No. 13-55704

IN THE 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,
and

OCOTILLO EXPRESS, LLC,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for
the Southern District of California, No. 3:12-cv-1167-GPC-PCL

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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GLOSSARY

ACEC	Area of Critical Environmental Concern
APA	Administrative Procedure Act
APE	Area of Potential Effects
BLM	Bureau of Land Management
Br.	Quechan Brief
CDCA	California Desert Conservation Area
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
EIS	environmental impact statement
ER	Quechan's Excerpts of Record
FLPMA	Federal Land Policy and Management Act
OSER	Intervenor-Appellee's Supplemental Excerpts of Record
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
OWEF	Ocotillo Wind Energy Facility
Project	Ocotillo Wind Energy Facility
ROD	Record of Decision
VRI	visual resource inventory
VRM	visual resource management

JURISDICTION

The Federal Appellees concur in Appellant's Statement of Jurisdiction.

ISSUES PRESENTED

Plaintiff-Appellant Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan") seeks review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, of a decision of the Secretary of the Interior granting a right-of-way for the construction, operation, maintenance, and decommissioning of the Ocotillo Wind Energy Facility ("OWEF" or the "Project"). The Project is located on public lands within the California Desert Conservation Area ("CDCA"). The resource management plan for the area (the "CDCA Plan" or "Plan") designates the lands where the Project is located as multiple-use Class L (Limited Use), and provides that wind power facilities are permitted on Class L lands subject to compliance with NEPA. In addition to the right-of-way, the Secretary simultaneously approved an amendment to the CDCA Plan to accommodate the Project. That amendment – which Quechan does not challenge – designates the Project site as suitable for wind energy production.

Quechan claims the decision to grant the right-of-way was contrary to the CDCA Plan and therefore violated the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*. In addition, Quechan claims the right-of-way decision violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq*. The specific issues on appeal are:

I. Whether the Secretary's decision to grant the right-of-way was consistent with the CDCA Plan.

II. Whether the Secretary's decision to change the interim visual resource management classification of the Project area was reasonable.

III. Whether the Environmental Impact Statement's analysis of the Project's cumulative impacts complied with NEPA.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Quechan challenges a decision by the Secretary, acting through the Bureau of Land Management ("BLM"), granting a right-of-way for

the Project. ER 86, 134-35.[1] As part of the same decision making process, the Secretary also approved an amendment to the CDCA Plan expressly authorizing construction of the Project. ER 123, 134-35; OSER 188. The Plan amendment designates the Project site (as modified during the review process) as suitable for wind energy production, and designates the remainder of the land analyzed under the original project proposal as unsuitable for wind energy development. ER 134-35. Quechan does not challenge the Plan amendment.

The Project entails the construction, operation, maintenance, and decommissioning of 112 wind turbine generators and related facilities on a 10,151-acre site located along Interstate 8 near the town of Ocotillo, in Imperial County, California.[2] ER 96-97. The Project will

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[1] Citations are to Quechan's excerpts of record ("ER") and the Intervenor Appellee Ocotillo Express LLC's supplemental excerpts of record ("OSER").

[2] Though not reflected in the record, this Court may take judicial notice of the fact that construction of the Project has been completed. http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/elcentro/nepa/ocotilloexpress.Par.73734.File.dat/Ocotillo%20Express%20NTP%203%20Package%20Signed.pdf (BLM notice authorizing Ocotillo to begin operation, dated December 21, 2012).

produce up to 315 megawatts ("MW") of electricity – an amount sufficient to meet the needs of 94,500 homes and offset approximately 288,000 metric tons of greenhouse gasses annually. ER 93, 109, 136. During the review process, the Project was substantially modified to minimize and mitigate its impacts on cultural and environmental resources. In approving the right-of-way and Plan amendment, the Secretary found that the Project will further the development of environmentally-responsible renewable energy and serve the public interest. ER 93-94, 109-10, 112.

On May 14, 2012, Quechan filed suit alleging that the Secretary's decision granting the right-of-way violated FLPMA, NEPA, and other laws. Dkt. 1; *see* ER 48 (First Amend. Compl.). The developer of the Project, Ocotillo Express, LLC ("Ocotillo"), intervened as a defendant. Quechan sought a preliminary injunction, which the district court denied. Dkt. 48. On cross-motions for summary judgment, the district court (the Honorable Gonzalo Paul Curiel) entered judgment for the defendants on all claims.[3] ER 1. This appeal followed.

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[3] Quechan's amended complaint also alleged violations of the National Historic Preservation Act ("NHPA"), the Archaeological

B. Legal Framework

1. The Federal Land Policy and Management Act

BLM manages the lands at issue in this case under FLPMA, 43 U.S.C.§ 1701 *et seq.,* which provides that the public lands should be managed for multiple use and sustained yield. *See* 43 U.S.C. 1701(a)(7), (8). FLPMA directs BLM to develop land use plans (also known as resource management plans) for all of the public lands under the agency's jurisdiction based on principles of multiple use and sustained yield and consideration of both present and potential uses of those lands. 43 U.S.C. § 1712; *see generally* 43 C.F.R. Part 1600. FLPMA authorizes BLM to grant rights-of-way across public lands for various purposes, including for "systems for generation, transmission, and distribution of electric energy," 43 U.S.C. § 1761(a)(4), after considering factors like environmental quality, economic efficiency, and public health and safety. *See id.* §§ 1763, 1764, 1765.

Resources Protection Act, and the Native American Graves Protection and Repatriation Act. *See* ER 3. Quechan has not raised any issues under those statutes in its opening brief. Accordingly those claims are waived. *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005).

2. BLM's visual resource management policy

FLPMA includes scenic values among the values to be protected and managed by BLM under principles of multiple-use, 43 U.S.C. §§ 1701(a)(8), 1702(c), but otherwise contains few specific directives regarding visual resources. Section 201 directs the Secretary to "prepare and maintain . . . an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values)[.]" *Id*. § 1711(a). Section 505 provides that right-of-way grants shall contain, among other things, terms and conditions that "minimize damage to scenic and esthetic values[.]" *Id.* § 1765(a). Except for these provisions, FLPMA leaves the management of visual resources to the agency's discretion.

BLM manages visual resources under its visual resource management ("VRM") policy, which is set out in BLM guidance.[4] ER 298, 477. VRM is not intended to be a "method to preclude all other resource development," but rather is a tool for BLM to consider those resource values as part of its decision making process. ER 486.

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[4] Specifically, BLM Manual M-8400 (ER 544-60); BLM Handbook H-8410 and H-8431 (ER 490-543); and BLM Instruction Memorandum 2009-167. *See* ER 298.

BLM's first step under its VRM policy is to conduct a visual resource inventory ("VRI") to assess an area's existing visual conditions. On the basis of that inventory, BLM assigns a VRI Class (or "Inventory Class") ranging from I (highest visual value) to IV (lowest visual value). ER 299, 499-500. Inventory Classes "are informational in nature;" they "do not establish management direction" and are not "a basis for constraining or limiting surface disturbing activities." ER 499; *see also* 43 U.S.C. § 1711(a) (inventory "shall not, of itself, change or prevent change of the management or use of public lands."); *Southern Utah Wilderness Alliance, et al.* (*"SUWA"*), 144 IBLA 70, 85 (May 20, 1998).

After BLM determines Inventory Classes, BLM establishes VRM Classes (or "Management Classes") for particular areas of public lands. While their acronyms (VRI and VRM) are easily confused, Inventory Classes and Management Classes serve distinct purposes. Inventory Classes describe the present visual conditions of an area, while Management Classes guide BLM's management of visual resource values consistent with general principles of multiple-use. ER 299.

BLM typically designates Management Classes when it approves or revises a resource management plan. ER 499, 548; *SUWA* at 85.

Management Classes range from I (preservation of the existing visual landscape) to IV (allowance for major modifications). Management Classes are based on the visual values reflected in the area's Inventory Classes, other resource values (such as wind energy potential), and the proposed uses of the area. ER 299, 549. Importantly, the approved Management Classes must "*result from, and conform with, the resource allocation decisions made in*" the relevant resource management plan. *SUWA,* 144 IBLA at 84 (quoting BLM Manual 8400.0-6A.2) (emphasis supplied by IBLA); ER 548. Once visual resource Management Classes are established in a resource management plan, "meeting the objectives of each of the respective visual resource classes is as much a part of the [plan] mandate as any other aspect of the resource allocation decisions made in the [plan]." *SUWA,* 144 IBLA at 85.

The CDCA Plan, however, does not designate visual resource Management Classes. ER 300, 421. When a project is proposed in an area where final Management Classes have not been established, BLM conducts an inventory (if necessary) and establishes an *interim* Management Class, the geographic scope of which is generally limited to the immediate project area. ER 300, 500, 517, 548. Like final

Management Class designations, interim Management Class designations must conform to the resource management plan's land use allocations for the area, and can change over time as BLM's management of the area changes. ER 500, 517.

3. The California Desert Conservation Area Plan

i. Background

As part of FLPMA, Congress designated approximately 25 million acres of California desert – almost one quarter of the State – as the California Desert Conservation Area ("CDCA"). 43 U.S.C. § 1781(c); ER 726. BLM manages about 12 million of those acres – an area about the size of the States of New Hampshire and Vermont combined. ER 727; *American Motorcyclist Association v. Watt,* 714 F.2d 962, 964 (9th Cir. 1983). Congress directed BLM to "prepare and implement a comprehensive, long-range plan for the management, use, development, and protection" of those lands, taking into account, consistent with FLPMA's general planning authority, "the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development." 43 U.S.C. § 1781(d).

BLM adopted the CDCA Plan in 1980, and has amended it many times since. ER 860. As noted above, in connection with its approval of the Project, BLM amended the CDCA Plan to permit the Project, designate the Project site as suitable for wind energy production, and designate the remainder of the land analyzed under the original project proposal as unsuitable for wind energy development. ER 123, 134-35; OSER 188.

ii. The CDCA Plan's multiple-use classes, multiple-use class guidelines, and plan elements

The Plan divides the CDCA's public lands into four "multiple-use classes" – C (controlled use), L (limited use), M (moderate use), and I (intensive use). ER 732. For each multiple-use class, the Plan includes "multiple-use class guidelines" that identify specific uses and resource management activities that are allowed or prohibited within that class, ER 733-39, and "plan elements" that further describe the "specific application of the multiple-use class guidelines" to particular resources and activities. ER 740-818.

The lands where the Project is located are designated Class L. About half of the CDCA's public lands – 5.9 million acres – are so

classified. ER 732. As the Plan explains, that designation is intended to protect "sensitive, natural, scenic, ecological, and cultural resource values," and to "provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." *Id.* In turn, the Plan's multiple-use class guidelines identify specific uses and resource management activities that are permitted or prohibited on Class L lands. The guidelines for Class L expressly provide that wind and solar electrical generation facilities "[m]ay be allowed after NEPA requirements are met." ER 734.

In addition, the Plan includes several "plan elements" that provide direction relevant to the application of the guidelines here. These include a plan element for "energy production and utility corridors." ER 812. The Plan establishes 16 of these corridors in a network that spans the entire CDCA and includes land within each of the Plan's multiple-use classes. *Id.* The Plan designates these corridors as the preferred location for new power generation and transmission facilities, with the intent of minimizing the proliferation of separate rights-of-way across the landscape. *Id.*; *see* 43 U.S.C. § 1763. The Project is located in and

adjacent to two of these corridors and adjacent to the Sunrise Powerlink transmission line. ER 131.

The plan element for energy production and utility corridors further provides that BLM will identify "potential sites for geothermal development, wind energy parks, and powerplants," and will approve new power generation and transmission facilities through site-specific Plan amendments using the criteria contained in this plan element and additional criteria specified in the Plan's amendment procedures. ER 812, 814, 836-39. For new wind energy sites in particular, the Plan explains that the "Plan Amendment procedures will adequately provide for the coordination needed for assuring rapid implementation of these important fuel-replacement alternative energy programs in an environmentally sound manner." ER 814.

The Plan also includes plan elements for "cultural resources" and "Native American values." The cultural resources plan element directs BLM to "[p]reserve and protect [a] representative sample of the full array of the CDCA's cultural resources," "[e]nsure that cultural resources are given full consideration in land use planning and management decisions," and "ensure that BLM authorized actions avoid

inadvertent impacts." ER 741. "When protection and/or preservation of cultural and paleontological resources cannot be achieved, mitigation . . . will be undertaken as developed through mitigation plans." ER 743. Similarly, the Native American values plan element directs the agency to "[i]dentify Native American values through regular contact and consultation with tribal entities and/or individuals," "[g]ive full consideration to Native American values in land use planning and management decisions," and "[m]anage and protect Native American values wherever prudent and feasible." ER 745.

iii. Areas of Critical Environmental Concern

The CDCA Plan also provides for the designation of Areas of Critical Environmental Concern ("ACECs"). ER 819. ACECs are "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural or scenic values, fish and wildlife resources," or other values. 43 U.S.C. § 1702(a). Many of the CDCA's 95 ACECs protect Native American cultural values. There are 52 archaeological areas located within 47 ACECs. ER 741, 746, 821-22. The Project site is not located within an ACEC.

4. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.,* serves the dual purpose of informing agency decision makers of the environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA "does not impose any substantive requirements * * * it exists to ensure a process." *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (*en banc*) (citation and quotations omitted). NEPA requires a federal agency proposing a "major Federal action[] significantly affecting the quality of the human environment" to prepare an EIS analyzing the potential impacts of the proposed action and possible alternatives. 42 U.S.C. § 4332(C). If the EIS adequately identifies and evaluates the adverse effects of the proposed action, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. *Robertson*, 490 U.S. at 350.

The Council on Environmental Quality's ("CEQ") implementing regulations require consideration of the "cumulative impacts" of the proposed action, which the regulations define as the "impact on the

environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

CEQ's guidance on the analysis of cumulative effects advises that "[a]gencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effects of all past actions combined."[5] The guidance explains that "agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions." Guidance at 2. This Court has held that CEQ's "aggregate effect" interpretation is not plainly erroneous or inconsistent with the language of the regulation, and is entitled to deference. *League of Wilderness Defenders v. U.S. Forest Service*, 549 F.3d 1211, 1217-18 (9th Cir. 2008); *Ecology Center v. Castaneda*, 562 F.3d 986, 1000 (9th Cir. 2009) ("Forest Service 'may

[5] http://energy.gov/nepa/downloads/guidance-consideration-past-actions-cumulative-effects-analysis (last visited 11/25/2013).

aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7'").

5. The National Historic Preservation Act[6]

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

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[6] While Quechan has abandoned its NHPA claims on appeal, we provide an overview of the statute because, as discussed below, BLM consulted with Quechan and other tribes under the NHPA and relied on information obtained through those consultations to modify the Project and develop mitigation measures to protect cultural resources.

endeavors to resolve any adverse effects. These steps occur in consultation with the consulting parties identified by the agency. *See, e.g.*, 36 C.F.R. §§ 800.4(3), 800.5(a).

Section 106 does not prohibit the approval of undertakings that result in adverse effects. Rather, "the NHPA, like NEPA, is a procedural statute requiring government agencies to 'stop, look, and listen' before proceeding with agency action." *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior,* 608 F.3d 592, 610 (9th Cir. 2010). The Section 106 process often culminates in a Memorandum of Agreement ("MOA"), which reflects the understanding of the agency, the State Historic Preservation Office, the Advisory Council on Historic Preservation, and other signatories as to how identified adverse effects to historic properties are to be resolved, including any provisions for mitigation. *See* 36 C.F.R. §§ 800.6(c), 800.16(o). Execution and implementation of an MOA "evidences the agency official's compliance with section 106," and concludes the Section 106 process. *Id.* § 800.6(c).

C. Statement of Facts

1. Overview

In October, 2009, Ocotillo sought authorization from BLM and Imperial County to develop a 155-turbine, 465-megawatt wind energy facility on approximately 12,500 acres of mostly public land in Imperial County, California. ER 190, 137; OSER 178. The Project site is one of the few areas in the County with a high-quality wind resource. OSER 313-14, 320; *see also* ER 234-35. As noted, the Project site is located in the CDCA on land designated multiple-use Class L and is within and adjacent to two designated energy production and utility corridors that transect the Project area. ER 131, 873; OSER 183-84, 201-02. Existing and approved utilities in the Project area include the Sunrise Powerlink transmission line, a San Diego Gas & Electric Company 500-kV transmission line, an AT&T telecommunication line, the San Diego & Arizona Eastern Railway, Interstate 8, State Route 98, and County roads. ER 131; OSER 183-84, 201-02 , 312. A sand and gravel surface mine is located on the Project site, and numerous open and closed mines are within two miles of the site. OSER 202, 207-08. At the time of the

application, the area was also used for recreation, including off-highway vehicle use and target shooting. ER 283; OSER 201-02.

In response to Ocotillo's application, BLM and Imperial County undertook a joint analysis of the environmental effects of the proposed Project pursuant to NEPA, the California Environmental Quality Act ("CEQA"). ER 150; OSER 178. In addition, BLM consulted with Quechan and over a dozen other Indian tribes pursuant to the NHPA.[7] ER 12-15 (district court findings); ER 115-20; OSER 277-308. And because the requested right-of-way would require an amendment to the CDCA Plan authorizing the use of the Project site for a wind energy facility, BLM proposed a Plan amendment stating "Permission granted to construct wind energy facility (proposed Ocotillo Wind Energy Facility)." OSER 188; *cf.* ER 815. BLM reviewed Ocotillo's application using the Plan amendment process and criteria specified in the Plan. ER 128-30, 812, 838; OSER 188-89.

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[7] In the district court, Quechan argued that BLM violated NHPA by failing to adequately consult with Quechan and failing to adequately identify all historic properties in the Project area. The court rejected those claims and upheld BLM's actions. ER 8-15. On appeal, Quechan does not challenge the district court's rulings on those issues.

Using these combined NEPA, NHPA, and Plan amendment procedures, BLM provided multiple opportunities for public comment, consulted with numerous federal, state, local, and tribal authorities, and prepared a 4300-page EIS that provides an extensive analysis of the impacts of the proposed Project and five alternatives on various environmental, social, economic, and biological resources. ER 131-33, 149; OSER 309-10; *see* ER 155-64 (listing the various resources analyzed).

2. BLM's analysis of impacts on cultural resources

BLM's NEPA analysis included a detailed assessment of the proposed Project's potential impacts on cultural and archaeological resources, including traditional cultural properties and cultural landscapes, and reflects the concerns raised by Quechan and other tribes in the NHPA consultations. ER 115-20, 356-400, 420-39; OSER 275-308. In assessing those impacts and concerns, BLM assumed, consistent with the assertions of Quechan and other tribes, that the entire Project area constitutes a "traditional cultural property" eligible for inclusion on the National Register of Historic Places. ER 364. The

design modifications and mitigation measures that BLM ultimately approved are based on that assumption. ER 119.

Specifically, BLM and Ocotillo developed – and BLM ultimately approved – a modified version of the proposed Project known as the "Refined Project." ER 94. The Refined Project eliminates 43 of the 155 turbines included in the Proposed Alternative.[8] ER 116, 191-92. These 43 turbines were eliminated, based on BLM's analysis and consultations with various Indian tribes (including Quechan), in order to reduce the impact of the Project on biological and cultural resources, particularly in the northwest corner of the Project site and the surrounding viewshed. ER 103, 110; OSER 312. The Refined Project configures the remaining 112 turbines and ancillary facilities to avoid all direct physical impact to identified archaeological and cultural resources, and mitigates indirect impacts to those resources to the extent practicable. ER 94, 116, 374. In addition, due to the reduction in the number of turbines, the Refined Project reduces the Project area

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[8] Ocotillo originally proposed to construct 193 turbines. That number was reduced to 155 early in the planning process in response to concerns about impacts to resources on the Project site. ER 107; *see* OSER 320-21.

by 2,285 acres, to a total of 10,151 acres. ER 92. Within those 10,151 acres, 460 acres will be temporarily disturbed. OSER 176. The footprint of the finished facilities will be about 120 acres. *Id.*

3. BLM's analysis of impacts on visual resources

Because the CDCA Plan does not include any visual resource Management Class designations, BLM conducted a visual resource inventory of the Project area as part of its NEPA analysis. ER 300, 421. That inventory designated certain sites as Inventory Class II and III because of their moderate to high visual quality. ER 302-05. Based on those Inventory Classes, and the interim Management Class designations that BLM used in its 2008 review of the Sunrise Powerlink transmission line (which crosses part of the Project area), BLM's draft EIS described the Project site as interim Management Class III. ER 959-64, 977-82. The draft EIS found that the Project would not meet the objectives of that interim designation. ER 964. Nevertheless, the draft EIS stated that the VRM policy would not preclude approval of the Project so long as reasonable attempts were made to minimize visual impacts. ER 967-68; *see also* ER 482.

In the final EIS, BLM adopted a different approach, finding that the Project area should be designated interim Management Class IV rather than III. ER 420-21. BLM reasoned this designation was appropriate given the VRM policy's direction that Management Classes must be consistent with the governing resource management plan's land use allocations. ER 421; *see* ER 548; *SUWA,* 144 IBLA at 84.

4. The Record of Decision

In May, 2012, BLM issued a Record of Decision ("ROD") granting the right-of-way for the Refined Project.[9] ER 86, 134-35. The ROD also approved Plan amendments granting permission to construct the Project and designating the 2,285 acres excluded from the original Project area as unsuitable for wind energy development in recognition of the cultural resources located there. ER 134-35; OSER 188. The ROD includes specific findings that the 10,151-acre Project site is suitable for wind energy production, and that the Project and Plan amendments are consistent with the applicable CDCA Plan multiple-

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[9] For the remainder of this brief, references to the Project mean the Refined Project unless otherwise specified.

use class guidelines, plan elements, and decision criteria for Plan amendments. ER 123-34.

The ROD recognizes that, even with the Project's design changes and mitigation measures, the Project will still have "an unmitigated adverse effect on resources that are spiritually and culturally significant to the affected Tribes." ER 94, 119-20. BLM explained, however, that these unresolved adverse effects did not require the agency to deny the right-of-way or prohibit the Project. ER 94, 125. BLM ultimately concluded that "it has, in consultation with the tribes, identified all practicable measures to avoid, minimize, or mitigate the impact of the Project on the cultural resources identified on the Project site, and that while adverse effects remain, approval of the Project is in the public interest." ER 120. Among other things, BLM found that the Project will "further the development of environmentally responsible renewable energy" and advance the objectives of

- the Energy Policy Act of 2005, Pub. L. 109-58, § 211 (Aug. 8, 2005), which sets out the "sense of Congress" that the Secretary should approve non-hydropower renewable energy

projects on the public lands with a generation capacity of at least 10,000 megawatts by 2015;

- Executive Order 13212 (May 18, 2001), which directs agencies to increase the production and transmission of energy in a safe and environmentally sound manner; and
- Secretarial Order 3285A1 (Feb. 22, 2010), which establishes the development of renewable energy as a priority for the Department of the Interior.

ER 100; OSER 180. BLM also found the Project will serve to advance the State of California's goals of reducing greenhouse gas emissions to 1990 levels and obtaining 33 percent of its power from renewable energy sources by 2020. ER 171-72; OSER 182.

SUMMARY OF ARGUMENT

The district court properly upheld BLM's decision to grant a right-of-way for the Project. Consistent with the broad multiple-use mandates embodied in FLPMA and the Plan, BLM amended the Plan to authorize the Project and designate the Project site as suitable for wind energy production. Given that Plan amendment – which Quechan does

not challenge – Quechan's argument that the decision to grant the right-of-way violated the Plan is untenable.

Further, and independent of the Plan amendment, the CDCA Plan expressly authorizes wind energy facilities on Class L lands where NEPA requirements are met and impacts are considered and minimized to the extent practicable. Here, BLM conducted an extensive environmental analysis, consulted with State, tribal, and local governments, and worked with Ocotillo to develop numerous design modifications and mitigation measures. BLM ultimately found that the Project, as modified, will comply with the Plan's multiple-use class guidelines and the plan elements, including the plan elements applicable to energy production facilities, cultural resources, and Native American values. BLM recognized that the Project will have some unavoidable adverse environmental impacts, but concluded that the Project is in the public interest because it will advance important federal and State goals for the development of environmentally-responsible renewable energy. Those findings are reasonable, supported by the record, and entitled to deference.

Quechan argues that the right-of-way grant is contrary to the Plan, which according to Quechan imposes a substantive legal obligation on BLM to "ensure" that cultural and scenic resource values on Class L lands are "not significantly diminished." Quechan's argument ignores the fact that the Plan has been amended to specifically authorize the Project. In addition, Quechan reads the Plan's broad statement of management goals in isolation while ignoring the Plan's multiple-use class guidelines and plan elements, which give content to those goals. The Plan's guidelines expressly allow wind power facilities on Class L lands. The plan elements require consideration, minimization, and mitigation of impacts on cultural resources and Native American values, but do not limit BLM's discretion to give priority to other multiple-use values such as the production of environmentally-responsible renewable energy and the reduction of greenhouse emissions. And in any event, the Project's impacts will not significantly diminish sensitive values on Class L lands.

Nor is there merit to Quechan's challenge to BLM's decision to change the Project area's interim visual resource management

classification from Class III to Class IV. Quechan argues that the prior visual resource classification was binding and the agency's decision was arbitrary. The CDCA Plan does not include any visual resource management classifications, however, and the prior Class III designation was an interim designation. Under BLM's visual resource management policy, an area's visual resource Management Class designations must conform to the resource management plan's land use allocation. BLM reasonably determined that the change was needed to make the Project area's management classification consistent with the Plan given the Plan amendment designating the Project site as suitable for a wind energy facility.

BLM's analysis of cumulative impacts satisfied NEPA. The EIS includes almost 100 pages of detailed analysis of potential cumulative impacts arising from the Project and 116 other foreseeable projects. There is a separate analysis for each of the 20 categories of resources discussed in the EIS, and the geographic scope of the analysis varies depending on the nature of the resource and the potential impacts. Quechan's argument that BLM was required to analyze the cumulative effects of "Interior's aggressive program of energy development" fails to

recognize that the agency action at issue in this case is not some undefined "program of energy development" but BLM's site-specific decision to grant a right-of-way and amend the Plan based on its review of the proposed Project. And Quechan's assertions that the EIS fails to provide sufficient detail are contradicted by the record, which shows that BLM's analysis of cumulative impacts was reasonable.

STANDARD OF REVIEW

This Court's review of the district court's grant of summary judgment is *de novo*. *Gardner v. U.S. Bureau of Land Management,* 638 F.3d 1217, 1220 (9th Cir. 2011).

Agency compliance with NEPA and FLPMA is reviewable under the APA. *Id.; Earth Island Institute v. U.S. Forest Service*, 697 F.3d 1010, 1013 (9th Cir. 2012). Under the APA, a court may set aside an agency action it determines was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is highly deferential, presuming the agency action to be valid and affirming the agency decision if a reasonable basis for it exists. *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). Under this

deferential standard, a court may reverse a decision as arbitrary and capricious:

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

Lands Council, 537 F.3d at 987 (citations and quote marks omitted).

An agency's interpretation of its own regulations is entitled to deference. *Siskiyou Regional Education Project v. U.S. Forest Service,* 565 F.3d 545, 554-55 (9th Cir. 2009); *see also Earth Island Institute,* 697 F.3d at 1013 (deference to Forest Service's interpretation of forest plan). A court "must give an agency's interpretation of its own regulations 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Miller v. California Speedway Corporation,* 536 F.3d 1020, 1028 (9th Cir. 2008) (*quoting Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)). Substantial deference is also warranted where, as here, a court is reviewing scientific judgments and technical analyses within the agency's expertise. *Lands Council,* 537 F.3d at 988.

ARGUMENT

I. BLM's decision complies with FLPMA and the CDCA Plan.

A. Quechan has not challenged the Plan amendment, which authorizes the Project and designates the Project site as suitable for wind energy generation.

BLM's decision to grant the right-of-way for the Project complies with FLPMA and is consistent with the Plan. Quechan argues that BLM's decision is barred by the Plan's designation of the Project site as multiple-use Class L. But Quechan ignores the fact that BLM amended the Plan to authorize construction of the Project and designate the site as suitable for wind energy development. ER 123, 134-35; OSER 188. BLM adopted the amendment after considering the criteria specified in the Plan's amendment procedures and the plan element for energy and utility corridors. ER 103, 123-130, 812, 838. Quechan does not challenge the amendment or BLM's findings in support of the amendment, and does not otherwise dispute BLM's authority to amend the Plan.

This unchallenged, site-specific Plan amendment expressly authorizing construction of the Project is dispositive. Given the amendment, it is unnecessary for this Court to reach Quechan's

arguments based on the Plan's general description of Class L. In any event, even if this Court concludes that the Plan amendment is not dispositive, Quechan's arguments are without merit, as we demonstrate in the following sections.

B. The Plan gives BLM discretion to authorize wind power facilities on Class L lands.

BLM's decision is consistent with the Plan, which gives BLM discretion to authorize wind power facilities on Class L lands so long as NEPA requirements are met and impacts are considered and minimized to the extent practicable in accordance with the guidelines and plan elements. Here, consistent with the broad multiple-use mandates embodied in FLPMA and the Plan, BLM carefully balanced the goals of developing renewable energy, reducing greenhouse gas emissions, and preserving and protecting environmental and cultural resources. ER 93. BLM conducted an extensive public comment and NHPA consultation process, prepared a thorough NEPA analysis, and developed numerous design modifications and mitigation measures. BLM ultimately found that the Project, as modified, will complied with the CDCA Plan, including (1) the guidelines for Class L lands and (2)

the plan elements applicable to energy production facilities, cultural resources, and Native American values. ER 123-25, 129-31.

Quechan misconstrues BLM's decision when it asserts (Br. 27, 36) that BLM interprets its obligations under the Plan as "purely procedural." The guidelines and plan elements contain procedural *and* substantive requirements. The ROD finds that the decision complies with all of those requirements. ER 123-31. Tellingly, Quechan does not challenge any of those findings.

1. The Project is consistent with the guidelines for Class L lands.

BLM reasonably concluded that the Project is consistent with the CDCA Plan's multiple-use class guidelines, which unambiguously provide that wind and solar electrical generation facilities "may be allowed [on Class L lands] after NEPA requirements are met." ER 734. The Record of Decision for the CDCA Plan further explains the reasoning behind this guideline as it relates to Class L lands: wind and solar facilities "are different from [conventional] power plants and must be located where the energy resource conditions are available." ER 580. And while these facilities pose the potential for adverse environmental impacts, "[a]ppropriate environmental safeguards can be applied to

individual project proposals which clearly must be situated where the particular energy resources are favorable." *Id.*

Here, consistent with this guideline, BLM fully satisfied all NEPA requirements. *See* pp. 19-23 above and Argument III below. And under NEPA, the mere existence of impacts will not defeat a project as long as those impacts are addressed in the EIS. *Robertson,* 490 U.S. at 350 ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.").[10]

2. The Project is consistent with the plan elements.

BLM reasonably concluded that the Project complies with all applicable CDCA plan elements, including the plan elements for cultural resources, Native American values, and energy production

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[10] Quechan argues that compliance with NEPA is necessary but not sufficient to comply with the multiple-use class guideline for wind and solar power facilities. Br. 29-30. But the record shows that BLM used the NEPA process in precisely the manner intended by the Plan – that is, to consider potential impacts to the resource values identified in the Plan, and to modify the Project to avoid and mitigate those impacts to the extent practicable. ER 93-94, 102, 116, 125, 129; *see* ER 580. Those modifications included a substantial reduction in the number of turbines, a reduced Project footprint, and the development of extensive mitigation. All of these modifications were adopted by BLM as part of its approval of the Project. ER 110-11.

facilities. ER 124-25, 129-31. Those plan elements generally require BLM to *consider* cultural resources and Native American values and protect them *to the extent possible* consistent with other multiple-use objectives. Specifically, the cultural resources plan element requires the preservation and protection of a "representative sample" of those resources. ER 741. BLM must give "full consideration" to those resources in its management decisions, avoid "inadvertent impacts," and "[e]nsure proper data recovery of significant (National Register quality) cultural resources where adverse impacts can[not] be avoided." *Id; see also* ER 743 ("When protection and/or preservation of cultural and paleontological resources cannot be achieved, mitigation through proper data recovery or other means will be undertaken as developed through mitigation plans.").

Similarly, the Native American values plan element requires BLM to "[i]dentify Native American values" through contact and consultation, give "full consideration" to those values in its management decisions, and "[m]anage and protect Native American values *wherever prudent and feasible*." ER 745 (emphasis added).

In addition, the plan element for energy production and utility corridors provides that decisions on new alternative energy facilities are to be made under the Plan Amendment process, ER 814, which is based on principles of multiple use and BLM's "desert-wide obligation to maintain a balance between resource use and resource protection." ER 838.

BLM's decision is consistent with all these plan elements. After fully considering the impacts and adopting design modifications and mitigation measures, BLM found that the Project will "avoid direct physical impacts to identified archeological and cultural resources" and will "mitigate other impact to those resources to the extent practicable." ER 94, 125. The agency recognized that despite the modifications and mitigation measures, the Project will still have "unmitigated adverse effects" on resources that are spiritually and culturally significant to the affected Tribes. ER 125. But the agency concluded that, "consistent with the applicable [multiple-use class guidelines], . . . cultural resources are preserved and protected to the extent practicable," ER 125, and that approval of the right-of-way grant and associated Plan amendment is in the public interest. ER 94, *see also* ER 120 (BLM

identified and adopted "all practicable measures to avoid, minimize, or mitigate the impacts of the Project" on cultural resources). Neither FLPMA nor the Plan require anything more.

C. Quechan misconstrues the Plan.

Quechan argues that BLM's approval of the Project violated the CDCA Plan's "substantive legal obligation" to "ensure" that cultural and scenic resource values on Class L lands are "not significantly diminished." Br. 25, *see generally* Br. 23-49. Quechan bases this argument on the Plan's description of multiple-use Class L. As explained above (pp. 10-11), that description states that Class L "protects sensitive natural scenic, ecological, and cultural resource values," and that Class L lands "are managed to provide for *generally* lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." ER 732 (emphasis added).[11]

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[11] Quechan (Br. 25, 28, 31) also cites a statement in the introduction to the plan elements that "judgment is called for in allowing consumptive uses [on Class L lands] only up to the point that sensitive natural and cultural values *might be degraded*." ER 740 (emphasis added). This language cannot be read as prohibiting any possible degradation of sensitive values on Class L lands, however, because, as

Quechan's attempt to construe this language as imposing a free-standing substantive legal obligation is unfounded. FLPMA describes land use plans as tools by which "present and future use is *projected*." 43 U.S.C. § 1701(a)(2) (emphasis added). Land use plans contain both "goals and objectives for resource management" and "the measures needed to achieve these goals and objectives." OSER 348-49. The language cited by Quechan is a goal – a "broad statement[] of desired outcomes" in Class L. OSER 349. This goal must be read in context with the Plan's multiple-use class guidelines and plan elements. The guidelines and plan elements identify the "type and degree of land-use actions allowed" in Class L, and reflect BLM's decision as to the specific allowable uses and management actions that the agency anticipates will achieve the goal. ER 733, 740; *see* OSER 349-50; *cf. Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (words of a statute must be read in context and with a view to their place in the overall statutory

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described above, the guidelines and plan elements expressly authorize impacts to those values provided BLM considers those values and avoids or minimizes impacts to the extent practicable. Indeed, Quechan itself tacitly concedes that this language must be discounted, as Quechan's arguments are based on a "not-significantly-diminished" standard, not a "might-be-degraded" standard. Br. 25-32.

scheme). As described above, the guidelines expressly allow wind power facilities on Class L lands. ER 734. Further, the plan elements call for consideration, minimization, and mitigation of impacts on cultural resources and Native American values, but do not limit BLM's discretion to balance the protection of those values against other multiple-use values. ER 741, 743, 745-46.

Quechan attempts to downplay the significance of the guidelines and plan elements, asserting that their purpose "is not to preclude categories of use, but rather to differentiate between the permissible 'degree' and 'intensity' of use[.]" Br. 26, citing ER 573, 732. But contrary to Quechan's assertion, the guidelines and plan elements plainly control the *type* as well as the degree of use, and they unambiguously preclude certain uses while permitting others. *E.g.,* ER 573. In particular, the guidelines provide that nuclear and fossil fuel facilities are "[n]ot allowed" on Class L lands, while wind and solar facilities "[m]ay be allowed after NEPA requirements are met." ER 734. Quechan's narrow focus on the Class L management goals fails to give the guidelines and plan elements their proper weight and function within the Plan's overall management framework. *See Davis,* 489 U.S.

at 809. Contrary to Quechan's interpretation, the guidelines and plan elements are integral to the interpretation of the Plan's Class L management goals. The guidelines and plan elements embody BLM's decision on how those goals are to be achieved, and confirm that the authorization of wind and solar facilities on Class L lands is consistent with those management goals. *See* OSER 349-50.

Further and more broadly, by reading the Plan's management goals for Class L lands to give priority to protection of cultural resources and Native American values over development of wind and solar power facilities, Quechan effectively elevates all of the CDCA's Class L lands – 5.9 million acres – to the status of an Area of Critical Environmental Concern. That approach is inconsistent with the Plan, which establishes detailed criteria and procedures for the designation and management of ACECs that are separate from the designation of multiple-use classes. ER 819-20. And it is undisputed that the Project is not located in an ACEC.

Thus, when the Class L management goals are read in context with the rest of the Plan, it is clear that they are goals, not a separate substantive standard that must be implemented without reference to

the guidelines and plan elements. Alternatively, to the extent the meaning of the Plan is ambiguous, BLM's interpretation of the Plan, embodied in the ROD's detailed findings of compliance, ER 123-31, is reasonable and entitled to deference.[12] *See Siskiyou Regional Education Project,* 565 F.3d at 554-55 (deference to Forest Service interpretation of forest plan). Quechan's interpretation of these management goals as a stand-alone legal standard, even if it were a permissible one, is plainly not the only possible interpretation. As a result, Quechan's claim that BLM violated a "substantive legal obligation" of the Plan fails.

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[12] While BLM's interpretation is embodied in the ROD for the right-of-way grant and Plan amendment rather than a formal rulemaking, it is entitled to deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001). Since *Mead*, the Supreme Court has repeatedly emphasized that the fact that an agency "reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (citation omitted); *see also Bassiri v. Xerox Corp.,* 463 F.3d 927, 930-31 (9th Cir. 2006); *United States v. W.R. Grace*, 429 F.3d 1224, 1236-37 (9th Cir. 2005).

D. The Project will not significantly diminish sensitive values.

Even if the Plan did create the substantive legal obligation to ensure that sensitive values on Class L lands are not significantly diminished, as Quechan asserts, Quechan's argument (Br. 40) that the Project violates that (purported) obligation would still fail, because it is contrary to the record. The EIS and ROD acknowledge that the Project will have adverse impacts on some resources, including some impacts on cultural and scenic resources that Quechan and other tribes consider significant. *E.g.,* ER 176-84. But Quechan incorrectly equates BLM's forthright acknowledgement of "adverse impacts" with findings that sensitive resource values on Class L lands will be "significantly diminished" as a result of the Project. Neither the EIS nor the ROD contain any such finding.

Moreover, here again Quechan improperly reads the phrase "significantly diminished" in isolation, ignoring the specific provisions of the Plan that are "anticipated to achieve" the Plan's broad management goals for Class L lands. *See* OSER 349. As described above, the plan elements governing protection of cultural resources and Native American values require BLM to identify and give full consideration to

those values, avoid inadvertent impacts, manage and protect those values "wherever prudent and feasible," and ensure proper data recovery where adverse impacts cannot be avoided. ER 741, 745, *see also* ER 743 ("When protection and/or preservation of cultural and paleontological resources cannot be achieved, mitigation through proper data recovery or other means will be undertaken as developed through mitigation plans."). Similarly, the plan elements provide that visual resources are to "receive consideration" in BLM's management decisions consistent with agency's visual resource management objectives. ER 791. The record establishes that BLM fully considered the impacts to these resource values, minimized impacts to the extent practicable, and adopted all feasible mitigation measures. ER 110-11, 120, 125, 129-30. In so doing, BLM ensured that those values will not be "significantly diminished" within the context of the CDCA Plan.

II. BLM's decision to change the interim visual resource management classification of the Project area was reasonable.

Quechan argues (Br. 42-49) that BLM's decision to change the interim visual resource management classification for the Project area from Class III to Class IV violated the agency's purported obligation

under the Plan to ensure that scenic values are "not significantly diminished." This argument fails for the same reasons as Quechan's arguments regarding cultural resources and Native American values: it is premised on a misreading of the Plan and is not supported by the record. *See* Argument I above.

Quechan also contends that the change of VRM classification was arbitrary and capricious. That argument reflects a fundamental misunderstanding of BLM's VRM policy.

As described above (pp.22-23), the draft EIS described the Project site as interim Management Class III based on a visual resource inventory and interim Management Class designations for the Sunrise Powerlink transmission line. ER 959-64, 977-82. The draft EIS found that the Project would not meet the objectives of that interim designation, but stated that the VRM policy would not preclude approval of the Project so long as reasonable attempts were made to minimize visual impacts. ER 967-68; *see also* ER 482.

In the final EIS, BLM took a different approach, finding, in light of the VRM policy's direction that Management Classes must be consistent with the applicable land use allocations, that the Project area

should be designated interim Management Class IV rather than Class III. ER 420-21; *see* ER 421; *SUWA,* 144 IBLA at 84. This approach reflects the facts that (1) the Project is located on Class L lands, which the Plan allocates to potential use for wind energy facilities; (2) BLM's proposed action included an amendment to the Plan specifically designating the Project site as suitable for a wind energy facility; and (3) wind turbines are consistent with the objectives of Management Class IV but not Management Class III. ER 99-100, 103, 123, 421.[13]

Quechan's arguments challenging this change in the interim Management Class designation are unpersuasive.[14] Quechan fails to

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[13] As the EIS explained, "BLM also has to assess the conformance of the [P]roject with the Interim VRM Class Objectives for the [P]roject area." ER 421. Because the CDCA Plan does not include VRM objectives, one of the purposes of BLM's decision on the Project was to designate an interim class that "conforms with the land use allocation in the existing plan." *Id.* Because the existing plan allocation "allows for renewable energy development in MUC-L (Limited), and this level of (wind) development can only conform with interim Class IV objectives," an Interim Class IV designation was selected. *Id.; see also* ER 299-300.

[14] To be sure, some of the discussion of the new interim Management Class designation in the final EIS is inconsistent or confusing. *E.g.,* ER 305, 482. That lack of clarity does not render BLM's decision arbitrary, however. BLM's reasoning is apparent from the record, and courts must "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Arizona Cattle Growers' Ass'n v.*

recognize that (1) the CDCA Plan does not include any visual resource Management Class designations, and (2) the Class III designation discussed in the draft EIS was an *interim* designation, not a provision of the Plan. Given those facts, nothing in FLPMA, the Plan, or the VRM policy prevented BLM from changing the designation as it did.

Quechan argues that "VRM classifications are binding on the agency[.]" Br. 43, *citing SUWA,* 144 IBLA at 86, and *Oregon Natural Resources Council Fund v. Brong,* 492 F.3d 1120, 1125 (9th Cir. 2007). Quechan's reliance on those cases is misplaced. The VRM classification at issue in *SUWA* and the limitation on salvage timber harvest at issue in *Brong* were provisions of approved resource management plans. *SUWA,* 144 IBLA at 84-85; *Brong,* 492 F.3d at 1126-27. The two cases thus support the (undisputed) proposition that "once a land use plan is developed, all future resource management authorizations and actions . . . shall conform to the approved plan." *Brong,* 492 F.3d at 1125 (internal alterations and quotation marks omitted). But *SUWA* and *Brong* do not support Quechan's argument here, where the VRM

Salazar, 606 F.3d 1160 (9th Cir. 2010) (*quoting National Ass'n of Home Builders,* 551 U.S. 644, 658 (2007).

classification was an *interim* determination and was *not* part of the Plan. ER 300. Indeed, *SUWA* holds that when there is a conflict between a plan's land use allocations and a visual resource Management Class designation, BLM must revise the Management Class designation to conform to the plan. *SUWA,* 144 IBLA at 85. BLM's action here, which made the Project site's Management Class designation consistent with the site's land use allocation, is consistent with *SUWA*. ER 306, 421.[15]

Moreover, even if the Plan *had* included a final Management Class designation, BLM could have changed that designation by amending the Plan. ER 836. Here, BLM followed the Plan amendment procedures to designate the Project site as suitable for a wind energy facility. ER 103, 124-30. Those procedures and the existing record would be sufficient to support an amendment to the visual resource Management Class designation, if such an amendment were required.

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[15] Nor is it relevant that Ocotillo believed an interim Management Class III designation applied. *See* Br. 44. BLM, not Ocotillo, is responsible for making the Management Class designation.

Quechan further argues (Br. 43-44) that BLM's interim Management Class IV designation is inconsistent with BLM's prior designation of some of the land within the Project area as interim Management Class III in connection with the agency's approval of the Sunrise PowerLink high voltage transmission line. Quechan's argument is inconsistent with the BLM Manual, which specifically instructs BLM to limit interim Management Class designations to the "area affected by the [applicable] project." ER 517. The Sunrise PowerLink project area is not coextensive with the instant Project. ER 388. Moreover, the fact that Sunrise PowerLink fell within interim Management Class III does not mean that the instant Project area must also be designated Management Class III. As the EIS explains, the Project's impacts on visual resources are different than the impacts of Sunrise PowerLink. *E.g.,* ER 376. In any event, as discussed above, the VRM policy requires that BLM's visual resource Management Class designations be consistent with the resource management plan's land use allocations. ER 421; *SUWA,* 144 IBLA at 85. BLM reasonably determined that a designation of interim Management Class IV was necessary to maintain consistency with the Plan's multiple-use

guideline authorizing wind energy facilities and the proposed Plan amendment specifically designating the site as appropriate for a wind energy facility.

Quechan argues (Br. 49) that BLM's Management Class designation violates FLPMA's requirement that right-of-way grants mandate compliance with "State standards for . . . environmental protection" if those standards are more stringent than applicable Federal standards. 43 U.S.C. § 1765(a)(iv). The record contradicts this argument. First, the State of California certified that the proposed Plan amendment for the Project is consistent with state and local plans, policies, and programs. ER 130. Second, while the EIS discloses that the Project is not consistent with certain California and Imperial County visual resource provisions (ER 306), those provisions are too "subjective and vague to serve as a 'standard' for purposes of [43 U.S.C. § 1765(a)(iv)]." *Montana v. Johnson,* 738 F.3d 1074, 1077-78 (9th Cir. 1984). In addition, the Imperial County General Plan "is not applicable to lands administered by the Bureau of Land Management." OSER

347.[16] The County plan is also not a "State standard," and therefore would not be covered by 43 U.S.C. § 1765(a)(iv) even if it were applicable to BLM lands. In any event, BLM found, consistent with the CDCA Plan's decision criteria for energy production and utility corridors, that the Project conforms to the Imperial County General Plan "to the extent practicable." ER 812, 130. Imperial County concurred in that finding. ER 130.

III. BLM complied with NEPA.

As part of its NEPA analysis, an agency must consider the "cumulative impacts" of its action. *Center for Environmental Law and Policy v. United States Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011). Cumulative impacts are impacts that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions[.]" 40 C.F.R. § 1508.7. Consideration of cumulative impacts requires "some quantified or detailed information," and "general statements about possible effects and some risk do not

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[16] The analysis of consistency with the Imperial County General Plan was prepared to fulfill Imperial County's responsibilities as lead agency in the review the proposed Project under the California Environmental Quality Act. *See* ER 172-73, 150.

constitute a hard look absent a justification regarding why more definitive information could not be provided." *Center for Environmental Law and Policy,* 655 F.3d at 1007 (internal quotation marks and citation omitted). The "determination of the extent and effect of [cumulative impacts], *and particularly identification of the geographic area within which they may occur*, is a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (emphasis added); *see also Churchill Cnty. v. Norton*, 276 F.3d 1060, 1077-80 (9th Cir. 2001); *Native Ecosystems Council v. Weldon,* 697 F.3d 1043, 1051 (9th Cir. 2012) ("A court generally must be at its most deferential when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA.") (internal quotation marks and citation omitted).

A. The EIS takes a hard look at the cumulative impacts of the proposed Project.

Quechan argues (Br. 49-59) that BLM's cumulative impacts analysis was inadequate. But a review of the EIS confirms that BLM took the requisite "hard look" and provided a thorough analysis of those impacts.

The EIS provides a detailed analysis of cumulative impacts on 20 categories of resources.[17] *See* ER 336-37. It identifies 116 foreseeable projects that could contribute to a cumulative impact, and provides (where available) the name, owner, location, type, status, acreage, and a brief description of the project. ER 338-51 (Table 4.1-1); OSER 345-46. As the EIS notes, most of these projects have been or will be subject to their own independent environmental review under NEPA or CEQA. ER 336.

The EIS then identifies the particular categories of resources that could be impacted by each of these projects, and separately analyzes the impacts on each resource. ER 352-55 (Table 4.1-2). The geographic scope of the analysis for each resource is based on the topography of the Project area and the nature of the particular resource. ER 336. The EIS explains the basis for the chosen geographic scope. *E.g.,* OSER 210

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[17] These impact categories include: air, climate change, cultural resources, environmental justice, lands and realty, mineral resources, multiple-use classes, noise, paleontological resources, public health and safety, recreation, social and economic issues, soils, special area designations, transportation and public access, vegetation, visual resources, water, and wildland fire ecology. *See* ER 157-64.

(air), 218 (lands and realty), 222 (mineral resources), 224 (noise), 229 (paleontological resources), 241 (recreation).

For cultural resources, BLM considered impacts in the Project area plus impacts to cultural sites, traditional use areas, and cultural landscapes within approximately ten miles of the Project area, an area equivalent to the Area of Potential Effects ("APE") under the NHPA. ER 352, ER 386-87, 388 (Table 4.4-2), 356; OSER 344. The EIS discusses the cumulative impacts arising from ten current and reasonably foreseeable projects in this area. ER 387-88. It describes the relevant tribal concerns in detail and acknowledges that projects in the surrounding area such as the Sunrise Powerlink transmission line will contribute to changes in visual conditions, modify traditional landscapes, and limit traditional uses of an area. ER 389. The EIS finds that while the Project is designed to avoid physical effects to "most known archaeological resources,"[18] the Project "will contribute in a small but measurable way to adverse cumulative impacts on cultural

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[18] The impacts to the Spoke Wheel Geoglyph described in the EIS (ER 388) were substantially reduced as a result of BLM's decision to adopt the "Refined Project," which reduced the size of the Project by 43 turbines. ER 116, 376.

resources." ER 388. Among other things, the Project, in combination with the other projects within the cumulative impacts analysis area, "will contribute to the alteration of culturally important landscapes" by "adversely affect[ing] the setting for [a] resource that is assumed eligible for listing" on the National Register of Historic Places. ER 388-89.

For visual resources, BLM analyzed "local cumulative impacts" – impacts from projects within 15 miles of the Project area – plus "regional cumulative impacts" beyond the immediate Project viewshed, including existing and reasonably foreseeable future solar and other energy development projects along the I-8 corridor and in the southern Imperial Valley. ER 355, 433-36. The EIS finds that the cumulative impacts of the Project and the reasonably foreseeable local and regional projects will "contribute to the sense of industrialization of the desert landscape." ER 436.

In analyzing cumulative impacts to multiple-use classes, BLM considered the 18 energy development projects located partially or entirely on BLM-administered lands in the CDCA, and the subset of

those projects located on Class L lands.[19] ER 337, 409-10 (Table 4.8-1). BLM chose this geographic scope based on the potential of the Project and other renewable projects to restrict or preclude otherwise allowable uses of these lands for recreation, mineral exploration, transportation development, and transmission facilities. ER 410. The EIS finds possible short-term cumulative impacts on access to, and use of, these lands while the Project is under construction. ER 410. Further, during the operation of the listed energy development projects there may be "substantial long term land use and recreation impacts" to 19,713 acres designated Class L. ER 411. The Project would not contribute substantially to those potential cumulative impacts, however, because the Project site will be available for recreation once construction is completed. *Id.*

Thus, as the foregoing summary illustrates, the EIS provides a thorough and reasoned analysis of cumulative impacts. *See Center for Environmental Law and Policy*, 655 F.3d at 1007.

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[19] The EIS discloses that as of February 2011, there were 291 renewable projects totaling 31,375 MW proposed or under construction on BLM, State, or private land in California. Of those, 18 are in BLM's California Desert District. ER 337.

B. Quechan's challenge to the cumulative impacts analysis is legally and factually unfounded.

Quechan's challenge to BLM's analysis of cumulative impacts is premised on a fundamental misunderstanding of BLM's obligations under NEPA. Quechan asserts (Br. 51) that the EIS "fails to analyze the cumulative effects on Class L lands . . . *from Interior's aggressive program of energy development*." Br. 51 (emphasis added); *see also* Br. 17-18. But the "final agency action" under review in this case – and the "major Federal action" that is subject to NEPA – is not Interior's "program of energy development" but the agency's decision to grant the right-of-way. *See Lujan v. National Wildlife Federation,* 497 U.S. 871, 890 (1990) (BLM's "land withdrawal review program" is not "an 'agency action' within the meaning of [5 U.S.C.] § 702, much less a 'final agency action' within the meaning of § 704."). BLM's obligation under NEPA was to analyze the incremental impacts of *the Project decision* in combination with the impacts of *related* past, present and reasonably foreseeable projects, not the "program of energy development" posited by Quechan. 40 C.F.R. §§ 1508.7, 1508.27(b)(7).

Further, Quechan's repeated assertions that the analysis of cumulative impacts is vague or lacks detail (*e.g.,* Br. 53-56) are

contradicted by the EIS. For example, Quechan quotes the EIS's statement that "impacts to [multiple-use Class L] lands associated with construction of these cumulative projects may overlap with" the proposed Project. Br. 53 (quoting ER 410, EIS Section 4.8.9.4). According to Quechan, "Interior does not explain what these impact are or how they would cumulatively affect Class L lands[.]" Br. 53. But the EIS does in fact explain – in the very same section – that "some of the cumulative projects described above may be under construction at the same time as the proposed [Project], which may result in limited access to BLM lands in the Imperial Valley and the surrounding area." ER 410. The relevant projects and their approximate acreages are specifically identified (in Table 4.8-1), and there are cross-references to Tables 4.1-1 and 4.1-2, which provide additional information on the projects. *Id.* This same section of the EIS then goes on to explain that these impacts would be to recreational users, and provides cross-references the EIS's discussions of cumulative impacts to recreational resources (OSER 241-45) and visual resources (ER 433-36). ER 411. Quechan also fails to acknowledge that much of the cumulative impacts analysis that it claims is missing from the EIS's discussion of impacts to

Class L lands appears in other sections of the EIS. *See, e.g.,* ER 386-90 (cultural resources), ER 440-48 (wildlife).

Quechan also argues (Br. 56-58) that the EIS fails to provide a sufficiently detailed analysis of the effects of past projects. Here again, the analysis that Quechan claims is missing from the EIS's discussion of impacts on Class L lands is included in other sections of the EIS. *See, e.g.,* ER 401 (cross-referencing discussions of impacts of other land use activities in Chapters 3 and 4 of the EIS); ER 241-53 (historical information of cultural resources).

At bottom, Quechan's challenge to BLM's analysis of cumulative impacts reflects a disagreement with the geographic scope of the agency's analysis. Quechan presumes that all impacts of energy development anywhere on the CDCA's 5.9 million acres of Class L lands are necessarily cumulative to the Project's impacts. But as described above, BLM concluded that the geographic scope for the cumulative impacts analyses should take into account the nature of the potential impacts on the affected resources. ER 336, 352-55, 386. That conclusion was reasonable, is supported by the record, and is entitled to great deference. *Kleppe*, 427 U.S. at 414 ("determination of the extent

and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies"); *see also Churchill Cnty.*, 276 F.3d at 1077-80.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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November, 2013
DJ# 90-1-4-13633

STATEMENT OF RELATED CASES

Desert Protective Council v. United States Department of the Interior, 9th Cir. No. 13-55561, is currently pending before this Court and involves a challenge to the same agency actions regarding the Ocotillo Wind Energy Project that are at issue in this appeal.

s/Mark R. Haag

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) , I certify that the foregoing Brief is proportionately spaced, has a typeface of 14 points, and contains xxxxxx words.

s/Mark R. Haag

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users will be served by the appellate CM/ECF system.

s/Mark R. Haag