER732. Since late 2010, Interior has approved numerous large energy developments on thousands of acres of Class M lands. However, Interior has erred by approving similar large-scale utility developments, like OWEF, on sensitive Class L lands. On Class L lands, sensitive resource values must be protected from significant diminishment. ER732; 641; 674-78.

The multiple-use class designations in the CDCA Plan were purposefully created to conform with the sensitivity of the resources contained on specific

CDCA lands. ER598; 577 ("Class L areas are by definition resource sensitive"). The designation of lands as Class C and L was intended to protect the resources on those lands going forward. ER732; ER572 (noting "extensive allocations of protection-oriented multiple-use classes . . . in the Proposed Plan"). This is especially so for Native American and cultural values. ER599 (the Plan "places 66% of known cultural values in high to moderate protection"). Interior represented and committed to the public in 1980 that sensitive wildlife, cultural, and Native American resources would be protected by the Class C and L designations. ER641; 667; 676-79. The lands at issue here, within the OWEF project area, were designated as Class L due to their cultural and spiritual importance. ER1431-32. The four distinct land-use classes were created to provide a governing framework for all future land use decisions. ER573. Interior, in its haste to develop large energy projects in the California desert, is unlawfully ignoring that framework and the distinctions between management classes.

This is not the first case in which Interior has ignored its substantive obligations to protect resources on Class L lands within the CDCA. In 2010, Interior approved a large solar energy project, known as the Imperial Valley Solar (IVS) Project, which proposed construction of 30,000 individual solar energy collectors, along with associated roads, buildings, and energy infrastructure across 6,500 acres of Class L land just a few miles east of OWEF. *Quechan Tribe of the*

Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010). The Class L lands proposed for the IVS Project contain 459 identified cultural sites in addition to sensitive biological resources. *Id.* Interior prepared an EIS that confirmed the IVS 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, Interior's position in that litigation, as now, was that no substantive limits in the CDCA Plan apply to renewable energy development on Class L lands, and that preparation of the EIS under NEPA was the sole prerequisite to approval of the IVS Project on the Class L lands. *See* Case No. 10cv2241-LAB-CAB, Dkt. #22 (S.D. Cal.). The Court granted the Tribe's motion for preliminary injunction, on grounds that Interior failed to comply with the National Historic Preservation Act, but also 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. Over the past three years, Interior has approved other large solar energy projects on Class L lands. ER410. Unless this Court reverses Interior's clearly erroneous interpretation of its obligations under the CDCA Plan, the cultural and Native American values, and other sensitive resources located on Class L lands throughout the CDCA are at grave risk of harm from Interior's aggressive energy development program.

3. Interior Failed to Evaluate or Determine Whether OWEF Would Significantly Diminish or Degrade Sensitive Resource Values Protected by the Class L Designation, Rendering Interior's Approval Arbitrary, Capricious, and Unlawful.

Interior evaluated OWEF under the incorrect premise that any wind energy development is permissible on any Class L land, regardless of impact, so long as Interior prepares a study of those impacts pursuant to NEPA. ER99; 123-24. 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." ER124. However, the CDCA Plan plainly requires more than just "consideration" of the values that might be degraded. ER732. On Class L lands, Interior must actually "protect" and "ensur[e] that sensitive values are not significantly diminished." *Id*. Here, Interior not only failed to comply with its substantive obligations, but its decision-makers also failed to consider or evaluate the relevant question of whether significant diminishment to the sensitive resources would occur. This is arbitrary and capricious, as well as an abuse of discretion.

In the ROD approving OWEF, Interior's decision-makers failed to consider whether approval of OWEF would be consistent with Interior's substantive obligation to ensure that sensitive resource values on these Class L lands "are not significantly diminished." ER732. The FEIS, and administrative record generally, does confirm that numerous adverse and significant impacts will result from the construction and operation of OWEF and that many of these impacts will occur

even with implementation of all prescribed mitigation. ER176-84; 451-55. BLM's archaeologist, prior to project approval, characterized the impacts as "significant" and "severe." ER1197-98. However, in the ROD, Interior's decision-makers failed to consider or determine whether these un-mitigated impacts would result in significant diminishment of resource values protected by the Class L designation.

A failure to consider relevant factors or to analyze a decision under the relevant standard is arbitrary and capricious. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Western Watersheds Project v. U.S. Forest Service*, 2012 WL 6589349, *15-18 (D. Ariz., Dec. 17, 2012) (agency failure to determine whether effect of grazing would be "significant" on identified archaeological sites, as required by management plan, was arbitrary and capricious). Interior's failure to analyze whether OWEF is consistent with the substantive limitations associated with Class L land management renders the approval unlawful. *Id*.

The District Court found that the Tribe failed to establish that OWEF would result in prohibited "significant diminishment." ER17. Although the Tribe disagrees with that ruling and believes that the record clearly shows that OWEF will unlawfully significantly diminish sensitive resource values, it is for Interior's decision-makers to make that determination, applying the correct legal standards. Thus, at minimum, the OWEF ROD should be vacated and the matter remanded to

Interior for a determination of whether OWEF is consistent with the substantive standards applicable to Class L land management.

4. Interior Applied A "Practicability" Standard That Is Inconsistent With, and Unlawfully Weakens, the Protections of Class L Management, Rendering Interior's Approval Arbitrary, Capricious, and Unlawful Under FLPMA and the APA.

Interior also violated the CDCA Plan by protecting sensitive resources on Class L lands only "to the extent practicable." ER94; 125. This "to the extent practicable" language is not found in the CDCA Plan and it is a weaker standard of protection than that actually provided in the CDCA Plan.

In the ROD, Interior concedes that approval of OWEF would result in "unmitigated adverse effects" on Native American religious and cultural values. ER94, 125. Despite these impacts, Interior determined that its approval was lawful under the CDCA Plan, because "cultural resources are preserved and protected to the extent practicable." *Id*. Protection of resources "to the extent practicable" is not the applicable standard for Class L management. ER732. Regardless of "practicability," Interior has an affirmative and unqualified obligation to "protect" sensitive Native American cultural and spiritual values and to "ensur[e] that sensitive values are not significantly diminished." *Id.*

Protection of resources on Class L lands is always "practicable" because Interior has no legal obligation to grant a right-of-way for energy development to a private utility applicant. 43 CFR § 2804.26; *International Sand & Gravel Corp.*,

153 IBLA 295, 298 (2000) (right-of-way grant is discretionary). If a proposed energy project is inconsistent with protection of sensitive resources on Class L lands, the project can and must be denied. *Id.* The CDCA Plan's definition of Class L management contains no language regarding "practicability" and it was error for Interior to utilize this weaker standard in its decision-making.

A standard of protecting resources "to the extent practicable" could arguably be consistent with management of Class M and I lands – but not Class L. On Class M and I lands, development priorities may override resource protection, although Interior must still make efforts to mitigate damage to resources in those areas. ER732. The definition of Class I lands (the least protective of the four land-use classes) contains language remarkably close to the "to the extent practicable" standard that Interior applied here. *Id.* Although Class I provides for "Intensive Use," it also states that "reasonable protection will be provided for sensitive natural and cultural values. Mitigation of impacts on resources and rehabilitation of impacted areas will occur *insofar as possible*." *Id.* (emphasis added). This "insofar as possible" language in the definition of Class I management corresponds closely with the "to the extent practicable" standard utilized by Interior here. However, the lands at issue here are not Class I, they are Class L. The definition of Class L offers no comparable "practicability" standard; instead, the definition of Class L contains an express and unqualified mandate to "protect" the sensitive

resource values and to "ensure" that those values "are not significantly diminished." *Id.* Incorporating a "practicability" standard into Class L management is arbitrary, capricious, and unlawful under FLPMA and the APA.

5. Interior's Own Analysis and the Administrative Record Confirms That OWEF Will Significantly Diminish Sensitive Resource Values.

Although Interior's decision-makers did not specifically determine whether OWEF would significantly diminish or degrade sensitive resources, the supporting analysis in Interior's FEIS and the administrative record shows that significant diminishment will occur, thus rendering the project approval unlawful. The FEIS confirms that the Class L lands at issue here have sensitive natural, scenic, and cultural values. ER256-72 (cultural); 285-97 (vegetation); 298-306 (scenic); 307-32 (wildlife). Interior's FEIS reports that OWEF, even assuming implementation of all mitigation, would have significant adverse impacts on air quality, noise, and cultural, paleontological, vegetation, visual, and wildlife resources. ER176-84; 451-55. Throughout the administrative process, multiple tribes and individuals repeatedly characterized the impacts to the cultural, scenic, and Native American values in terms going beyond diminishment – such as irreparable, destruction, and desecration. *See, e.g.*, ER905 ("For the Native Americans, the development of [OWEF], inevitably resulting in cultural destruction, will be another scar on their souls . . . ."); ER908; 918; 1184.

BLM's archaeologist, prior to project approval, published a report stating that "the traditional tribal values encompassed by the Project area . . . *will* be significantly impacted by the Project, should it be approved." ER1197-98 (emphasis in original). The report added: "BLM acknowledges that no treatment measures or amount of Project redesign, short of selecting a "No Action" alternative, will completely mitigate the effects of this Project." ER1198. The report further concedes that OWEF would "severely affect" the cultural/ethnographic landscape of concern. *Id.* This report, not addressed in Interior's ROD, is a BLM admission that OWEF will result in significant diminishment of sensitive cultural values, as prohibited by the CDCA Plan. ER732. The OWEF ROD must be vacated.

6. Interior's Approvals of Intensive Energy Projects like OWEF on Class L Lands Violates Congressional Intent and the Purpose of the CDCA Plan.

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); ER622. 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. ER622.

The CDCA Plan implements Congress' intent to protect and preserve the desert environment, while providing for more intensive uses where appropriate in less sensitive areas. 43 U.S.C. § 1781. Class M and I lands prioritize consumptive use over resource protection, but Class L lands (at issue here) prioritize resource preservation. ER638; 732. Interior's action to approve OWEF on these Class L lands is inconsistent with the clear direction and intent of the CDCA Plan. *See Brong*, 492 F.3d at 1127 (enjoining action inconsistent with land use plan). This Court should reverse the District Court, vacate the OWEF ROD, and direct that summary judgment be granted in the Tribe's favor.

B. Interior's Management of Visual Resources in this Proceeding Violated FLPMA, the CDCA Plan, and the APA.

FLPMA requires that public lands be managed to protect the quality of scenic values. 43 U.S.C. §§ 1701(a)(8); 1702(c); 1711(a); 1765(a); 1781(a)(1). An express purpose of the Class L designation in the CDCA Plan is protection of scenic values. ER732. BLM must "ensur[e] that sensitive [scenic] values are not significantly diminished" on Class L lands. *Id*. Here, Interior's management of visual resources within the OWEF project area is the essence of unlawful arbitrary, capricious decision-making. Interior also failed in its obligation to "protect" sensitive scenic values as required by the CDCA Plan. *Id*.

Interior protects scenic values of public lands, including CDCA lands, through implementation of Visual Resource Management (VRM) classifications. ER299, 450-84, 499-500, 548-49. Development of VRM classifications, as on all BLM lands, is required in the CDCA. 43 U.S.C. § 1711(a); ER494, 300. "VRM Class designations set the level of visual change to the landscape that may be permitted for any surface-disturbing activity." ER299. "[O]nce the visual resource management classes are established, however, they are more than merely guidelines." *Southern Utah Wilderness Alliance, et al.*, 144 IBLA 70, 85 (May 20, 1998).[4] VRM classifications are binding on the agency and must be complied with when evaluating discretionary management activities. *Id.* at 86; *Brong*, 492 F.3d at 1125.

In 2008, Interior designated the lands within the OWEF Project Area as VRM Class III lands. ER977-82; 1064. Subsequently, in both the Draft and Final EIS for OWEF, Interior found that, based on the 2008 classification, "the land area encompassing the OWEF project area is to be managed in accordance with Interim VRM Class III objectives." ER964; 305. Under VRM Class III: "The objective is to partially retain the existing character of the landscape. The level of change to the

[4] Interior Board of Land Appeals [IBLA] decisions may be relied upon as persuasive authority where, as here, 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).

characteristic landscape should be moderate or lower. Management activities may attract attention but should not dominate the view of the casual observer." ER299.

Interior's site-specific visual resource studies for OWEF also confirmed "the land area encompassing the OWEF project area is to be managed in accordance with Interim VRM Class II or III objectives." ER482, 451-55, 305.[5] 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." ER732.

As mentioned above, BLM previously applied the VRM Class III designation to the lands within the OWEF project area (i.e., to the exact same lands now at issue). In 2008, BLM established Interim VRM Classes for the lands within the OWEF project area when it was analyzing the Sunrise Powerlink, a transmission line approved by BLM in 2009 that crosses through the middle of the OWEF project area. ER964; 977-82; 1064. BLM reaffirmed the Class III designation in a separate inventory in 2010. ER969-73; 145-48. Based on BLM's prior designation of a VRM classification for the specific lands at issue, the applicant's Final Plan of Development for OWEF (May 2012) agreed that OWEF is located in, and subject to, a VRM Class III management area. ER145-48.

[5] Class II is a more protective designation than Class III. ER299.

Consistent with its determinations in 2008 and 2010, Interior again found that Class III was the appropriate management standard in both the Draft and Final EIS for OWEF, stating:

> The 2008 Yuha Desert/West Mesa Visual Resource Inventory assigned a VRI Class III to the land area that encompasses the presently proposed OWEF project area. This inventory classification was reiterated in the more recent regional inventory prepared by Otak. At the time of the 2008 inventory, it was determined that the VRI classifications would be carried forward as Interim VRM classifications. ***Therefore, the land area encompassing the OWEF project area is to be managed in accordance with Interim VRM Class III objectives***.

ER964 (DEIS); ER305 (FEIS) (emphasis added).

Appendix E-1 of the OWEF FEIS provides Interior's site-specific visual resources analysis for OWEF and again confirms: "For the Proposed Project [OWEF], the Interim VRM Classes was determined to be VRM Class II and VRM Class III." ER482. Once developed, "VRM Class designations set the level of visual change to the landscape that may be permitted for any surface-disturbing activity." ER299. Consistent with its prior inventories and its past VRM designation for these exact same lands, Interior's visual resource analysis for OWEF again confirmed that the appropriate and applicable VRM designation for the OWEF project area lands is (at minimum) Class III. ER305; 482.

Interior's FEIS also confirms that OWEF, with its 112 massive wind turbines, does not, and cannot, satisfy the governing Class III VRM standard.

ER451-55. In Appendix E-1 of its FEIS, Interior found that all alternatives of OWEF are "Not Consistent" with the Class III VRM standard (or the more protective Class II standard). *Id*. In assessing the visual impact of a 105-turbine alternative (less than the 112 turbines ultimately approved), Interior says: "The high level of change would not meet the VRM Class III objective of a moderate (or lower) degree of visual change." ER455. Interior's analysis characterized the visual "impact significance" of OWEF as "significant," even after mitigation. *Id.* Interior also concedes: "this level of (wind) development can only conform with Class IV standards," the least restrictive VRM classification. ER421. Despite this analysis, Interior approved the visually intrusive OWEF, with its 112 massive turbines spread across 10,151 acres.

Interior's VRM process in this proceeding is fatal to the OWEF ROD for three reasons. First, it is arbitrary and capricious decision-making in violation of the APA. Interior's consistent assessment since 2008 is that these specific lands are subject to the VRM Class III designation. This is based on Interior's past visual resource inventories, Interior's affirmative statements in its EIS for OWEF, as well as the OWEF Final Plan of Development (May 2012). ER964; 973; 977-82, 1064; 305; 451-55; 482; 145-48. However, in late February 2012, a reviewer of an administrative draft of the FEIS (which was dated and published that same month) realized the problem: Interior could not legally approve the OWEF,

because the project could not conform with the applicable and binding VRM Class III designation. ER966-68. The reviewer's solution: change the governing standard. *Id.* Disregarding multiple studies and determinations that concluded Class III was the appropriate and applicable standard, the reviewer simply deleted Class III and inserted Class IV as the new standard. *Id.* The reviewer advised:

> Replace [VRM Class III] with interim VRM Class IV – unless the [analysis] show that a portion of the project area will meet VRM Class III objectives, then you can go with III for that part – Again, VRM Classes (interim or final ones) are a land use allocation & we can't approve a project that does not meet them or we are in conflict with our plan.

ER968. Just days before the FEIS was released, and without any assessment or analysis other than the "track changes" comments contained in the margins at ER967-68, the previously established VRM standard was arbitrarily changed from Class III to Class IV – not for the purpose of better managing visual resources in a rational way, but solely for the purpose of facilitating approval of an otherwise non-compliant project. This is not reasoned decision-making, nor reasoned management of public lands.

Second, the VRM process applied by Interior violates FLPMA and the CDCA Plan. FLPMA requires that public lands be managed in a manner that protects the quality of scenic values. 43 U.S.C. § 1701(a)(8); ER546. The CDCA Plan mandates that Interior ensure that sensitive scenic values on Class L lands are not significantly diminished. ER732. Quechan and other tribes advised Interior

that visual impacts resulting from OWEF (as approved) would directly interfere with cultural and Native American values that are subject to protection in the CDCA Plan. ER905; 1188 (discussing importance of viewshed to tribes). The OWEF destroys the sensitive and protected viewshed that connects spiritual landmarks that are central to the Quechan's Creation Story and their spiritual beliefs. *Id.*; ER 918. Impacts to the visual landscape are among the most controversial aspects of this project, because they extend throughout the entire project area and also affect adjacent lands and protected areas. ER451-55, 1068-75, 1103-16.

Interior's visual studies expressly found that OWEF would significantly diminish scenic values. Interior's visual resource evaluation, contained in Appendix E-1 of its FEIS, reports that OWEF is not consistent with VRM Class III and that this impact, even after mitigation, would be "significant." ER451-55. Yet, instead of denying the project and protecting scenic values from this significant diminishment, Interior arbitrarily changed the management standard at the last minute solely in order to approve a project that it knew would significantly diminish the scenic values of these culturally significant Class L lands. *Id.;* ER967-68. In addition to violating VRM standards, Interior has violated the CDCA Plan by failing to ensure that culturally sensitive scenic values on Class L lands are not significantly diminished. ER732.

Third, OWEF, as approved, is not consistent with state or local visual management standards. ER306. Any right-of-way granted by the Secretary "shall contain . . . terms and conditions which will . . . require compliance with State standards for . . . environmental protection . . . if those standards are more stringent than applicable Federal standards." 43 U.S.C. § 1765(a); *Montana v. Johnson*, 738 F.2d 1074, 1078-79 (9th Cir. 1984). Even if it were appropriate for OWEF to be managed under a VRM Class IV standard (which it is not), the right-of-way approved by Interior is unlawful, because it is not consistent with applicable state law visual standards. ER306. The OWEF ROD must be vacated.

C. Interior's Cumulative Effects Analysis Violates NEPA.

NEPA 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 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).[6]

[6] This Court has considerable jurisprudence on project-specific cumulative impacts analysis. Much of that jurisprudence addresses deficiencies in analyses prepared by BLM. *Ctr. for Biological Diversity v. U.S. Bureau of Land*

This Court summarized the basic requirements of a cumulative impacts analysis in *Te-Moak Tribe*, 608 F.3d at 603:

> 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.' *Lands Council*, 395 F.3d at 1028. 'General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.' *Neighbors of Cuddy Mountain*, 137 F.3d at 1380. '[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.' *Id.* at 1379.

This Court has clarified that agencies may "aggregate" the environmental effects of 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 sufficiently 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

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Management, Case No. 10-72356 (9th Cir., Oct. 22, 2012) (unpublished memorandum opinion) (holding BLM's cumulative impacts analysis deficient and unlawful); *Te-Moak Tribe*, 608 F.3d 592, 602-607 (9th Cir. 2010) (same); *Oregon Natural Resources Council Fund v. 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. U.S. Bureau of Land Management*, 470 F.3d 818, 822-23 (9th Cir. 2006) (same); *Klamath Siskiyou Wildlands Center v. U.S. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004) (same); *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062 (9th Cir. 2002) (same).

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.*, 668 F.3d at 1076 (summarizing requirements of cumulative effects analysis); *Te-Moak Tribe*, 608 F.3d at 603 (same).

1. The FEIS Fails to Provide Detail Regarding the Cumulative Effects of Past, Present, and Reasonably Foreseeable Projects on Class L Lands Within the CDCA.

In the CDCA Plan, Interior designated certain lands as Class L for the purpose of protecting sensitive, natural, scenic, ecological, and cultural resource values. ER732. Interior's EIS for the CDCA Plan informed the public that the majority of cultural resources and Native American values within the CDCA would remain protected via the Class C and Class L designations. ER640-41; 675. However, from late 2010 through the present, Interior has breached this promise and violated the public trust by approving multiple large energy projects that detrimentally affect, and in many cases permanently destroy, sensitive resources designated for protection on Class L lands. ER410.

The FEIS for OWEF fails to analyze the cumulative effects on Class L lands and the protected Class L resources that are resulting, and will foreseeably result, from Interior's aggressive program of energy development. Unless the cumulative effects of these energy projects are subject to analysis, even though distantly spaced throughout the CDCA, Interior will proceed to industrialize the sensitive

Class L desert lands piecemeal, without ever considering or disclosing the multiple projects' cumulative environmental impacts. *See Dombeck*, 304 F.3d at 897. NEPA does not permit this. *Id.* *Kern*, 284 F.3d at 1078 (requiring assessment of cumulative effects associated with timber sales throughout forest management unit); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312-13 (9th Cir. 1990) (requiring assessment of cumulative effects associated with reasonably foreseeable timber sales spread throughout the Tongass National Forest).

In the FEIS, Interior properly commenced an assessment of the cumulative effects of past, present, and reasonably foreseeable projects on Class L lands throughout the CDCA. ER409 (stating in FEIS, "the geographic extent for the analysis of cumulative impacts related to MUC designations are the local and regional BLM lands under the CDCA Plan"); ER353 (stating geographic area for analysis of cumulative effects to multiple use classes are the "CDCA Plan areas bearing the multiple use class designation 'Limited'"). Interior acknowledged: "This area is defined as the geographic extent because cumulative impacts could result from the construction and operation of large renewable energy projects on MUC-designated lands . . . The potential for impacts to MUC-designated lands has recently increased due to the influx of applications for solar and wind energy facilities." ER409. Having identified the appropriate geographic area of analysis (Class L lands managed by BLM in the CDCA), and the general source of

significant cumulative effects (increasing development of large-scale energy projects), Interior then violated NEPA by failing to actually analyze what the cumulative impact of the multiple energy developments would be on the sensitive resources designated for protection on Class L lands in the CDCA.

Interior broaches the subject of cumulative impacts to Class L lands in FEIS Section 4.8.9.4, stating that "impacts to MUC-L [Class L] lands associated with construction of these cumulative projects may overlap with the proposed OWEF due to the proximity of these projects to the OWEF site." ER410. Interior does not explain what these impacts are or how they would cumulatively affect Class L lands, or the resource values that the Class L designation is intended to protect. Interior continues its discussion by vaguely stating that "numerous energy-related development projects . . . would have adverse effects on the viewscape" and "would adversely affect BLM lands, particularly for recreational uses." ER410-11. There is no elaboration and no "quantified or detailed information" about what the impacts are, or how other resource values on Class L lands may be affected.

Interior again frames the issue by stating:

> the proposed and approved solar energy projects would result in the conversion of thousands of acres of desert lands that are currently designated for MUC land use activities. Altogether the Imperial Valley Solar Project, the Blythe Energy Project, and the Ivanpah Solar Electric Generating System would result in the permanent conversion of 19,713 acres of land within the MUC-L designation. As a result, there may be substantial long-term land use and recreation impacts during operation of the renewable energy projects.

ER411. No further assessment or elaboration occurs. Nowhere in the FEIS does Interior analyze or disclose the actual cumulative effect on Class L lands, or Class L resources, resulting from the "permanent conversion of 19,713 acres" of Class L lands into industrial solar development. "A calculation of the total number of acres to be [impacted] is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from [developing] those acres." *Klamath Siskiyou Wildlands Center*, 387 F.3d at 995. The lack of "quantified or detailed information" is inexcusable here, because Interior had specific information available about the impacts of each project, as it had already prepared an EIS for the projects identified. *Northern Plains Resources Council, Inc.*, 668 F.3d at 1079 (invalidating cumulative effects analysis due to agency's failure to incorporate available data about reasonably foreseeable future development).

There is also no discussion of cumulative impacts that will result to cultural or biological resources, or Native American values, throughout the CDCA due to the projects being built on Class L lands. The reader of the OWEF FEIS is left with no "quantified or detailed information" about the cumulative loss of cultural resources and Native American values resulting from past, present, and reasonably foreseeable development on Class L lands in the CDCA. This "makes it impossible to gauge the cumulative impact" of industrializing another 10,151 acres

of Class L land (consisting of a sensitive cultural area and a traditional cultural property) for OWEF. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 10-72356, at 6 (9th Cir., Oct. 22, 2012) (unpublished opinion).

The vague and conclusory discussion offered by Interior regarding cumulative effects to resources on Class L lands in the CDCA is wholly lacking in "quantified or detailed information" and is similar to the vague and conclusory analyses repeatedly found unlawful by this Court. *See, e.g., Brong*, 492 F.3d at 1134 (rejecting analysis that summarized cumulative effects in broad and general terms); *Te-Moak Tribe*, 608 F.3d at 604 (rejecting vague and conclusory analysis of cumulative effects); s*ee also* fn. 6 supra. "The Bureau 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, so as to provide a reasonably thorough assessment of the projects' cumulative impacts." *Hankins*, 456 F.3d at 974.

A rigorous analysis of cumulative impacts is critical here. A central purpose of NEPA is to avoid the mistakes and environmental harms associated with incremental and piecemeal decision-making. Schultz, *History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law*, 27 J. Envtl. Law And Litigation 125, 132-33 (2012). Interior is proceeding to approve numerous individual utility-scale energy developments on

Class L (and Class M) lands throughout the CDCA, each of which independently have significant impacts on resources within the CDCA. ER339; 349-50. 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. ER1198 (BLM archaeologist statement that "the number and scale of the renewable energy projects proposed for the deserts of southern California make it more important than ever to local tribes that some places are protected"). It is imperative, for the protection of Class L lands and the resources that the CDCA Plan was created to protect, that Interior thoroughly disclose and analyze the cumulative effect of its energy development approvals on Class L lands throughout the CDCA.

2. Interior's Analysis Fails To Provide Adequate Detail About the Effects of Past Projects.

"An . . . 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.'" *Te-Moak Tribe*, 608 F.3d at 603. This Court has "repeatedly held that general statements about prior projects affecting environmental conditions are insufficient; 'quantified or detailed data' about the effects of specific projects is necessary." *Ecology Center*, 574 F.3d at 666. Here,

Interior failed to provide, either in the aggregate or on an individual basis, any quantified or detailed data about the effects of past projects. Interior provides only the general, vague, and conclusory statements that this Court has long found insufficient. *Id.; Te-Moak Tribe*, 608 F.3d at 603.

For example, Section 4.8.9.2 purports to describe "existing cumulative conditions" relating to MUC-designated lands within the CDCA. The "analysis" of the past and present projects consists of one sentence, which reads: "Past and present projects include management plans and, more recently, renewable energy generation facilities." ER409. There is not any data or discussion as to how these past and present projects (including the "renewable energy generation facilities") have impacted the environment.

Similarly, Section 4.4.9.2 provides an unlawfully vague and conclusory assessment of the effects on cultural resources resulting from past projects:

> In the past, cultural resources have sometimes been damaged or destroyed by development projects, resulting in the loss of potential knowledge . . . .Development projects in the region have resulted in the damage or destruction of cultural resources, and the area has hosted various human activities in the past and certain activities, such as recreation, continue today.

ER387. No further assessment of past projects or their impacts on cultural resources is provided. The FEIS fails to provide any data, even on an aggregate basis, of the number of cultural resources that have been damaged, destroyed, or removed as a result of past developments. This lack of "quantified or detailed

information" clearly conflicts with this Court's precedent. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211, 1218-19 (9th Cir. 2008) (generally noting that timber sales had occurred in the past is not adequate discussion of past effects, even in the aggregate).

Other sections offer similarly vague discussion of past effects. Section 4.17.9.2 offers a general summary of the impacts of past projects on vegetation:

> Urbanization, population growth, and continuing development pressure particularly in Imperial, San Diego, and Riverside counties have brought about substantial changes to, and effects on, natural resources. Consequently, modification, alteration, and/or destruction of vegetation, special status plant species, federal and state jurisdictional areas, and the proliferation of invasive weeds are occurring throughout the region.

ER413.[7] No "quantified or detailed data" about these past projects, even on an aggregate basis is provided. No attempt is made to quantify the number of acres with sensitive vegetation that have been subject to development and there is no explanation why such information could not be provided. Interior similarly failed to provide quantified or detailed data, in the aggregate or otherwise, regarding past effects on wildlife resources. ER 440-41. Without supporting quantified or detailed information, the general statements of past effects offered by Interior are

[7] Interior used nearly identical language to describe the effects of past projects on wildlife. ER440-41.

not sufficient to show that Interior took the "hard look" required by NEPA. *Te-Moak Tribe*, 608 F.3d at 603.

IX. CONCLUSION

The Quechan Tribe respectfully requests that this Court reverse the District Court's order granting summary judgment for the United States and denying the Tribe's motion for summary judgment (ER1, 2). The Tribe requests that this Court remand to the District Court with a direction to vacate the OWEF ROD (ER86) and to enter summary judgment for the Tribe.

Respectfully submitted this 4th day of September, 2013.

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X. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 13,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief compiles with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Respectfully submitted this 4th day of September, 2013.

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s/*Thane D. Somerville*
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STATEMENT OF RELATED CASES

Desert Protective Council v. United States Department of the Interior, Case No. 13-55561, currently pending in this Court, also involves a challenge to the Record of Decision approving the Ocotillo Wind Energy Facility.

Respectfully submitted this 4th day of September, 2013.

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