UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV14-02504 JAK (SPx)	Date	June 11, 2015
Title	Colorado River Indian Tribes, et al. v. Department of Interior, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (DKT. 37, 69)**

I. Introduction

In 2010, the Bureau of Land Management ("BLM") approved the construction of a solar power plant on approximately 7,000 acres of federal land in the Mojave Desert, northwest of Blythe, California ("Blythe I," or "Original Project"). Complaint ("Compl."), Dkt. 1, ¶¶ 20, 34, 36. On August 11, 2011, in a separate action, a motion for the preliminary injunction of the Blythe I construction was denied. *La Cuna de Aztlan Sacred Sites Protection Circle Advisory Comm. v. U.S. Dep't of Interior* ("*La Cuna*"), LA CV11-04466 JAK (OPx), Dkt. 74 (C.D. Cal. Aug. 11, 2011). Thereafter, the entity developing Blythe I had financial difficulties, its parent companies filed for Chapter 11 bankruptcy and construction stopped. Compl., Dkt. 1, ¶ 38. In 2012, NextEra Blythe Solar Energy Center, LLC ("NextEra") purchased the assets of Blythe I, and submitted to BLM a new plan to develop a photovoltaic solar energy generation facility on approximately 4,000 acres of the land designated for Blythe I ("Blythe II," or "Project"). *Id.* ¶¶ 39-40. From 2013 through 2015, BLM approved certain applications of NextEra in connection with the development of Blythe II. *Id.* ¶¶ 40-56; Dkt. 37 at 17.

Colorado River Indian Tribes ("CRIT," or "Plaintiff") is a federally recognized Indian tribe whose members include Mohave, Chemehuevi, Hopi and Navajo peoples. Compl., Dkt. 1, ¶ 20. Plaintiff's Reservation "begins several miles northeast of the Project site." *Id.* Plaintiff's "ancestral homelands cover the Mohave Desert, including the Project site." *Id.* The ancestors of Plaintiff's Mohave and Chemehuevi members used "trails that cross the Project site and [left] behind the burial grounds, grindstones, hammerstones, petroglyphs, and trails that have been found in the Project vicinity." *Id.* ¶ 21. Plaintiff contends its members have a religious and cultural relationship to the artifacts left by their ancestors, and its "Mohave members experience significant spiritual harm when such resources are dug up, relocated or damaged." *Id.* ¶ 22. In addition, the religion and culture of Plaintiff's member tribes is "strongly connected to the physical environment of the area." *Id.*

On December 4, 2014, Plaintiff brought this declaratory and injunctive action under the Administrative

Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"). *Id.* at 1. The following defendants were named: BLM and several officials employed by it; the United States Department of the Interior ("DOI"), which is the parent agency of BLM; and Sally Jewell in her official capacity as Secretary of the Interior ("Secretary") (collectively, "Federal Defendants," or the "Government"). *Id*. The parties later stipulated to have NextEra intervene as a Defendant (together with Federal Defendants, "Defendants") pursuant to Fed. R. Civ. P. 24. Dkt. 26.

Plaintiff alleges that, by approving of the Project and related actions, BLM violated its obligations under three federal statutes and corresponding regulations. First, BLM did not comply with the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* ("NHPA"), because it did not meaningfully consult Plaintiff as required. Compl., Dkt. 1, ¶¶ 77-79. In addition, BLM did not fulfill certain obligations to Plaintiff required by a Programmatic Agreement with Plaintiff and others entered pursuant to the NHPA. *Id.* ¶¶ 37, 45, 58-60, 78. Second, the Environmental Impact Statement ("EIS") prepared by BLM did not adequately consider the environmental and cultural impact of the Project as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). *Id.* ¶¶ 80-82. Third, the Project was not consistent with the land designation or visual resource classification assigned to the land on which it was built under the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* ("FLPMA") and implementing regulations. *Id.* ¶¶ 83-85. Plaintiff contends that these actions adversely affect its legal interests, and seeks to have them set aside and further construction enjoined. *Id.* ¶¶ 79, 82, 85 (asserting jurisdiction under Section 10 of the APA, 5 U.S.C. § 702); *id.* at 18-19.

On March 16, 2015, Plaintiff filed a Motion for Preliminary Injunction ("Motion"). Mot., Dkt. 37-1. Plaintiff argued this relief was necessary because construction was scheduled to begin in April 2015, and Plaintiff would be irreparably harmed if it proceeded due to the resulting damage to cultural, religious and historic resources and the transformation of the desert landscape. *Id.* at 7-8.[1] The Government and NextEra each filed a separate opposition. Dkts. 59, 68.[2]

A hearing on the Motion was held on May 11, 2015, and the matter was taken under submission. Dkt. 90. For the reasons stated in this Order, the Motion is **DENIED**.[3]

II. Statutory Framework

A. National Historic Preservation Act

At the time the Project and related review proceedings began, Section 106 of the NHPA required federal agencies to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" before approving the "expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 16 U.S.C.

[1] The parties have stipulated that cross-motions for summary judgment will be filed in May and June, and heard on July 13, 2015. Dkt. 54.

[2] NextEra has moved to join the Government's opposition. Dkt. 69. That motion is **GRANTED**.

[3] Because no injunction will issue, Plaintiff's request to be excused from the security bond requirement of Fed. R. Civ. P. 65(c) is **MOOT**. Mot., Dkt. 37-1 at 31.

§ 470f (2013).[4] The purpose of the NHPA is to "accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning." 36 C.F.R. § 800.1(a). When an agency proposes such a project, it is to consult with the State Historic Preservation Officer ("SHPO"). *Id.* § 800.3. In consultation with the SHPO, the agency shall then "identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process." *Id.* § 800.3(f).

Indian tribes that "might attach religious and cultural significance to historic properties in the area of potential effects" are entitled to be consulting parties. *Id.* §§ 800.2(c)(2), 800.3(f)(2). Indian tribes must be consulted "regardless of the location of the historic property." *Id.* § 800.2(c)(2)(ii). "Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. . . . Consultation with Indian tribes . . . should be conducted in a manner sensitive to the concerns and needs of the Indian tribe." *Id.* § 800.2(c)(2)(ii)(C). "Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes . . . and should consider that when complying with the procedures in this part." *Id.* § 800.2(c)(2)(ii)(D).

In consultation with the SHPO and any Indian tribes or other consulting parties, the agency must "identify historic properties within the area of potential effects." *Id.* § 800.4(b). If an identified property of potential historic significance has not previously been evaluated for National Register eligibility, the agency official shall apply the National Register criteria set forth at 36 C.F.R. part 63. *Id.* § 800.4(c)(1). The official "shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." *Id.* If the agency official and the SHPO agree that any National Register criteria are met, "the property shall be considered eligible for the National Register for section 106 purposes." *Id.* § 800.4(c)(2). If the official and SHPO agree that the criteria are not met, the property shall not be considered eligible. *Id.* If an Indian tribe disagrees with these determinations, it may request that the Advisory Council on Historic Preservation ("Council"), an independent agency, propose that a formal determination be made by the Secretary. *Id.* Depending on the outcome of the determination whether historic properties are affected by the proposed undertaking, the agency is required to provide certain documentation, and may be required to initiate further proceedings. *Id.* § 800.4(d).

As an alternative procedure to those required by Section 106 and the implementing regulations, an agency may "negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." *Id.* § 800.14(b). A programmatic agreement may be used:

> (i) When effects on historic properties are similar and repetitive or are multi-State or

[4] On December 19, 2014, the NHPA was recodified in several sections of the U.S. Code, "except with respect to rights and duties that matured, penalties that were incurred, or proceedings that were begun before the date of enactment of [the recodifying Act]." Pub. L. No. 113-287, § 7, 128 Stat. 3094, 3272-73. The Government concedes that, because the relevant proceedings began before the date of this Act, the earlier provisions govern. Opp'n, Dkt. 68 at 9 & n.2. Plaintiff does not dispute this.

> regional in scope;
> (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
> (iii) When nonfederal parties are delegated major decisionmaking responsibilities;
> (iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
> (v) Where other circumstances warrant a departure from the normal section 106 process.

Id.

Where a programmatic agreement affects tribal lands or property of religious or cultural significance to an Indian tribe, the agency is required to engage in "appropriate government-to-government consultation with [the] affected Indian tribes," and take their views "into account in reaching a final decision on the proposed program alternative." *Id.* § 800.14(c)(4), (f). Following approval by the Council, a programmatic agreement "satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated . . . ." *Id.* § 800.14(b)(2)(iii).

B. National Environmental Policy Act

NEPA requires a federal agency to prepare an Environmental Impact Statement ("EIS") when it engages in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. An EIS must include a "detailed statement" regarding, *inter alia*, (i) "the environmental impact of the proposed action"; (ii) "any adverse environmental effects which cannot be avoided should the proposal be implemented"; and (iii) "alternatives to the proposed action." *Id.*

Under the applicable regulations, "[e]ffects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8.[5] The "alternatives" section "is the heart of the environmental impact statement." *Id*. § 1502.14. It must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," and "[i]nclude the alternative of no action." *Id.* It is also required that the statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *Id.* § 1502.13.

Once an agency determines that an EIS is required, it must prepare a draft EIS ("DEIS"). The agency is then required to release the DEIS for comment by the public and other agencies. *Id.* § 1503.1(a). After the public comment period has ended, the agency prepares a Final EIS ("FEIS"), which must respond to comments made during the DEIS comment period. *Id.* § 1502.9(b). After the FEIS is released, the agency may request comments before it makes a final decision. *Id*. § 1503.1. The agency ultimately produces a

[5] NEPA regulations are promulgated by the Council on Environmental Quality, a division of the Executive Office of the President. 42 U.S.C. § 4342.

record of decision ("ROD") in which it explains its action. *Id.* § 1505.2.

C. Federal Land Policy and Management Act

The FLPMA directs the Secretary to prepare land use plans for public lands owned by the federal government. 43 U.S.C. §§ 1701, 1712. These plans must address several criteria, including present and potential uses and scientific, economic and environmental considerations. *Id.* § 1712(c). In connection with the FLPMA, Congress designated approximately 25 million acres of land within the California Desert Conservation Area ("CDCA"), approximately 12 million of which are public lands. *Id.* § 1781.[6] BLM manages the CDCA pursuant to the CDCA Plan, which it developed in 1980 and subsequently amended several times. *See* Declaration of Winter King ("King Decl."), Dkt. 39, Ex. C01.[7] The CDCA Plan designates four multiple-use classes of land "based on the sensitivity of resources and kinds of use for each geographic area." *Id.* at 5806. The Project is sited on lands designated as "Class L." King Decl., Dkt. 39, Ex. A05 at 4188. Class L designation "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." King Decl., Dkt. 39, Ex. C01 at 5806.[8] The CDCA Plan expressly permits solar power plants to be built on Class L land, provided they are found to be "environmentally acceptable." *Id.* at 5808; Finn Decl., Dkt. 58, Ex. 1 at 22.

The Secretary must consider "scenic" values, among others, in administering the FLPMA and CDCA Plan. 43 U.S.C. §§ 1701(a)(8), 1702(c), 1711(a), 1781(a), (d). She may do so by applying a "standard visual assessment methodology" to determine the Visual Resource Management ("VRM") classification of "scenic resources." King Decl., Dkt. 39, Ex. A03 at 1346. These "set the level of visual change to the landscape that may be permitted for any surface-disturbing activity." *Id.* at 1347. The CDCA Plan does not itself establish VRM classes for land within the CDCA. King Decl., Dkt. 39, Ex. A04a at 2725. However, it requires BLM to identify "[t]he appropriate levels of management, protection, and rehabilitation on all public lands in the CDCA . . . commensurate with visual resource management objectives in the multiple-use class guidelines." King Decl., Dkt. 39, Ex. C01 at 5865.

As projects are proposed, they may be assigned "Interim VRM Classes." King Decl., Dkt. 39, Ex. A04a at 2725. Interim VRM classification "requires that visual values be considered and that those considerations be documented as part of the decision-making process, and that if resource development/ extraction is approved, a reasonable attempt must be made to meet the interim VRM objectives for the area in question and to minimize the visual impacts of the proposal." *Id.* It is the position of BLM that, "[b]ecause the CDCA Plan does not have Resource Management Plan-adopted VRM objectives, a land use plan

[6] The FLPMA directed the Secretary to file a map and legal description of the CDCA, which the Act incorporates by reference. *See* 43 U.S.C. § 1781(c); Bureau of Land Management, The California Desert Conservation Area Plan 1980, at 5 (1980).

[7] Because they were not conducive to electronic filing, over 4000 pages of documents, which were stored on a CD, were lodged and attached as exhibits to the declaration of Winter King, counsel for Plaintiff. Docket entry 39, which refers to the notice of manual filing of these items, is cited when reference is made to these documents.

[8] Approximately 48.5 percent of BLM-administered CDCA land, or 5.88 million acres, is designated as Class L. King Decl., Dkt. 39, Ex. C01 at 5806.

amendment is not required to address instances of non-conformance." *Id.*

The Project was assigned Class III Interim VRM classification. King Decl., Dkt. 39, Ex. A03 at 1024. As a result, "the existing character of the landscape" is to be partially retained. *Id.* at 1348. Thus, "[t]he level of change to characteristic landscape should be moderate. Management activities may attract attention but should not dominate the view of the casual observer. Changes should repeat the basic elements found in the predominant natural features of the characteristic landscape." *Id.*

III. Factual and Procedural Background

A. Blythe I Proceedings

In August 2010, BLM issued a CDCA Plan Amendment and FEIS for Blythe I. King Decl., Dkt. 39, Ex. A04 at 2363. A Notice of Availability was published in the Federal Register, and the public and other agencies were given an opportunity to comment. Decl. of Kenneth Stein ("Stein Decl."), Dkt. 60, ¶ 4. Plaintiff did not comment, nor did it participate in a separate, parallel protest process. *Id.*

In October 2010, BLM entered a Programmatic Agreement with the California Energy Commission ("CEC"), Palo Verde Solar I, LLC ("Palo Verde"), the developer of Blythe I, and the California SHPO. King Decl., Dkt. 39, Ex. A01. Several Indian tribes, including Plaintiff, signed the Programmatic Agreement as concurring parties. *Id.* at 52. *Inter alia*, the Programmatic Agreement required BLM to prepare and implement a Historic Properties Treatment Plan ("HPTP") to identify adverse effects to historic properties, mitigate negative impacts to them, and develop procedures for the discovery of any unanticipated historic properties during construction. King Decl., Dkt. 39, Ex. A01 at 28-30. Stipulation X(b) of the Programmatic Agreement permitted BLM to authorize construction activities "in specific geographic areas of the Project's [Area of Potential Effects ('APE')] where there are no historic properties; where there will be no adverse effect to historic properties; where a monitoring and discovery process or plan is in place per Stipulation VI(b); or where an HPTP(s) has been approved and initiated." *Id.* at 32.

Stipulation VI(b) provides:

> If the BLM determines that implementation of the Project or a HPTP will affect a previously unidentified property that may be eligible for the [National Register of Historic Places ("NRHP")], or affect a known historic property in an unanticipated manner, and a monitoring and discovery plan has not been finalized, the BLM, in coordination with the Energy Commission, will address the discovery or unanticipated effect by following the procedures at 36 C.F.R. 800.13(b)(3) where a process has not been yet been [sic] agreed to pursuant to 36 C.F.R. 800.13(a)(1).

Id. at 30.

In October 2010, BLM also issued a ROD that explained its decisions to modify the CDCA Plan and grant a Right-of-Way ("ROW") in connection with Blythe I. King Decl., Dkt. 39, Ex. A04 at 2795. On November 4, 2010, BLM issued the ROW to Palo Verde. *Id.* at 2378. Blythe I was planned as a "1,000-megawatt

(MW) solar energy generating plant utilizing thermal parabolic trough solar generating technology on 6,831 acres of public land." *Id.* Construction activity began after the issuance of the ROW, and ceased in August 2011, after Palo Verde told BLM that it sought to amend the existing authorizations to allow the development of solar photovoltaic energy technology on the site. *Id.* at 2379. As discussed, in August 2011, several parties other than Plaintiff moved for a preliminary injunction of construction, which was denied. *La Cuna*, LA CV11-04466 JAK (OPx), Dkt. 74 (C.D. Cal. Aug. 11, 2011).

Beginning in December 2011, while construction was suspended pending Palo Verde's application for an amendment, Palo Verde's American and European parent companies filed for bankruptcy. King Decl., Dkt. 39, Ex. A04 at 2379. On July 12, 2012, in connection with the bankruptcy proceedings as to one of these companies, NextEra "purchased the un-built assets of" Blythe I. *Id.*

B. Blythe II Proceedings

1. Preparation and Issuance of the Draft EIS and Final EIS

a) NextEra Submits for Approval the Modified Plan

In September 2012, NextEra stated that it would proceed with Palo Verde's plan to convert the previously approved solar thermal project to a photovoltaic project. As a result, it requested that BLM lift the order suspending construction pending consideration of that plan. King Decl., Dkt. 39, Ex. A05 at 4173. BLM approved this request. *Id.* On March 7, 2013, "[i]n anticipation of the fact that a [photovoltaic] project on the site would require a smaller footprint," NextEra relinquished approximately 35 percent of the ROW grant area to BLM. *Id.* On June 21, 2013, NextEra submitted a Level 3 variance request to BLM, asking that "BLM amend the 2010 ROW grant to convert the Approved Project to PV technology, reduce the size of the solar plant site," and make certain other changes. *Id.* On August 30, 2013, BLM published in the Federal Register a Notice of Intent. This announced that BLM would initiate a NEPA analysis of the Modified Project. *Id.*

b) BLM Issues the Draft EIS, and Plaintiff Submits Comments

On February 7, 2014, BLM published a DEIS for Blythe II. King Decl., Dkt. 39, Ex. A03. It was the position of BLM that "[n]one of the land use plan decisions analyzed in the 2010 PA/FEIS and approved in the 2010 ROD for the Approved Project need to be revisited for purposes of the Level 3 variance now under consideration." *Id.* at 688. Instead, the DEIS analyzed only "the components that would be changed by the Modified Project." *Id.* at 689. BLM noted that "previously considered alternatives" included the Approved Project and a No Project Alternative in which "no solar development would occur on the BSPP site." *Id.* at 709. The DEIS stated that "government-to-government consultation with a number of tribal governments" had taken place in connection with the Blythe I approval process. *Id.* at 1057. It stated that a draft Programmatic Agreement amendment had been sent to 15 tribes with whom it had consulted in connection with Blythe I, and "BLM also held government-to-government consultation meetings with the Colorado River Indian Tribes and the Quechan Tribe regarding the project." *Id.* at 1058. BLM tentatively recommended approval of Blythe II, which it deemed superior to Blythe I because it would have a reduced impact on environmental and cultural resources. *Id.* at 709.

On March 24, 2014, Plaintiff submitted comments objecting to the DEIS. King Decl., Dkt. 39, Ex. B02. These included several legal arguments similar to those raised in this litigation, e.g., that the No-Action Alternative was improperly defined and that the statement of purpose and need was too narrow. *Id.* at 5662, 5669. Plaintiff also raised several fact-based disagreements. These included that the DEIS was not as thorough as a CEC Staff Assessment, which listed eight additional prehistoric sites that did not appear in the DEIS. *Id.* at 5663. In addition, the DEIS failed to incorporate in its cultural resource analysis "significant new information" that had been gathered in connection with other solar plant construction in the area. *Id.* at 5664. Similarly, Plaintiff criticized as inadequate certain mitigation measures approved in connection with Blythe I and carried over to the Blythe II DEIS, in light of the "four additional years of information on how mitigation measures for utility-scale solar projects are applied on the ground." *Id.* at 5665 & n.3. Plaintiff also challenged BLM's claim that it consulted with Plaintiff. *Id.* at 5665, 5668. Further, Plaintiff claimed that it had not received a final amended version of the Programmatic Agreement. *Id.* at 5665.[9]

c) BLM Issues the Final EIS

(1) Evaluation of Environmental and Cultural Impact

The FEIS was issued on May 30, 2014. King Decl., Dkt. 39, Ex. A04. It stated, "[t]his Final EIS does not supersede or replace the BLM's 2010 PA/FEIS or other consideration of the Approved Project, but rather, to the extent applicable, is tiered to the analysis in the 2010 PA/FEIS and 2010 ROD." *Id.* at 2365. It described its "Purpose and Need" as "to respond to the Grant Holder's request for a Level 3 variance . . . and modification of the existing ROW grant . . . . The BLM will decide whether to approve, approve with modifications, or deny the Grant Holder's Level 3 variance request and the issuance of an amendment to the BSPP's existing ROW grant for the Modified Project." *Id.* at 2364.

The FEIS stated that it "takes into account comments received during the public comment period on the Draft EIS and fully analyzes the Grant Holder's proposal to construct, operate, maintain, and decommission the Modified Project (Alternative 1) as well as a No Action Alternative, which reflects the BLM's denial of the variance request and pursuit of a solar thermal trough development in accordance with the existing 2010 ROW grant on the site within an approximately 4,433-acre area (Alternative 2)." King Decl., Dkt. 39, Ex. A04 at 2356. It did not evaluate as alternatives for selection either the Original Project proposed by Palo Verde or "the effects that would occur if, rather than build the BSPP, the Grant Holder elected to relinquish the approved ROW grant and not build a solar project on the approved site (i.e., the effects of not constructing, operating, maintaining, and decommissioning a solar project on the site which were analyzed as the No Project alternative in the 2010 PA/FEIS)." *Id.* at 2366. However, it included, for "informational purposes," a detailed table comparing the effects of the Modified Project, the "No Action Alternative," the Original Project and no construction at all. *Id.* at 2366, 2368-76.

The FEIS stated that 99 archaeological sites had been identified within the Project site. *Id.* at 2601. Of

[9] The communications between Plaintiff and BLM before and after this exchange are discussed in greater detail below.

these, only 15 had been evaluated for listing in the NRHP. *Id.* The remaining 84 sites were to be evaluated in phases pursuant to the Programmatic Agreement, and all sites would be "treated as eligible by the BLM until they are determined ineligible." *Id.*

Only one of these sites, a thermal cobble feature, has been determined to be eligible for NRHP listing. King Decl., Dkt. 44, Ex. A16 at 5628. Kenneth Stein, an Environmental Manager employed by NextEra, declares that, in response to concerns raised about potential impacts to the thermal cobble feature, NextEra has redesigned the Project such that the feature will now be avoided. Stein Decl., Dkt. 60, ¶ 87. The only other site determined to be eligible for NRHP consideration is a prehistoric rock art site "located more than a mile from the closest MBSP boundary." *Id.* ¶ 88; King Decl., Dkt. 44, Ex. A16 at 5628. Cultural resource monitors are to examine the site every three months to assess any adverse impacts, and a tribal representative will be given the opportunity to participate in these examinations. *Id.* at 5648.

The FEIS also stated that "several potential cultural landscapes (Prehistoric Trails Network Cultural Landscape [PTNCL] and Desert Training Center Cultural Landscape [DTCCL]) and one archaeological district (Prehistoric Quarries Archaeological District [PQAD])" were identified "within the vicinity of the project; however, these have not been completely defined nor formally evaluated for NRHP eligibility. Further research would be needed to determine their boundaries, periods of significance, and contributing resources." King Decl., Dkt. 39, Ex. A04 at 2601. The FEIS stated that NextEra would finance this research and ensure the implementation of a data recovery plan. *Id.* The FEIS also noted that ground-disturbing activities "could directly impact cultural resources by damaging and displacing artifacts, diminishing site integrity and altering the characteristics that make the resources significant, resulting in an adverse effect on cultural resources." *Id.* at 2606. It stated that, in addition to artifacts at the 99 archaeological sites identified, "there may also be currently unknown subsurface resources within the APE. These resources could be directly impacted by construction of the Modified Project." *Id.* The FEIS described 19 Design Features proposed by NextEra "to address potential effects to cultural resources." *Id.* at 2604. These include compliance with the Programmatic Agreement, as well as a number of data recovery and specialized personnel requirements. *Id.* at 2604-06.

In an Appendix, BLM responded to each of the objections raised by Plaintiff in its March 24, 2014 letter that criticized the DEIS. *Id.* at 4113-22. Among other things, BLM disputed Plaintiff's claim that sites identified in the CEC proceedings had not been adequately considered. It stated that two of these sites had been considered, and three were beyond the scope of the FEIS because they were not "located within the boundary of the Modified or Approved Project." *Id.* at 4115. In addition, BLM stated that it "recognizes that values ascribed to places or things by social or cultural groups, including Indian tribes, may make them important and worthy of consideration even if those places or things do not meet the NRHP definition of significance," and "noted" "CRIT's strong preference for in-situ or other onsite reburial." *Id.* at 4116, 4119. BLM stated that the Programmatic Agreement, together with the Design Features, would be sufficient to address these concerns. *Id.* at 4117.

The FEIS stated that the effects of any approved project "would combine with impacts from past, present, and reasonably foreseeable projects, and cumulative effects on cultural resources would be substantial and adverse." *Id.* at 2610. Mitigation measures would reduce, but not eliminate, these effects. *Id.* at 2611. After considering these and other factors, BLM recommended approval of the Project. *Id.* at 2416.

(2) Evaluation of CDCA Plan and VRM Guidelines

The CDCA Plan designated the Project site Class L, but did not assign a VRM classification. King Decl., Dkt. 39, Ex. A03 at 1348. In 2010, in connection with the Original Project FEIS, BLM recommended that the Blythe I site be designated as Interim VRM Class III. *Id.* at 1350-51. This recommendation was based in part on a BLM "Scenic Quality Field Inventory" of a larger area and a determination of "relatively low levels of recreation use, a history of low-level development of private lands in the area, and use as a transportation and utility corridor." *Id.* at 1350, 2046-2066. The site was evaluated from eight "key observation points" ("KOPs"). *Id.* at 1609-14. It was determined that, although certain mitigation measures could be taken, Blythe I would not be in conformance with the requirements of Interim VRM Class III from several KOPs, and that three adverse impacts were found to be "unavoidable." *Id.* at 1609-14, 1619. One was the reflection of sunlight by the parabolic mirrors, which would cause a glare visible from all KOPs. *Id.* at 1619. After considering this and other factors, BLM recommended approval of the Original Project. *Id.* at 1203.

BLM amended the CDCA Plan to designate the Blythe I site for solar energy generation. King Decl., Dkt. 39, Ex. A04 at 2826. The amendment was a "Category 3 amendment" "to accommodate a request for a specific use or activity that will require analysis beyond the Plan Amendment Decision." *Id.* This designation was made after several required determinations were made and decision criteria considered. *Id.* at 2826-34. The amendment to the CDCA Plan remained in effect during the Blythe II approval process. *Id.* at 2636.

In connection with the Blythe II EIS, which concerned a smaller area bounded by that of Blythe I, BLM adhered to the 2010 designation of the Project area as Interim VRM Class III. *Id.* at 2725. The area was evaluated from six of the eight KOPs used in the Original Project FEIS. *Id.* BLM concluded that Blythe II would conform to the Interim VRM Class III requirements from four of these six points, but that it would not from the remaining two, and this was "adverse and unavoidable." *Id.* at 2728-31. From one KOP, the entrance to a campsite, the Project would create "a darkly colored 'seam' and visual interruption in the typically smooth transition between the mountain slopes and valley floor," and create glint and glare. *Id.* at 2729. From another, the McCoy Mountains, it would strongly contrast with the surrounding landscape and create glint and glare. *Id.* at 2731. Several of the mitigation measures proposed in the Original Project FEIS were incorporated by reference, and one was revised in light of the "change in solar energy generating technology" between the two Projects. *Id.* at 2734-35. Thus, "visible structures, buildings, and backs of solar panels [could] be painted in colors compatible with the surrounding landscape, reducing the color contrast of these elements," and visual contrast could be reduced through "restoration of temporarily disturbed areas and proper design fundamentals." *Id.* at 2729, 2731. BLM recommended approval of the Project. *Id.* at 2416.

On June 30, 2014, CRIT sent BLM a comment letter that was critical of certain aspects of the FEIS. King Decl., Dkt. 39, Ex. B03.

2. Communications and Meetings Involving Plaintiff and BLM

a) April 2013 – July 2014:

On April 12, 2013, BLM and Plaintiff participated in a "special tribal council meeting." King Decl., Dkt. 39, Ex. C16. The minutes of this meeting, which describe it as a "renewable energy update," reflect that a variety of matters were discussed. The minutes suggest that there was less discussion of the Project, about which the tribal representatives did not ask questions, than of other nearby solar projects. *Id.* at 6271-72. Plaintiff describes this meeting as a mere "informational meeting[]" rather than a true consultation, while the Government describes it as a bona fide "government-to-government meeting[]." Mot., Dkt. 37 at 22; Opp'n, Dkt. 68 at 17.

On June 27, 2013 -- after NextEra submitted to BLM its request for a variance, but before BLM published the Notice of Intent -- BLM sent a letter to Plaintiff notifying it of the proposed modification. King Decl., Dkt. 39, Ex. B01. The letter stated that a new EIS would be prepared, and asked Plaintiff to submit any concerns in connection with the EIS approval process. *Id.* at 5659. Plaintiff was also asked to "assist in identifying any additional issues or concerns the Tribe may have about the proposed Project modification, including places of religious and cultural significance that might be affected by the Project," pursuant to the Programmatic Agreement. *Id.* BLM also invited Plaintiff to attend an "informational meeting" on July 23, 2013. *Id.* at 5659-60. The FEIS describes this meeting as a "[g]eneral information meeting and site visit with BLM staff and Grant Holder," and states that representatives from Plaintiff and four other tribes attended. King Decl., Dkt. 39, Ex. A04 at 2763.

BLM contends that, on July 19, 2013, a draft Amendment to the Programmatic Agreement was sent to all parties who had signed the original Programmatic Agreement; this included Plaintiff. Finn Decl., Dkt. 58, Ex. 2. These parties were invited to submit comments by August 19, 2013. *Id.* at 15. The proposed Amendment provided:

> The terms of this Agreement are a condition of any ROD and the ROW grant that the BLM may issue and are binding on the Applicant. For purposes of this Agreement, changes in the corporate name of the Applicant or reassignment of the ROW to a subsidiary company or other entity may be authorized by the BLM and does not require the Agreement to be amended.

King Decl., Dkt. 39, Ex. A05 at 4409.

The Amendment was executed by BLM and the SHPO in November 2013. *Id.* at 4410. In a later submission by Plaintiff about the Draft EIS, it stated that it "has been unable to locate a copy of the final amended version." King Decl., Dkt. 39, Ex. B02 at 5665. Douglas Bonamici, a law clerk in the Colorado River Indian Tribes Office of the Attorney General, declares that he and other staff members "have been unable to locate any letters or other written notice informing the Colorado River Indian Tribes of the proposed amendment or seeking consultation regarding the proposed amendment." Bonamici Decl., Dkt. 37-7, ¶ 3. However, at proceedings before the CEC in November 2013, the CEC found that outreach had occurred and Plaintiff had notice of the changes to the Project and the Amendment to the Programmatic

Agreement. Stein Decl., Dkt. 63, Ex. 14.[10]

Plaintiff's council members and BLM officials also met to discuss Blythe II on December 30, 2013. King Decl., Dkt. 39, Ex. C20. Although the parties have not submitted minutes of this meeting, it appears from the PowerPoint presentation displayed there that Blythe II was one of several items on the agenda. *Id.* The Government has submitted a similar PowerPoint presentation from a meeting held on April 29, 2014. Finn Decl., Dkt. 58, Ex. 8.[11]

Plaintiff sent comment letters critical of the DEIS and FEIS on March 24, 2014 and June 30, 2014. King Decl., Dkt. 39, Exs. B02, B03. On July 1, 2014, NextEra submitted to BLM a "Limited Notice to Proceed Activities Work Plan" ("Work Plan") in connection with certain actions it sought to undertake before the issuance of a final HPTP. Stein Decl., Dkt. 63, Ex. 16.

b) August – September 2014: BLM Issues a Limited Notice to Proceed, and Limited Ground-Disturbing Activities Occur

On August 11, 2014, after the FEIS had been published, representatives of Plaintiff sent a letter to BLM officials. King Decl., Dkt. 39, Ex. B04. The letter stated that BLM had given only a "cursory" response to Plaintiff's comment letter on the DEIS, and had provided no response to Plaintiff's letter about the FEIS. *Id.* at 5690-91. Plaintiff stated it understood that BLM "intends to issue a Limited Notice to Proceed for installation of tortoise fencing, geotechnical activities, re-activation of a well, and surveying and staking activities," and expressed the view that these activities could not be commenced without Plaintiff's prior approval. *Id.* at 5691. Finally, Plaintiff stated that it had been advised by NextEra that construction would begin in November, and expressed its concern that this time frame would not "give BLM or affected Tribes enough time to adequately consult on the draft plans, which have not yet been provided to Tribes." *Id.* at 5691. On August 12, 2014, BLM issued to NextEra a ROW grant "for the construction, operation, maintenance, and decommissioning of a solar site and authorized ancillary facilities." King Decl., Dkt. 39, Ex. A06. On August 13, 2014, BLM issued to NextEra a Limited Notice to Proceed ("LNTP") with the activities described in the Work Plan. Stein Decl., Dkt. 63, Ex. 15.

On August 14, 2014, a meeting was held at which three BLM staff members and four tribal participants were present. Finn Decl., Dkt. 58, Ex. 9. The minutes of this meeting state that Blythe II and four other

[10] The record reflects that BLM participated in parallel proceedings before the CEC and the BLM. *See* Stein Decl., Dkt. 60, ¶¶ 42-50 (citing relevant excerpts of record). In connection with these proceedings, NextEra entered a stipulation with CRIT "pursuant to which they agreed to modify several Conditions of Certification for the MBSP for cultural resources." *Id.* ¶ 47. Although CEC was a signatory to the Programmatic Agreement, it is unclear what effect, if any, these proceedings have on BLM obligations under Section 106. Because the determination of this issue is not necessary to the rulings made in this Order, the CEC proceedings are not described in detail.

[11] Plaintiff's letter commenting on the Draft EIS requested "an in-person meeting with appropriate BLM officials to discuss [BLM's requirement to curate materials resulting from data recovery in facilities meeting certain requirements] and possible mechanisms for allowing in-situ or onsite reburial for the Blythe Project and others in the area." King Decl., Dkt. 39, Ex. B02 at 5667. Plaintiff contends BLM "refused" to meet prior to approving the Project. Mot., Dkt. 37 at 22. It is not clear from the record whether these concerns were discussed at the April 29, 2014 meeting, which was held prior to the approval of the Project.

projects were discussed. The section of the minutes about Blythe II states that Plaintiff expressed the following concerns:

> Upset about lack of communication regarding the timing of the project, the ROD, and the NTP. The get only limited information from the proponent, but would really like to know when monitors will be necessary. BLM let them know that the LNTP was issued the night before; it only covers limited tortoise fencing, reactivation of the existing well, and geotech testing; and the LNTP will require that monitors are present. BLM asked for clarification from the Tribe whether they needed to see the LNTP before they could provide monitors (based on info from NextEra). The Tribe said they don't need the LNTP before they provide monitors. They would like to see the LNTP though. They would also like more communication regarding the timing for these projects, so they know when construction is proposed to start and when they need to have their monitors in place.

Id. at 2.

Concerns were also expressed about the following: the shipment of artifacts to other sites; the perceived need for BLM to place signs where artifacts were found; that other tribes who, according to Plaintiff, had "no ties to the area" were being improperly consulted; and that there "should be a price for destroying the desert and their artifacts. . . . The Tribe doesn't see that money." *Id.* at 3. Dennis Patch, the Chairman of CRIT, who had participated in the August 14, 2014 meeting, declares that BLM Acting Field Manager Dennis Wakefield "informed me that BLM intended to continue approving renewable energy projects through the region. Mr. Wakefield also stated that he was 'not the BLM' and he was not prepared to address CRIT's concerns." Patch Decl., Dkt. 37-5, ¶ 9.

Plaintiff was provided with a copy of the LNTP on August 15, 2014. Dkt. 37-16. Later that month, NextEra contacted Plaintiff to request that tribal members assist in cultural resource monitoring for the authorized work. This included the installation of the tortoise fencing, which was scheduled to begin on August 25, 2014. Dkt. 37-20. Nancy Jasculca, the Deputy Attorney General of CRIT, replied, "[w]hile we reserve our rights with respect to the BLM 'consultation' process on the project, the CRIT Museum is ready and able to provide monitors on Monday [August 25] for the Blythe project." *Id.*[12]

c) October 2014 – March 2015: BLM Develops the Historic Properties Treatment Plan

On October 2, 2014, Plaintiff requested a copy of the final HPTP and monitoring plan for the Project. King Decl., Dkt. 39, Ex. B05. Plaintiff claimed that it had not received a draft of any of the plans required by the Programmatic Agreement, which required a 30-day review period for a draft HPTP. *Id.* On October 8, 2014, a "Consulting Party Meeting" was held by BLM and NextEra to discuss the status of the HPTP for

[12] Kenneth Stein, an Environmental Manager employed by NextEra, declares that only one artifact of potential Native American significance was discovered while working under the Limited Notice to Proceed, and there were no impacts to known archaeological sites or unanticipated discoveries during this period. Stein Decl., Dkt. 60, ¶¶ 72-76. However, Plaintiff presents evidence that at least 14 isolates were found in early 2015. Supp. King Decl., Dkt. 86, Ex. A17.

the Project. Bonamici Decl., Dkt. 37-7, ¶ 4; Dkts. 37-9, 37-10. A representative of Plaintiff participated by telephone. Bonamici Decl., Dkt. 37-7, ¶ 5. He was informed that the HPTP and monitoring plans were still not prepared, and that it was expected that construction would begin in January 2015. *Id.* Draft documents were mailed to Plaintiff on October 9, 2014 and November 13, 2014. King Decl., Dkt. 39, Exs. B06, B09. On December 15, 2014, Plaintiff sent BLM its comments on the draft HPTP. *Id.* Ex. B12. In them, Plaintiff raised concerns about the failure to include certain sites, the provisions for treatment of prehistoric resources and the reporting and monitoring procedures in place. *Id.*

On January 7, 2015, BLM sent Plaintiff a revised HPTP that purported to address the concerns raised by Plaintiff. Dkt. 42; Finn Decl., Dkt. 58, Ex. 6. On January 21, 2015, Plaintiff sent BLM additional comments on the revised HPTP. King Decl., Dkt. 39, Ex. B14. This letter stated that "[w]hile CRIT appreciates BLM's minor efforts to incorporate the Tribes' previous comments, numerous issues remain." *Id.* at 5779.

On January 24, 2015, BLM issued a second Limited Notice to Proceed, and authorized NextEra to engage in certain activities on the Project site. Stein Decl., Dkt. 63, Ex. 17. Plaintiff stipulated that it would not object to these activities before filing a motion for a preliminary injunction, provided NextEra and the Government would not attempt to use this stipulation as a basis to respond to Plaintiff's arguments in any subsequent proceedings. King Supp. Decl., Dkt. 74-3.

On February 10, 2015, BLM sent a letter to Plaintiff that purported to address the issues it raised in its previous correspondence. King Decl., Dkt. 39, Ex. B15. On February 12, 2015, a meeting was held between BLM and Plaintiff. Finn Decl., Dkt. 58, Ex. 10. The Government has submitted as an Exhibit a PowerPoint presentation from this meeting, which identifies the following topic for discussion: "changes to Monitoring/Discovery Plans per CRIT Comments." *Id.* BLM issued the final HPTP in March 2015. Dkt. 44. Plaintiff contends the final HPTP "still failed to address many of CRIT's concerns regarding cultural resource protections and ignored CRIT's requests for consultation." Mot., Dkt. 37-1 at 17. BLM issued a final Notice to Proceed after the publication of these documents. Stein Decl., Dkt. 60, ¶¶ 85, 90.

IV. Analysis

A. Legal Standard

A "preliminary injunction is an extraordinary remedy never awarded as of right." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1307 (9th Cir. 2013) (citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). More than a possibility of irreparable harm is required to warrant preliminary injunctive relief. *Id.* at 22. However, under the Ninth Circuit's "sliding scale" approach, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support the issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

Plaintiff's claims under the NHPA, NEPA and the FLPMA are brought under the APA. In an APA action,

"[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

Plaintiff contends BLM's actions "were arbitrary and capricious and violated federal law, and thus violated the APA." Compl., Dkt. 1, ¶¶ 78, 81, 84. APA § 706(2) provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedures required by law." 5 U.S.C. § 706(2). "The arbitrary or capricious standard is a deferential standard of review under which the agency's action carries a presumption of regularity. Although the court's inquiry must be searching and careful, ... the ultimate standard of review is a narrow one. Thus, [e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may be reasonably discerned." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (citations and internal quotation marks omitted).

B. Application

1. Likelihood of Success on the Merits / Serious Questions Going to the Merits

a) NHPA Claim

(1) Applicable Standard

The "fundamental purpose of the NHPA is to ensure the preservation of historical resources." *Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592, 609 (9th Cir. 2010). The version of Section 106 of the NHPA that was in place during the relevant time period provided, "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, [a federal agency shall] take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f (2013).[13] "Section 106 of NHPA is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

As discussed, regulations implementing the NHPA require "government-to-government" consultation with recognized Indian tribes 36 C.F.R. § 800.2(c)(2)(ii)(C). The purpose of consultation with Indian tribes under the NHPA is "to ensure that all types of historic properties and all public interests in such properties are given due consideration." *Te-Moak Tribe*, 608 F.3d at 609 (quoting 16 U.S.C. § 470a(d)(1)(A) (2013)). The NHPA implementing regulations create binding obligations on BLM and other federal agencies to consult with affected tribes. A failure to do so may be grounds for setting aside an agency action. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (reversing summary judgment in favor of Government, and ordering summary judgment in favor of tribe, in part because it was

[13] *See supra* note 4 (discussing recodification of NHPA, and why earlier version and implementing regulations apply).

"undisputed that no consultation or consideration of historical sites occurred").

The NHPA regulations authorize the negotiation of a "programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." 36 C.F.R. § 800.14(b). Where this is done, "[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency." *Id.* § 800.14(b)(2)(iii). Thus, the procedures adopted by such an agreement serve as a "substitute" for the regulations that concern consultation for purposes of the agency's compliance with Section 106. *Id.* § 800.14(a)(4). This affects "all or part of subpart B of this part," i.e., 36 C.F.R. §§ 800.3 – 800.13, provided the procedures are consistent with certain requirements set forth in Section 110(a)(2)(E) of the NHPA, 16 U.S.C. § 470h–2(a)(2)(E). 36 C.F.R. § 800.14(a).[14] Although the NHPA regulations impose substantial obligations upon agencies to consult with affected tribes, they are to be evaluated in light of the broader requirement of 36 C.F.R. § 800.4 that "a reasonable and good faith effort to carry out appropriate identification efforts" be made. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999).[15]

(2) Whether the Use of the Programmatic Agreement Was Proper

The 2010 Programmatic Agreement, which Plaintiff signed, provides for tribal involvement in several steps of the process of identifying, assessing, managing and reporting culturally significant properties in connection with Blythe I. King Decl., Dkt. 39, Ex. A01. Among them is that BLM is to consult with interested tribes "regarding the identification of historic properties within the APE to which they attach religious or cultural significance and shall respond to any additional request to consult with Tribes, Tribal organizations or tribal officials." *Id.* at 25. Tribes are to be consulted in connection with determinations of eligibility for listing in the National Register, and have the right to call for review under some circumstances. *Id.* at 26-27. However, the Programmatic Agreement permits deferred final evaluation of the significance of cultural resources under certain circumstances, including where an HPTP is in effect. *Id.* at 26, 32. BLM is required to "consult with the Tribes and seek the views and comments of Tribal organizations and individual tribal members regarding any unevaluated cultural resource to which they may attach religious or cultural significance in order to ascertain the status of these places relative to NRHP and CRHR eligibility criteria." *Id.* Ex. A05 at 4290. The 2013 Amendment to the Programmatic Agreement did not change these requirements. *Id.* at 4409.

[14] Subpart B does not include 36 C.F.R. § 800.2, which describes the general obligation to consult on historic properties of significance to Indian tribes. Section 800.14 requires "consultation . . . as appropriate" with tribes. Therefore, the regulations in Subpart B are the default means of satisfying consultation requirements, and a Programmatic Agreement is an alternative means to satisfy the NHPA Section 106 obligations of the agency. From this it follows that adherence to the procedures of a valid Programmatic Agreement will satisfy the consultation requirements of Section 800.2.

[15] The Ninth Circuit has suggested that a tribe previously consulted on agency action must show "that it would have provided new information had it been consulted again" to prevail on an NHPA action. *Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592, 609 (9th Cir. 2010). Because it is assumed for purposes of this Motion that Plaintiff provided new information to BLM in its successive correspondence, this issue is not addressed in this Order.

Plaintiff contends it was improper for Defendants to rely upon the Programmatic Agreement, for three reasons. First, it was improper to defer evaluation of cultural properties because, under the regulations, this may be done only where "effects on historic properties cannot be fully determined prior to approval of an undertaking." Mot., Dkt. 37-1 at 24 (citing 36 C.F.R. § 800.14(b)(1)(ii)). Plaintiff claims there was "no reason why the cultural resources evaluation required by the NHPA could not be completed before BLM approved Blythe I or Blythe II," because this was an "individual project of defined scope" rather than a "complex project situation[]." *Id.* Second, Plaintiff argues that its "signature on the PA did not waive any of its consultation rights; indeed, the very purpose of signing on to a PA as a consulting party is to obtain extra consultation opportunities with the implementing agency." Reply, Dkt. 74 at 15. Third, Plaintiff argues that, pursuant to 36 C.F.R. § 800.5, "BLM's consideration of the Project amendment constituted a departure from the original 2010 Project NHPA findings, triggering the need for new historic properties evaluation and consultation efforts under the NHPA." *Id.* These arguments are addressed in this sequence.

First, Plaintiff fails to raise a serious question that the Project was not complex. "[C]omplex project situation[]" is not a defined term, and appears in a regulation that implements an ambiguous statutory directive. Thus, BLM's interpretation of this term and determination that the Project qualifies as complex is entitled to deference. *See, e.g.*, *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). As the phrase might be understood in common usage, there is no showing that it is arbitrary or capricious to consider as "complex" a solar power project that would cover thousands of acres of land. Nor is there any showing that it was arbitrary or capricious to determine that the effects on historic properties could not be fully determined prior to approval of the Original Project or the Project. A significant consideration was the possibility of discovering artifacts during ground-disturbing activities, which could bear on whether sites might qualify for inclusion in the National Register. The Ninth Circuit has held that the possibility of uncovering materials during ground-disturbing activities may provide a "good reason" to engage in the phased identification and evaluation of historic properties. *HonoluluTraffic.com v. Fed. Transit Admin*., 742 F.3d 1222, 1233 (9th Cir. 2014).[16]

Second, the claim that Plaintiff's "signature on the PA did not waive any of its consultation rights" is not consistent with the text of the regulations. It provides that a programmatic agreement may serve as a "substitute" for other procedures in the regulations, and "satisf[y] the agency's section 106 responsibilities." 36 C.F.R. § 800.14. The Programmatic Agreement states that "the Project shall be implemented in accordance with the following stipulations . . . ." King Decl., Dkt. 39, Ex. A01 at 20. As a result, it set forth substitute procedures for purposes of 36 C.F.R. § 800.14. Although the Programmatic Agreement did provide that BLM would continue to consult Plaintiff and other tribes, *see id.* at 19, Plaintiff identifies no provision of the Agreement, or other evidence, that raises a serious question whether, notwithstanding this language, additional rights were retained.

Third, Plaintiff's argument that the Project Amendment triggered new consultation requirements under 36

[16] *HonoluluTraffic.com* arose under Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, which incorporates the process for identifying historic properties provided in Section 106 of NEPA. *See* 49 U.S.C. § 303(d)(2). This distinction does not materially affect this analysis.

C.F.R. § 800.5 appears is premised on procedures that do not apply. A programmatic agreement acts as a "substitute" for procedures in "subpart B" of 36 C.F.R. part 800, which includes Section 800.5.[17] *See* 36 C.F.R. § 800.14. In the place of these procedures, the Programmatic Agreement set forth the exclusive conditions of its termination or expiration. It could be terminated by a "Signatory or Invited Signatory." King Decl., Dkt. 39, Ex. A01 at 34. Plaintiff was only a Concurring Party. The Agreement would expire, subject to certain conditions, "if the Project has not been initiated and the BLM ROW grant expires or is withdrawn, or the stipulations of this Agreement have not been initiated, within five (5) years from the date of its execution." *Id.* Plaintiff has not presented evidence that either of these conditions was satisfied. Nor has Plaintiff presented any evidence that, following the Project Amendment or any action by BLM or NextEra, it sought to withdraw from the Programmatic Agreement as a concurring party, or requested the amendment of the Agreement pursuant to Stipulation XI or any other procedure.

For these reasons, Plaintiff fails to raise a serious question that the implementation of the Programmatic Agreement or the use of its procedures was improper. Consequently, in evaluating whether BLM complied with its obligations under Section 106, those procedures are applicable.

(3) Whether BLM Adequately Consulted with Plaintiff

(a) Adequacy of Consultation Before Issuance of the LNTP

BLM issued the LNTP on August 13, 2014. Stein Decl., Dkt. 63, Ex. 15. It authorized NextEra "to perform the limited activities identified in the Blythe Solar Power Project Limited Notice to Proceed Activities Work Plan Docket . . . Dated July 1, 2014." *Id.* These activities were "limited to: 1) installation of temporary desert tortoise fencing; 2) Geotechnical Investigatiopn [sic] activities; 3) Reactivation of an existing groundwater well; 4) Limited staking and surveying relevant to the activities listed in items 1-3. NO OTHER WORK IS AUTHORIZED." *Id.*

Plaintiff argues that BLM "promptly violated" the Programmatic Agreement by failing to prepare an HPTP before issuing the LNTP. Mot., Dkt. 37-1 at 24. The Agreement provides that, "[p]rior to the issuance of any Notice to Proceed by the BLM to initiate the Project or any component of it that may affect historic properties, the Applicant shall develop and submit to the BLM one or more HPTPs for the BLM's approval." King Decl., Dkt. 39, Ex. A05 at 4264-65. Tribes and consulting parties have a 30-day period to review the HPTP, and additional consultation where the HPTP "specifically addresses treatment for adverse effects to historic properties to which Tribes attach religious or cultural significance." *Id.* at 4265. However, when it issued the LNTP, BLM "permitted NextEra to install temporary tortoise fencing, conduct geotechnical investigation, and reactivate an existing groundwater well, all of which included staking and surveying, even though BLM had not yet finalized plans for handling potentially affected sites or unanticipated discoveries." Mot., Dkt. 37-1 at 25 (citing excerpts of record).

Plaintiff contends that, because this procedure was not followed, the Programmatic Agreement does not

[17] *Confederated Tribes & Bands of the Yakama Nation v. U.S. Fish & Wildlife Service*, 2015 WL 1276811 (E.D. Wash. Mar. 20, 2015), upon which Plaintiff relies, is distinguishable. There, a programmatic agreement was recommended, but was not yet in effect. *Id.* at *4.

excuse Defendants from the consultation procedures that the NHPA implementing regulations impose by default: "merely entering into a programmatic agreement does not satisfy Section 106's consultation requirements." *Id.* at 24 (citing *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010)). Plaintiff argues that BLM's communications with it between NextEra's submission of the Modified Plan and BLM's issuance of the LNTP did not comply with these procedures. *Id.* at 24-25.[18]

It is not necessary to determine whether, on the record presented, Plaintiff could raise serious questions whether these communications satisfied the consultation requirement of the NHPA default procedures. No serious question is raised that there was not compliance with the Programmatic Agreement in issuing the LNTP. Therefore, its procedures, rather than those set forth in subpart B of the regulations, govern.

Defendants acknowledge that the Programmatic Agreement required an HPTP to be completed before the issuance of a Final Notice to Proceed. NextEra Opp'n, Dkt. 59 at 15-16; Opp'n, Dkt. 68 at 19. However, they argue that the LNTP did not trigger this requirement. They rely upon Stipulation X(b) of the Agreement, which provides:

> The BLM may authorize construction activities, including but not limited to those listed below, to proceed in specific geographic areas of the Project's APE where there are no historic properties; where there will be no adverse effect to historic properties; where a monitoring and discovery process or plan is in place per Stipulation VI(b) . . . . Such construction activities may include:
> i) demarcation, set up, and use of staging areas for the Project's construction,
> ii) conduct of geotechnical boring investigations or other geophysical and engineering activities, and
> iii) grading, constructing buildings, and installing parabolic solar trough assemblies.

King Decl., Dkt. 39, Ex. A05 at 4268.

Stipulation VI(b) provides that any such process shall comply with the procedures set forth at 36 C.F.R. § 800.13(b)(3). *Id.* at 4266. These procedures require that the SHPO and any tribe with a cultural or religious interest in discovered property be notified of any discovered historic property within 48 hours of discovery; that a notification describe the agency official's assessment of the National Register eligibility

[18] Plaintiff argues that BLM did not discuss the Project "in any depth" with Plaintiff until the August 14, 2014 meeting, which took place after BLM issued the Final EIS and LNTP. Mot., Dkt. 37-1 at 22-23. It argues that the meetings prior to that time were inadequate "informational meetings," and that BLM "refused" its request for in-person consultation following the issuance of the Draft EIS. *Id.* at 22. In addition, it characterizes the letters sent as "form letters" that "do not satisfy the consultation requirement." Reply, Dkt. 74 at 14. The record reflects that, during this time period, BLM sent several letters to Plaintiff, whose representatives had attended three meetings at which Blythe II and other projects were discussed. The minutes of the meeting for which minutes are available do not reflect any questions being asked by these representatives about the Project, which had not yet been submitted for NEPA review. King Decl., Dkt. 39, Ex. C16. Plaintiff's DEIS and FEIS comment letters criticized BLM for failing to consult as to archaeological methods and other matters within the purview of the NHPA, and Plaintiff raised similar concerns at the August 14, 2014 meeting with BLM. *Id.* Exs. B02, B03; Finn Decl., Dkt. 58, Ex. 9.

of the property and proposed actions to resolve adverse effects; that the tribe be given an opportunity to respond to any such notification; and that the agency official take these recommendations into account. 36 C.F.R. § 800.13(b)(13).

The LNTP authorized only those activities set forth in the Work Plan that were consistent with its procedures. Stein Decl., Dkt. 63, Ex. 15. The Work Plan set forth, *inter alia,* processes to "avoid and minimize the potential for impacts to cultural resources." *Id.* Ex. 16 at 1156. These included that known untreated archaeological sites be avoided during ground disturbance; a Cultural Resource Monitor be present during ground disturbing activities; and a Tribal Cultural Consultant be given the opportunity to monitor ground-disturbing activities. *Id.* at 1156-57. Cultural Resource Monitors and Tribal Cultural Consultants were given "the authority to temporarily stop work in order to make visual inspections of potential cultural deposits." Stein Decl., Dkt. 63, Ex. 16 at 1157. Kenneth Stein declares that "CRIT representatives served as [Tribal Cultural Consultants] for all ground-disturbing activities permitted under the limited notice to proceed," and evidence of this is presented. Stein Decl., Dkt. 60, ¶ 62 (citing Davis Decl., Dkt. 81, Ex. 1). He also declares that the procedures set forth at 36 C.F.R. § 800.13(b)(13) "did not even come into play because no historic properties were affected by the limited construction activities and no eligible historic properties were discovered during the activities undertaken pursuant to the limited notice to proceed." *Id.* ¶ 69.

The terms of the LNTP and Work Plan satisfy BLM's obligations under the Programmatic Agreement. Although an HPTP for Blythe II was not prepared at the time the LNTP issued, the Work Plan set forth procedures consistent with Stipulations VI(b) and X(b) of the Programmatic Agreement. Reading the Agreement as a whole, Stipulation X(b), which refers to a limited set of activities in "specific geographic areas," is not a means to evade the HPTP requirement for significant construction activities. However, no serious question is raised that the limited activities permitted were not authorized by the Programmatic Agreement.[19] Nor does Plaintiff present evidence that there were material violations of the procedures of the Work Plan. Plaintiff presents evidence that "at least 14 isolates were found in just a little over one month earlier this year." Reply, Dkt. 74 at 10 n.2 (citing Supp. King Decl., Dkt. 86). This is not proof of noncompliance, and the evidence on which Plaintiff relies -- the logs of Cultural Resource Monitors and/or Tribal Cultural Consultants -- supports the contrary conclusion, i.e., that the procedures were followed.

On the record presented, no serious question is raised that BLM did not satisfy its obligations under the Programmatic Agreement and the NHPA in issuing the LNTP.
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[19] The Work Plan stated approximately 2050 acres could be disturbed to install the tortoise fencing. Jasculca Decl., Dkt. 37-19 at 10. NextEra contends fewer than 25 acres were actually disturbed. NextEra Opp'n, Dkt. 59 at 15 (citing Stein Decl., Dkt. 63, Ex. 15); *see* Stein Decl., Dkt. 60, ¶ 62. Plaintiff does not respond to this in its Reply.

(b) Adequacy of Consultation Before Issuance of the Final Notice to Proceed

Drafts of HPTP and monitoring plan documents were sent to Plaintiff on October 9, 2014, and November 13, 2014. King Decl., Dkt. 39, Exs. B06, B09. King Decl., Dkt. 39, Exs. B06, B09. In December 2014, Plaintiff submitted comments on these drafts, and in January 2015, BLM responded by sending Plaintiff a revised draft HPTP. *Id.* Ex. B12; Dkt. 42; Finn Decl., Dkt. 58, Ex. 6. Later in January, Plaintiff sent comments on the revised draft, and in February BLM sent Plaintiff a letter that purported to address them. King Decl., Dkt. 39, Exs. B14, B15. BLM and Plaintiff also met to discuss these concerns. Finn Decl., Dkt. 58, Ex. 10. The final HPTP was issued in March 2015, which purported to address the concerns raised by Plaintiff at the various stages of these discussions. Dkt. 44.

Plaintiff's NHPA challenge focuses upon the issuance of the LNTP rather than the Final Notice to Proceed. The Final Notice was issued on March 19, 2015, after the Motion was filed. Dkt. 123-2. This intervening event is not addressed in Plaintiff's Reply. However, Plaintiff argues that the final HPTP "still failed to address many of CRIT's concerns regarding cultural resource protections and ignored CRIT's requests for consultation." Mot., Dkt. 37-1 at 17.

On the record presented, no serious question is raised that BLM did not satisfy its obligations under the Programmatic Agreement and the NHPA in issuing the Final Notice to Proceed. There is substantial evidence that the procedures that apply to drafting and consultation concerning the HPTP were followed. *See* King Decl., Dkt. 39, Ex. A01 at 28-30. The Programmatic Agreement authorizes construction pursuant to an HPTP. *E.g.*, *id.* at 32. Plaintiff's claim that BLM ignored its requests for consultation is not supported by the record. Instead, it shows substantial correspondence to, and interactions with, Plaintiff. That not all of Plaintiff's concerns were addressed does not raise serious questions as to the validity of the HPTP. The Programmatic Agreement and the NHPA give Plaintiff the right to be consulted about planning and actions, but the ultimate decision-making authority rests with BLM. *See id.* at 17 ("BLM will consider any timely comments in finalizing the HPTP and prepare the consulting parties and Tribes with a copy"); *id.* at 21-22 (in section titled "Dispute Resolution," stating that BLM "will render a final decision" regarding any objection to the "implementation of the terms of this Agreement," although it is to "take into account all comments from the parties regarding the objection").

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For the foregoing reasons, Plaintiff has not carried its burden to show that there are serious questions raised as to the merits of its NHPA claim.
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b) NEPA Claim

(1) Whether BLM Took a "Hard Look" at Potential Consequences to Cultural Resources

In determining whether agency decision-making under NEPA is arbitrary and capricious, the judicial review is limited to "ensur[ing] that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004); *see also Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011). "While we afford deference to the judgment and expertise of the agency, the agency must, at a minimum, support its conclusions with studies that the agency deems reliable. . . . The agency must 'explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.'" *N. Plains Res. Council, Inc.*, 668 F.3d at 1075 (citations omitted). Effects on "cultural" resources are among those that must be evaluated. 40 C.F.R. § 1508.8.

Plaintiff contends that, for three reasons, BLM failed to take a "hard look" at potential harm to cultural resources. First, BLM did not "include or analyze new information provided by CRIT demonstrating potentially devastating project impacts on historic trails." Mot., Dkt. 37-1 at 25-26. Second, it did not identify five prehistoric or prehistoric-component sites identified in the parallel CEC proceeding "as being directly impacted by the Project." *Id.* at 26. Third, it did not adequately analyze the effect of the Project on buried cultural resources. *Id.* These arguments are addressed in this sequence.

First, the FEIS states that the historic trails "have not been completely defined nor formally evaluated for NRHP eligibility. Further research would be needed to determine their boundaries, periods of significance, and contributing resources." King Decl., Dkt. 39, Ex. A04 at 2601. Plaintiff contends this shows that the analysis by BLM was incomplete. These trails include the "Coco-Maricopa Trail," which was found to be eligible for NRHP listing, and the "Salt Song Trail, Thumahnmp, and other Songscapes." All are identified as "within the APE for indirect effects for the Modified Project." *Id.* at 2602. All potentially eligible sites were to be "treated as eligible by the BLM until they are determined ineligible," *id.* at 2601, and they were to be subject to the mitigation and avoidance measures of the Programmatic Agreement, HPTP and Design Features. *Id.* at 2604-06, 2610-11. Further, a precise determination of the boundaries of these sites was difficult because many of the trails identified by Plaintiff are "songscapes," which are physical locations referenced in songs.[20] *See* King Decl., Dkt. 47-1, Ex. C15 at 6214-15. Plaintiff contends BLM did not consider "two archeological survey maps showing prehistoric trails crossing directly through the Project site," which were attached to its comment letter on the DEIS. Mot., Dkt. 37-1 at 26. However, BLM referred to this information in its response, and stated that it had considered it. King Decl., Dkt. 39, Ex. A04 at 4116. BLM was not obligated to adopt the maps offered by Plaintiff, nor does the qualified statement in the EIS about trail boundaries suggest that Plaintiff's evidence was not considered. *Cf. Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir. 1994)

[20] Further, the boundaries of the Coco-Maricopa Trail were difficult to identify because there are no physical remains of this trail. Finn Decl., Dkt. 58, Ex. 15 at 4.

("NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.").

Second, BLM evaluated the five sites identified in the CEC proceedings. One was evaluated in the Blythe II FEIS. A second had been evaluated in the Blythe I FEIS, which was incorporated by reference. Three were not evaluated because BLM determined they were "not located within the boundary of the Modified or Approved Project. Accordingly, the BLM disagrees with the suggestion that they would be directly affected by the Modified Project." King Decl., Dkt. 39, Ex. A04 at 4115. Even if the CEC reached different conclusions about certain of these sites, NEPA did not require BLM to adopt them. *Salmon River Concerned Citizens*, 32 F.3d at 1359; *see* King Decl., Dkt. 39, Ex. A04 at 4120 ("The BLM notes that the CEC's proceeding . . . is separate from and independent of the BLM's consideration of the Modified Project under NEPA and FLPMA.").

Third, BLM's conclusions that "currently unknown" subsurface resources may have existed in the APE and that the "total number of cultural resources located within the geographic area of analysis is unknown" do not show that it failed to take a hard look at any impact on these resources. King Decl., Dkt. 39, Ex. A04 at 2606-08. The FEIS noted that ground-disturbing activities could "directly impact cultural resources by damaging and displacing artifacts, diminishing site integrity and altering the characteristics that make the resources significant, resulting in an adverse effect on cultural resources," and recommended the use of corresponding mitigation measures. *Id.* at 2606. The Ninth Circuit has held that the possibility of uncovering materials during ground-disturbing activities may provide a "good reason" to engage in the phased identification and evaluation of historic properties. *HonoluluTraffic.com v. Fed. Transit Admin*., 742 F.3d 1222, 1233 (9th Cir. 2014). *HonoluluTraffic.com* noted that surveys designed to identify buried resources could be counterproductive, leading to "repetition of the surveys and more disturbance to [buried resourced] than would otherwise be necessary." *Id.* at 1234. Under the circumstances presented, *HonoluluTraffic.com* contemplates the use of a programmatic agreement that provided "specific protocols for addressing . . . archeological resources that are discovered." *Id*.

For these reasons, Plaintiff fails to raise a serious question that BLM did not take a hard look at the potential consequences to cultural resources or consider Plaintiff's comments on the DEIS.

(2) Whether the FEIS Adequately Defined and Considered the No-Action Alternative

NEPA regulations require every EIS to "[i]nclude the alternative of no action." 40 C.F.R. § 1502.14. Under the regulations, the "status quo [may] properly be the no action alternative. The 'no action' alternative may be thought of in terms of continuing with the present course of action until that action is changed." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin*., 126 F.3d 1158, 1188 (9th Cir. 1997) (internal quotation marks omitted) (citing Council on Env. Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("Forty Questions"), 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981)). The purpose of the no-action alternative is to "provide a baseline against which the action alternatives are evaluated." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

The FEIS deems the "no-action alternative" the denial of the variance requested by NextEra. King Decl., Dkt. 39, Ex. A04 at 2385. The FEIS assumes that, if the variance were denied, a solar plant using a solar thermal parabolic trough would be built on the Project site. *Id.* The FEIS also states that it is "tier[ed] . . . to the 2010 PA/FEIS for the Approved Project to the extent that the analysis in that document informs or is relevant to the BLM's consideration of the effects of the Grant Holder's proposed Modified Project." *Id.* at 2380. The 2010 PA/FEIS evaluated three no-action alternatives in detail. In each, no project was constructed. In one, the CDCA Plan would not be amended. In the second, the CDCA Plan would be amended to identify the Original Project site as unsuitable for any type of solar energy development. In the third, the CDCA Plan would be amended to identify the Original Project site as unsuitable for any type of solar energy development. King Decl., Dkt. 39, Ex. A03 at 1103. The Blythe II FEIS includes, for "informational purposes," a table comparing the respective effects of the Modified Project, the "No Action Alternative," the Original Project and no construction at all. *Id.* at 2366, 2368-76.

Plaintiff contends the EIS made an "untenable assumption when it assumed that [a scaled-down version of] the Original Project (Blythe I) would be developed if BLM denied Blythe II." Mot., Dkt. 37-1 at 27; Reply, Dkt. 74 at 17; *see* King Decl., Dkt. 39, Ex. A04 at 2731 (describing the 'no action alternative' as a "scaled-down version of the 2010 Approved Project using solar thermal parabolic trough technology").

Plaintiff has presented substantial questions with respect to whether the smaller solar thermal parabolic trough project described throughout the FEIS as "Alternative 2 (No Action Alternative)" was a "no-action alternative" as defined by the NEPA regulations. To be sure, "where ongoing programs initiated under existing legislation and regulations will continue . . . . 'no action' is 'no change' from current management direction or level of management intensity." Forty Questions, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981). However, Plaintiff has presented evidence that patent and other technological issues made it highly unlikely that, following the bankruptcy of Palo Verde and its sale of Blythe I assets, a new owner would build a scaled-down version of Blythe I. King Decl., Dkt. 39, Ex. C21. NextEra argues that this was still a valid no-action option because the "existing entitlements to construct, operate, maintain and decommission a solar thermal trough project within the existing ROW area after relinquishment would remain in place" if Alternative 2 were selected, and "NextEra could elect to pursue various options for that purpose." NextEra Opp'n, Dkt. 59 at 30. However, that these entitlements remained is distinct from the "baseline" of what was actually likely to happen if no action were taken. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). Plaintiff has shown that it was more likely that no construction would occur.

Although Plaintiff has shown that it likely that the FEIS contains a technical error, Plaintiff fails to raise a serious question that the FEIS or other BLM action should be set aside on this basis. "Relief is available under the APA only for 'prejudicial error,'" not "harmless error." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090-91 (9th Cir. 2013) (citations omitted), *cert. denied*, 134 S. Ct. 2877 (2014). Thus, even where "compliance with NEPA [is] less than perfect" and "'technical' violations" are identified, agency action will not be set aside where "the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence." *Id.*

The Blythe II EIS is "tiered to the analysis in . . . the 2010 PA/FEIS and Record of Decision." King Decl., Dkt. 39, Ex. A04 at 2357. NEPA regulations define "tiering" as "the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28. Tiering is appropriate where "the sequence of statements or analyses is . . . [f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis." *Id.*

The Blythe I EIS analyzed three actual "no action" alternatives. In each, no construction would be completed, and the Original Project site would subject to varying CDCA Plan classifications. The Blythe II EIS incorporated this analysis by reference and, for "informational purposes," compared it to the Modified Project and the misnamed "No Action Alternative" of a smaller Blythe I. King Decl., Dkt. 39, Ex. A04 at 2367-76. Under these circumstances, no serious question is raised that, when the Blythe I EIS and the Blythe II EIS are considered together, BLM failed to take a "hard look" at the range of alternatives, including the "alternative of no action," despite the mislabeling of the "No Action Alternative" in the Blythe II FEIS.

Plaintiff argues that this error was not harmless, and that the "No-Action Alternative" misled the public by "dramatically understat[ing] the environmental harm caused by approving the variance." Reply, Dkt. 74 at 17-18. Plaintiff adds that this is the result because the EIS "concludes that the No Action alternative would have similar, if not greater, environmental impacts than the Project itself." *Id.* To the extent Plaintiff contends that the Blythe II FEIS established an improper baseline by, for example, stating that 99 archaeological sites would be affected if Blythe II were built compared to 103 sites for the smaller Blythe I that was described as the "No Action Alternative," this statement is not supported by a reasonable review of the record. *See* King Decl., Dkt. 39, Ex. A04 at 2370. BLM acknowledges that if there were no construction, no archaeological sites would be affected, and it took a hard look at this alternative in connection with the Blythe I FEIS. *Id.* Nor is it plausible to read the Blythe II FEIS as misleading the public. It frequently refers to the Blythe I FEIS on which it is tiered, including to its appropriate analysis of the No Action Alternative.

For the foregoing reasons, Plaintiff has not raised serious questions going to the merits of its claim that BLM acted arbitrarily or capriciously in evaluating and presenting the No Action Alternative in the FEIS.

(3) Whether the Statement of Purpose and Need Permitted Adequate Consideration of Alternatives

NEPA regulations require a statement of purpose that serves to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. "An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1070 (9th Cir. 2010) (citation

omitted). However, "[c]ourts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need." *Alaska Survival v. Surface Transp. Bd*., 705 F.3d 1073, 1084 (9th Cir. 2013).

The following is the stated "purpose and need" of the Project:

> Taking into account the BLM's multiple use mandate, the BLM's purpose and need in connection with the Modified Project is to respond to the Grant Holder's request for a Level 3 variance under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA; 43 U.S.C. §1701 et seq.) and modification of the existing ROW grant to include the construction, operation, maintenance and decommissioning of a 485 MW solar PV project in compliance with FLPMA, BLM ROW regulations, and other applicable federal laws.
>
> In conjunction with FLPMA, BLM authorities include:
> 1. Executive Order 13212, dated May 18, 2001, which mandates that agencies act expediently and in a manner consistent with applicable laws to increase the "production and transmission of energy in a safe and environmentally sound manner;"
> 2. Secretarial Order 3285A1, dated March 11, 2009, and amended on February 22, 2010, which "establishes the development of renewable energy as a priority for the Department of the Interior;" and
> 3. The President's Climate Action Plan, released on June 25, 2013, which sets forth a new goal for the Department of the Interior to approve 20,000 MW of renewable energy projects on the public lands by 2020, in order to ensure America's continued leadership in clean energy.
>
> The BLM will decide whether to approve, approve with modifications, or deny the Grant Holder's Level 3 variance request and the issuance of an amendment to the BSPP's existing ROW grant for the Modified Project.

King Decl., Dkt. 39, Ex. A04 at 2364. BLM "rejected from detailed consideration" "[o]ther types of renewable energy projects including wind, geothermal, and other solar technologies . . . because they would not meet the BLM's purpose and need to respond to the Grant Holder's request . . . ." *Id.* at 2417.

Plaintiff claims that this statement does not comply with NEPA because it defined the purpose and need as "respond[ing] to the Grant Holder's request." Mot., Dkt. 37-1 at 28. It contends that the EIS rejected "numerous environmentally superior alternatives, including developing solar energy facilities on brownfields, rooftops, and other areas where the environmental damage would be far less, because these alternatives are not the exact project NextEra seeks to build." *Id.* It is Plaintiff's position that BLM "failed to identify a single agency goal" and "dramatically constrained the alternatives analyzed." Reply, Dkt. 74 at 20-21.

A statement of purpose and need "can include private goals, especially when the agency is determining whether to issue a permit or license." *Alaska Survival v. Surface Transp. Bd*., 705 F.3d 1073, 1085 (9th Cir. 2013). Thus, it is not unreasonably narrow to include in a statement of purpose and need the reason

for a response to an application or request, so long as agency goals are also included. *See Protect Our Cmty. Found. v. Jewell*, 2014 WL 1364453, at *3 (S.D. Cal. Mar. 25, 2014); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 2013 WL 4500572, at *5 (C.D. Cal. Aug. 16, 2013). The statement at issue incorporated by reference Executive Order 13212, Secretarial Order 3285A1 and the Climate Action Plan. Citations to statutory, executive and administrative authority are an accepted means by which an agency may reasonably express the underlying purpose and need to which a proposed action is responsive. *See Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 813 (9th Cir. 1999) (while statement of purpose "taken in complete isolation, would appear too narrow," its incorporation by reference of the goals of a regional forestry management plan made it reasonable); *see also Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1070 (9th Cir. 2010) ("[A]n agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.") (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004) ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."). The statement and purpose of need reasonably considered public goals, and did not unreasonably rely upon the private goals of NextEra.

Also lacking force is Plaintiff's claim that this statement failed to reflect the consideration of reasonable alternatives. The Blythe II FEIS is "tiered to the analysis in the 2010 PA/FEIS and 2010 ROD." King Decl., Dkt. 39, Ex. A04 at 2365. That analysis considered in detail three solar alternatives and three alternatives that did not involve construction. It also considered, but chose not to engage in a detailed analysis of, five alternative locations, five alternative solar technologies, and eight alternative forms of energy. *Id.* Ex. A03 at 1107-12, 1204. The Blythe II FEIS expressly incorporates that analysis by reference. *Id.* Ex. A04 at 2417. BLM did not perform a detailed analysis as to siting the Project on brownfields or alternative sites. However, this was because the site was already deemed suitable for development, and NextEra already held a valid ROW for the site. *Id.* at 2416-17. Plaintiff cites no evidence to support its claim that these alternatives were "environmentally superior" to the one chosen. Even assuming they had merit, the range of alternatives considered satisfied BLM's obligation not to construe too narrowly the statement of purpose.

Plaintiff has not shown either that it is likely to succeed on the merits of its claim that BLM acted arbitrarily or capriciously in crafting the statement of purpose and need, or that serious questions going to the merits are raised as to this issue.

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For these reasons, Plaintiff has not carried its burden to raise serious questions as to the merits of its NEPA claim.
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c) FLPMA Claim

(1) Compliance with Class L Designation

The Project is sited on lands designated as "Class L." King Decl., Dkt. 39, Ex. A05 at 4188. This designation "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." King Decl., Dkt. 39, Ex. C01 at 5806. The 1980 CDCA Plan permits the construction of solar power plants on Class L lands "where the energy resource conditions are available" and the plants are "environmentally acceptable." Finn Decl., Dkt. 58, Ex. 1 at 22. In 2010, BLM amended the CDCA Plan for the express purpose of designating the Blythe I site as one to be used for solar energy generation. King Decl., Dkt. 39, Ex. A04 at 2636, 2826.This amendment remained in place during the evaluation of Blythe II. *Id.*

Plaintiff argues that the project is "plainly inconsistent with the Class L designation," for two reasons. Reply, Dkt. 74 at 24. First, the 2010 Plan Amendment "did not change the Project site's designation from Class L. Nor did it change the substantive land use restrictions contained in the land use designation provision." *Id.* Second, BLM "ignored the substantive limits imposed by the governing designations and never made any findings that the Project was consistent with the Class L designation." *Id.* at 23. These and similar arguments were previously rejected as to Blythe I. *La Cuna*, LA CV11-04466 JAK (OPx), Dkt. 74, at 12-13 (C.D. Cal. Aug. 11, 2011). Although Plaintiff, which was not a party to that action, is not bound by that ruling, its arguments fail for the same reasons stated there.

Plaintiff's first argument assumes that, at most, the Blythe II Plan complied with BLM's Multiple-Use Class Guidelines, but not with the underlying Class L designation. Reply, Dkt. 74 at 22-23 (citing King Decl., Dkt. 39, Ex. C01 at 5808). These Guidelines appear as a table in Chapter 2 of a BLM publication of the Plan as amended. Based on the record submitted, it appears that this table serves as administrative guidance as to the interpretation of the Plan by BLM. Whether the Guidelines are deemed an additional set of requirements, or as advisory and non-binding, allowing solar energy plants on Class L land is not limited to what is provided in the Guidelines, but is a feature of the underlying Plan. Thus, in 1980, when BLM issued its final CDCA Plan decision as required by FLPMA § 601, 43 U.S.C. § 1781, it rejected suggestions that solar plants should be prohibited on Class L lands. Finn Decl., Dkt. 58, Ex. 1 at 8, 22. Instead, it determined that they could be permitted "if environmentally acceptable." *Id.* at 22.

For these reasons, in interpreting the administrative regulations that it promulgated, BLM determined that it would be consistent with the protection of "sensitive, natural, scenic, ecological, and cultural resource values" to build a solar plant on Class L land. This is a reasonable interpretation of the applicable regulations. The CDCA Plan ROD, which issued after public notice and agency consideration of "about 40,000 separate comments," adopted in substance this interpretation. Finn Decl., Dkt. 58, Ex. 1 at 11, 22. Even if this portion of the CDCA Plan ROD is not deemed an agency rule for purposes of 5 U.S.C. § 553, BLM's interpretation is entitled to substantial deference. *See Decker v. Nw. Envtl. Def. Ctr*., 133 S. Ct. 1326, 1337 (2013) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *see also La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 2013 WL 4500572, at *7 (C.D. Cal. Aug. 16, 2013) ("The CDCA Plan clearly allows for solar electricity generation facilities on Class L lands,

as long as the requirements of NEPA are satisfied. This represents a discretionary judgment by BLM that if solar electricity generation facilities are sited on Class L lands and NEPA is satisfied, the potential degradation of natural and cultural values does not outweigh the importance of the electricity generating facilities."). Therefore, a finding that the Government complied with the Class L requirements based on the actions taken would not require the "substantive requirements contained in the CDCA Plan's land use designations" to be "completely ignore[d]," nor would it "render the Class L designation language 'superfluous.'" Reply, Dkt. 74 at 22-23.

Plaintiff's next argument is that BLM did not make findings that the Project was consistent with the Class L designation. This position is not supported by the record; rather, it conflicts with it. When BLM requested the Plan amendment with respect to the site of Blythe I, it considered several criteria, including air and water quality, cultural and paleontological resources, Native American values, NEPA compliance, and vegetation and wildlife. King Decl., Dkt. 39, Ex. A04 at 2826-30. In addition, BLM made the determinations required as a basis for requesting a Plan amendment under the applicable regulations. *Id.* at 2830-32; *see* King Decl., Dkt. 39, Ex. C01 at 5910-13. The Blythe II FEIS determined that the Modified Project was "consistent with the 2010 Approved Project CDCA Plan Amendment, and no additional Plan Amendment would be required," and complied with the Multiple-Use Class Guidelines. King Decl., Dkt. 39, Ex. A04 at 2636-37. BLM has determined that these findings may satisfy the requirements of a Class L designation. This determination, which is not unreasonable, is entitled to deference.

For these reasons, Plaintiff has not shown that it is likely to succeed on the merits of the claim that BLM acted arbitrarily or capriciously in failing to comply with the Class L designation. Nor has it shown, as to this issue, the presence of serious questions that go to its merits.

(2) Compliance with Interim VRM Classification

The Blythe I FEIS assigned to the Original Project site an Interim VRM Class of III. King Decl., Dkt. 39, Ex. A03 at 1350-51. This assignment was based on an evaluation of the Original Project site and the surrounding area. *Id.* at 2046-2066. According to the Draft EIS, "[t]he objective of [VRM Class III] is to partially retain the existing character of the landscape. The level of change to characteristic landscape should be moderate. Management activities may attract attention but should not dominate the view of the casual observer. Changes should repeat the basic elements found in the predominant natural features of the characteristic landscape." King Decl., Dkt. 39, Ex. A03 at 1348. The Blythe II FEIS assigned the Modified Project site an Interim VRM Class of III based on the findings of the Blythe I FEIS. King Decl., Dkt. 39, Ex. A04 at 2725. The Blythe II FEIS acknowledges that, as viewed from two KOPs, the Project would not conform to Interim VRM Class III objectives. *Id.* at 2729. Plaintiff contends that one KOP, the McCoy Mountains, has "significant cultural and religious importance to the Tribes." Reply, Dkt. 74 at 25 (citing Declarations).

Plaintiff argues that "BLM violated FLPMA when it approved a Project that is plainly, and admittedly, inconsistent with the Project site's VRM classification." Mot., Dkt. 37-1 at 29. It relies upon an Interior Board of Land Appeals ("IBLA") decision, *Southern Utah Wilderness Alliance et al.*, 144 IBLA 70 (1998). Reply, Dkt. 74 at 24. That decision held that, "[o]nce the visual resource *management* classes are established, however, they are more than merely guidelines. Rather, having been developed through the

RMP process, meeting the objectives of each of the respective visual resource classes is as much a part of the RMP mandate as any other aspect of the resource allocation decisions made in the RMP." *S. Utah Wilderness Alliance et al*., 144 IBLA at 85 (emphasis in original).[21]

The Government argues that, because the Project conformed to VRM Class III requirements from four of the six KOPs and mitigation measures were taken with respect to the two others, it fulfilled its obligations under FLPMA. Opp'n, Dkt. 68 at 26. It notes that, according to the Blythe II FEIS, "VRM Policy does not require Interim VRM Classes to be used as a method to preclude all other resource development. Rather, it requires that visual values be considered and that those considerations be documented as part of the decision-making process, and that if resource development/extraction is approved, a reasonable attempt must be made to meet the interim VRM objectives for the area in question and to minimize the visual impacts of the proposal." King Decl., Dkt. 39, Ex. A04 at 2725. NextEra adds that the Interim VRM Classes create no binding requirements to which the Project must conform. NextEra Opp'n, Dkt. 59 at 33-34.

Even assuming that the designation of an Interim VRM Class imposes certain obligations upon BLM, NextEra or both, Plaintiff has not met its burden to show that, on the merits, it would be entitled to have the BLM action set aside on this basis. Plaintiff cites authority for two propositions. First, that BLM is obligated to consider visual resource management objectives. And, second, at least where final VRM classifications are at issue, their effect is more than advisory. *But see Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921, 938 (S.D. Cal. 2013) (distinguishing *Southern Utah Wilderness Alliance* as "stand[ing] for the proposition that VRM class designation can be changed during the . . . process prior to finalization"). However, Plaintiff has cited no authority to support the proposition that, if a project does not comply with its VRM Class objectives when it is viewed from certain KOPs, its approval would necessarily be arbitrary or capricious.

The Ninth Circuit has rejected a similar argument. *S. Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718, 725 (9th Cir. 2009). In *South Fork Band Council*, the BLM approved a mining project on lands designated as Class III and IV. *Id.*[22] Some mining facilities were found to satisfy the standards associated with their classifications, and others "were deemed unlikely to meet the relevant visual impact standards, but the agency determined that the adverse visual impacts were not significant enough to justify disapproving the project." *Id.* The plaintiff sought a preliminary injunction of the project approval. *Id.* The Ninth Circuit affirmed the district court's finding that the plaintiff was unlikely to succeed on the merits of its FLPMA claims: "[w]e will not second-guess the agency's weighing of the compliant and noncompliant visual resource areas in light of its experience and expertise." *Id.*

The present record provides support for the conclusion that BLM fully and fairly evaluated the Project in

[21] Certain IBLA decisions are entitled to judicial deference. *See Akootchook v. United States*, 271 F.3d 1160, 1166 & n.32 (9th Cir. 2001) (citing *Bicycle Trails of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 (1984))).

[22] The Ninth Circuit opinion refers to a "four-level system of classifying visual impacts due to mining projects" and does not refer to VRM classifications by name. 588 F.3d at 725. The district court opinion makes clear that these were VRM classifications. *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1211 (D. Nev. 2009), *aff'd in part, rev'd in part sub nom. S. Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009).

light of the VRM Class III objectives, found that it complied with them from a majority of KOPs and recommended measures to minimize any adverse effects. The VRM classification was one of many factors BLM considered as it engaged in the "enormously complicated task of striking a balance among the many competing uses to which land can be put" under FLPMA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). In light of this record, Plaintiff has failed to show that, when a proposed solar power plant for which mitigation measures will be taken produces glare and does not blend fully with the landscape from two of six vantage points, notwithstanding contrary VRM Class III objectives, an approval by BLM must be set aside under FLPMA, the CDCA, the VRM Guidelines or any other applicable law.[23]

Plaintiff has not shown that it is likely to succeed on the merits of the claim that BLM acted arbitrarily or capriciously in failing to comply with the requirements of Interim VRM Class III. Nor has it shown that serious questions going to the merits have been raised as to this issue.

* * *

For these reasons, Plaintiff does not carry its burden to raise serious questions as to the merits of its FLPMA claim.

2. Likelihood of Irreparable Harm in the Absence of Preliminary Relief

a) Generally

Harm may be "irreparable" where it cannot be compensated by monetary damages or other legal remedies. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). "[T]he person or entity seeking injunctive relief must demonstrate that irreparable injury is *likely* in the absence of an injunction. An injunction will not issue if the person or entity seeking injunctive relief shows a mere "possibility of some remote future injury, or a conjectural or hypothetical injury." *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (citations omitted). Environmental injury is frequently irreparable, although "this does not mean that any potential environmental injury warrants an injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

b) Impact to Archaeological Sites and Buried Artifacts

Plaintiff claims that "[p]roject construction will directly impact scores of archaeological sites and associated buried artifacts; it will also have indirect impacts on nearby rock art, trails and other sensitive prehistoric resources." Mot., Dkt. 37-1 at 18. Plaintiff contends that such harm will not be sufficiently mitigated where those artifacts are packed and shipped off-site, because Plaintiff's members "hold the artifacts sacred as a permanent connection to their past and a physical 'footprint' testifying to their

[23] *Southern Utah Wilderness Alliance*, the IBLA case on which Plaintiff principally relies, supports this outcome. That decision suggests that reclassification may be sufficient to cure defects related to improper VRM classification, and that BLM action need not be set aside on that basis. 144 IBLA at 87-88. Because this goes to the likelihood of irreparable harm rather than likelihood of success on the merits, and there are adequate alternative grounds to evaluate that factor, this issue is not resolved on this Motion.

people's continued existence and persistence in the area." *Id.* at 18-19 (citing Patch Decl., Dkt. 37-5, ¶ 11). In support of the claim that cultural resources will be destroyed, damaged or otherwise adversely affected, Plaintiff relies principally upon the EIS.[24] The EIS states that ground-disturbing activities would affect some archaeological sites, and could damage and displace buried artifacts. King Decl., Dkt. 39, Ex. A04 at 2606. It states that "[d]amage to or destruction of cultural resources would result in an adverse cumulative impact," particularly when considered in connection with the broader pattern of solar plant development in the region. *Id.* at 2610. The EIS states that adverse effects could be "resolved through compliance with the terms of the amended Programmatic Agreement," as well as the mitigation measures adopted by NextEra. *Id.* at 2610-11. However, it acknowledges that, "[e]ven with the implementation of mitigation measures described above, residual impacts related to cultural resources would be expected to occur." *Id.* at 2611.

Plaintiff fails to demonstrate that irreparable harm is likely to result absent injunctive relief. The Programmatic Agreement, HPTP and design features adopted by NextEra require substantial mitigation and avoidance measures. They include full-time archaeological monitoring of ground-disturbing activities, the use of tribal monitors, notification of tribes, including Plaintiff, when artifacts are discovered, and granting authority to cultural resource monitors to halt constriction in the event of a discovery. *See, e.g.*, *id.* at 2482-2502. Plaintiff does not show that, in light of these mitigation measures, irreparable harm will result if construction proceeds. *See, e.g.*, *Quechan Tribe of the Ft. Yuma Indian Reservation v. U.S. Dep't of the Interior*, 2012 WL 1857853, at *7 (S.D. Cal. May 22, 2012) (finding no likelihood of irreparable harm related to artifact destruction where plaintiff failed to show that mitigation procedures were "not adequate to guard against irreparable injury to items discovered on public land").

Plaintiff also relies upon the alleged destruction of artifacts in connection with the construction of the Genesis Solar Energy Project, as well as the "potential indirect Project impacts" that could affect a nearby prehistoric site that is eligible for NRHP listing." Reply, Dkt. 74 at 11 & n.4, 12. Plaintiff's evidence related to Genesis consists of a newspaper article in the Riverside County *Press-Enterprise*, which is hearsay, and the declaration of a member that states artifacts were discovered, but not that they were destroyed. Supp. King Decl., Dkt. 74-5, Ex. C29; Harper Decl., Dkt. 37-4, ¶ 7. Even if this evidence were deemed admissible and probative, Plaintiff makes no showing that what was discovered during the Genesis construction shows what is likely to be discovered if there is further construction on Blythe II.

BLM considered, and rejected, Plaintiff's claim that these discoveries, which occurred approximately 14 miles from the Blythe II site, show that it is likely that similar artifacts will be found at Blythe II. King Decl., Dkt. 39, Ex. A04 at 4117. The newspaper article on which Plaintiff relies states that some Genesis construction took place on land that "once housed an ancient lakeside village inhabited by the Mohave people"; Plaintiff makes no showing that any similar sites would be affected by Blythe II. Supp. King Decl., Dkt. 74-5, Ex. C29 at 7132. Plaintiff also fails to demonstrate that CA-RIV-11746, which is the nearby archaeological site that is not in the Project area, is likely to suffer irreparable harm if an injunction is not

[24] The Government argues that "Plaintiff cannot use the Agency's own NEPA compliance to support Plaintiff's claim of irreparable injury." Opp'n, Dkt. 68 at 27 (citing *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005)). This argument is not persuasive. This case states that candid disclosure in NEPA documents should be encouraged. It does not support the proposition that these assessments cannot be used as evidence of potential irreparable harm.

granted. The excerpt of the HPTP on which Plaintiff relies states, "CA-RIV-11746 will not be directly impacted by construction of the BSPP," and sets forth monitoring procedures to mitigate any possible indirect effects. King Decl., Dkt. 44, Ex. A16 at 5638, 5648-49. Plaintiff shows no more than a remote and speculative possibility of injury. This is not a sufficient basis on which preliminary injunctive relief may be granted. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)

Plaintiff contends that these mitigation measures are not sufficient to prevent irreparable harm. The premise of this argument is that, in light of the spiritual and cultural beliefs of Plaintiff's members, these measures are themselves harmful and offensive. As the Chairman of Plaintiff declared:

> Removal of archaeological artifacts from the ground is contrary to Mohave cultural and religious practices. Items such as manos, metates, flakes, cores, and hammerstones are closely associated with our Mohave ancestors. Given the Mohave ancestral territory, the Project site is likely to contain many of these resources. They are part of our footprint on the land. You cannot dig them out and not harm our people. Had we been consulted on this Project, we would have informed BLM that removal of these resources is not "mitigation" and will result in cultural harm.

Patch Decl., Dkt. 37-5, ¶ 11.

This evidence is not sufficient to show that irreparable harm is likely if an injunction is not granted. Plaintiff has not shown that it is likely artifacts will be removed for off-site evaluation. The applicable procedures permit the reburial of certain artifacts. NextEra represents that, as of this time, all discovered artifacts have been "isolated artifacts that CRIT is allowed to rebury. None of the types of artifacts found at Genesis have been found and are not expected to be found at the MBSP site." NextEra Opp'n, Dkt. 59 at 21-22 (citing Stein Decl., Dkt. 60, ¶¶ 72, 74, 79, 80, 81, 82).

Nor has Plaintiff shown that, even if it were likely that certain artifacts would be removed from the site, this would constitute cognizable harm for purposes of the relevant statutes. NEPA and NHPA require tribal consultation as a means of ensuring that agencies engage in informed decision-making on matters that may affect cultural resources. *See Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592, 597 (9th Cir. 2010) (describing the consultation requirement of NEPA and the NHPA). FLPMA promotes public participation in the management of public lands. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011). However, none provides relief for the subjective cultural and religious harm claimed by Plaintiff. *See La Cuna*, LA CV11-04466 JAK (OPx), Dkt. 74 at 6 & n.7 (C.D. Cal. Aug. 11, 2011); *see also Colo. River Indian Tribes v. U.S. Dep't of the Interior, et al.*, CV 12-04291-GW (SSx), Dkt. 92, at 6 (C.D. Cal. June 25, 2012) ("While the Court is uneasy at turning a blind eye to the obvious discomfort tribal members feel regarding the Project as a whole and the relocating of their ancestors' artifacts . . . . It cannot be the case that every time one such artifact is moved, the tribes have suffered irreparable harm . . . . NHPA and NEPA mainly provide to the public and groups interested in the preservation of resources merely consultation rights, not veto power.").

For these reasons, Plaintiff has not carried its burden to show that the anticipated construction is likely to cause irreparable harm to a legally cognizable interest.

c) Impact to Trails and Songscapes

Plaintiff claims the Project will adversely affect nearby trails that "play a crucial role in the religious practices of CRIT's members." Mot., Dkt. 37-1 at 19. These include "the Salt Song Trail, which passes through the Project's indirect 'area of potential effect,'" as well as the "songscapes" associated with the trails. *Id.* These trail systems were discussed earlier in connection with the FEIS. As noted there, the FEIS determined that these trails had "not been completely defined." King Decl., Dkt. 39, Ex. A04 at 2601. They are defined in part by songs that are "strongly rooted in Mojave (as well as Chemehuevi and Cahuilla) history . . . and have a very strong integrity of relationship to the beliefs and practices of the community." King Decl., Dkt. 47-1, Ex. C15 at 6214. BLM and an independent ethnographic assessment prepared in connection with another solar project have each determined that they may be eligible for NHRP listing in light of their cultural significance. *Id.* at 6214-15; King Decl., Dkt. 39, Ex. A04 at 2601-02.

Plaintiff claims the Project will irreparably harm these trails for two reasons. First, the presence of construction at these locations could adversely affect their "eligibility . . . for listing on [the] National Register of Historic Places as a 'Traditional Cultural Property.'" Reply, Dkt. 74 at 9. Second, based upon an ethnography prepared in connection with a nearby solar power project, Plaintiff contends development of the trails, which are "still connected to the people today through oral history and some through contemporary use [of] known sacred areas," would lead to "incalculable" loss "from the standpoint of people whose roots are so deeply entwined with its [sic] openness and integrity." King Decl., Dkt. 46, Ex. C6 at 5987.

Neither of these arguments supports Plaintiff's claim as to the likelihood of irreparable harm. First, the integrity of setting, i.e., the physical environment of a historic property, is just one of several factors considered in connection with NHRP evaluation. *See* 36 C.F.R. § 60.4. The ethnographic assessment on which Plaintiff relies states that, "[w]hile development (including [a solar project not at issue in this case]) may physically alter the landscape, the condition of the landscape has heretofore maintained integrity to the extent that the relevant relationships have survived." King Decl., Dkt. 47-1, Ex. C15 at 6215. That the change to the physical environment could disqualify for NHRP listing trails that would otherwise be eligible for registration is too remote and speculative to constitute a likelihood of irreparable harm. Second, as discussed earlier, general allegations of cultural harm related to development are not, by themselves, sufficient to show a likelihood of irreparable harm. To the extent Plaintiff's concern is about potential harm to legally protected interests, it has failed to demonstrate that construction in compliance with the Programmatic Agreement and HPTP will cause such harm, or that any harm would be irreparable.
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d) Other Harms Alleged by Members of Plaintiff

Plaintiff submits the declarations of several of its members in which they describe harm to them that will result if the Project is built. Reply, Dkt. 74 at 9; *see* Barrera Decl., Dkt. 37-2; Flores Decl., Dkt. 37-3; Harper Decl., Dkt. 37-4; Patch Decl., Dkt. 37-5; Laffoon Decl., Dkt. 37-6. Plaintiff describes these as perhaps its "most important" evidence of irreparable harm. Reply, Dkt. 74 at 9. Patch's declaration regarding the spiritual connection to buried resources has already been discussed. Other declarants describe the importance of the Project site and related "[c]ultural landscape[]" to their people, Harper Decl., Dkt. 37-4, ¶¶ 4-10; the physical, spiritual and emotional importance of this connection, Barrera Decl., Dkt. 37-2, ¶¶ 12-15; and concerns about harm to archaeological sites, Flores Decl., Dkt. 37-3, ¶¶ 15-16. Members of Plaintiff declare that Project construction will diminish their "freedom to walk around the area" and "ability to visit and enjoy this cultural landscape," *id.* ¶ 9, and "los[e] access to" "ancestral lands." Laffoon Decl., Dkt. 37-6, ¶ 5.

Plaintiff argues that "[t]his evidence goes far beyond what is necessary to show irreparable harm." Reply, Dkt. 74 at 9. Plaintiff relies upon *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). There, the Ninth Circuit found a likelihood of irreparable harm where members of an environmental group asserted that their ability to "view, experience, and utilize" a forest in its natural state would be harmed by a Forest Service project permitting logging on 1652 acres of land. *Id.* at 1135. Plaintiff contends that, "If outdoor enthusiasts suffer irreparable harm when they can no longer 'view, experience, and utilize' 1,600 acres of fire-damaged forest 'in their undisturbed state,' CRIT and its members will also suffer irreparable harm when they can no longer 'view, experience, and utilize' 4,138 acres of their ancestral homelands in their undisturbed state." Reply, Dkt. 74 at 10.

Plaintiff conflates standing and irreparable harm. For purposes of standing, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 183 (2000) (internal quotation marks omitted). However, to establish a basis for injunctive relief, "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury . . . ." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). The *Alliance for the Wild Rockies* plaintiffs had standing to complain of the Forest Service's actions by virtue of their recreational interests, but their showing of irreparable harm was based on the threat that the forest would be destroyed.

At the hearing on the Motion, Plaintiff suggested that its declarations established a likelihood of "environmental harm" distinct from the cultural harm discussed. With regard to its NHPA and NEPA claims, Plaintiff has not identified alleged errors of BLM that led to environmental harm as opposed to cultural harm.[25] Therefore, only the FLPMA claim may be construed to assert a distinct injury to environmental values. As noted, Plaintiff fails to raise any serious question on the merits as to this claim.

[25] The allegations in the Complaint (Compl., Dkt. 1, ¶ 81(e), (f)) that the EIS failed to analyze the impact of the Project on groundwater or Colorado River water, or its impacts on migrating birds, were not raised in support of this Motion.

Its showing is even less forceful than as to its NHPA and NEPA claims. Even if the alleged environmental harms were considered without reference to Plaintiff's insubstantial showing on the merits, they are speculative. Plaintiff offers only the speculation of the declarants that construction would likely harm, e.g., creosote and Mormon tea, plants of spiritual significance to Chemehuevi Indians, see Barrera Decl., Dkt. 37-2, ¶¶ 6, 10; hawks, eagles, and roadrunners, which are sacred animals; or desert pavement, which tells the age of the land, see Flores Decl., Dkt. 37-3, ¶¶ 11-12, 14, Laffoon Decl., Dkt. 37-6, ¶ 5.

Although it is assumed for purposes of this Motion that Plaintiff has standing, that does not demonstrate any immediate, threat of injury. Therefore, the declarations of Plaintiff's members do not show irreparable harm.

e) Procedural Harm

Plaintiff claims it will suffer "irreparable procedural harm" because if an injunction is not granted, construction will continue despite Defendants' alleged violations of the NHPA, NEPA, and FLPMA. Mot., Dkt. 37-1 at 20. It argues that, because the purpose of these statutes is to ensure that agencies "take a hard look at environmental impacts and historic properties *before* approving actions that could harm these resources," any further construction will irreparably harm Plaintiff's right to adequate evaluation. Reply, Dkt. 74 at 12.

This argument is not persuasive. The Supreme Court has rejected as "contrary to traditional equitable principles" a presumption of irreparable harm "when an agency fails to evaluate thoroughly the environmental impact of a proposed action." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987); *see also N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007) ("We are bound by precedent to hold that a NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction against all development."). *Winter* also suggests that there is no showing of a likelihood of irreparable harm based on a freestanding procedural violation. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7 (2008). Instead, *Winter* stated that the district court should have reevaluated its finding of irreparable harm when the Navy agreed not to challenge certain restrictions imposed by the court, notwithstanding that the court had also found the plaintiffs likely to succeed on the merits of their claim that the Navy had failed to prepare an EIS as required by law. 555 U.S. at 22-23.

An Order issued in connection with the Blythe I litigation, which followed *Winter*, stated, "[p]rocedural injury has been deemed sufficient to demonstrate an irreparable harm in environmental cases. However, this doctrine is applied to ensure that proper steps are taken so that decisions are made with an eye to environmental and cultural impacts." *La Cuna*, LA CV11-04466 JAK (OPx), Dkt. 74 at 7 (C.D. Cal. Aug. 11, 2011). Thus, "[p]aired with some showing of harm to the sites, [an alleged] procedural injury could provide some support for a claim of irreparable harm," but none was presented. *Id.* That same conclusion applies here.

Plaintiff has not shown that, based upon a consideration of the full administrative record, it is likely that BLM will be found to have violated any of the three statutes at issue in a manner that will cause irreparable harm to the "underlying substantive policy the process was designed to effect." *Amoco Prod.*

Co. v. Vill. of Gambell, AK, 480 U.S. 531, 544 (1987). The decision-making processes mandated by these statutes are designed to protect cultural and environmental resources. As discussed above, Plaintiff has failed to show a likelihood of irreparable harm to them. Therefore, Plaintiff has failed to show a likelihood of procedural harm for which injunctive relief would be appropriate.

* * *

For these reasons, Plaintiff fails to show that it is likely to suffer irreparable harm in the absence of preliminary relief.

3. Balance of Equities

When ruling on a preliminary injunction, "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Arc of California v. Douglas*, 757 F.3d 975, 991 (9th Cir. 2014) (citation omitted). Thus, "the injunction must do more good than harm (which is to say that the 'balance of equities' favors the plaintiff). How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co*., 582 F.3d 721, 725 (7th Cir. 2009), *cited with approval by Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133 (9th Cir. 2011). Under the Ninth Circuit's "sliding scale" approach, which survives *Winter*, the plaintiff's burden with regard to this factor depends upon the showings it has made as to the other factors. "[I]f a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (citations omitted) (emphasis in original).

The Government claims it has an interest in "promoting renewable energy," which will be injured by a preliminary injunction. Opp'n, Dkt. 68 at 31. It also claims that BLM administers "public lands, which are of value to a broader constituency than just the Plaintiff in this case." *Id.* (citing *Colo. River Indian Tribes v. U.S. Dep't of the Interior, et al.*, CV 12-04291-GW (SSx), Dkt. 92 (C.D. Cal. June 25, 2012)). These claimed harms, which would adversely affect the public at large, are more appropriately considered in connection with the "public interest" factor. Therefore, they are given little weight in the balancing of hardships. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 677-78 (9th Cir. 1988) (in pre-*Winter* review of preliminary injunction, merging analysis of "governmental and public interest").

NextEra claims that, if a preliminary injunction issued, it would likely suffer "significant economic harm." NextEra Opp'n, Dkt. 59 at 34-35. In support of this position it presents the declaration of Scott A. Busa, who is the Executive Director of Business Development at NextEra. Dkt. 79, ¶ 1. Busa advances five reasons why NextEra will suffer "irreparable" harm if construction is enjoined for the two months between the hearing on this Motion and that on the anticipated cross-motions for summary judgment. *Id.* ¶¶ 2-6.

First, the project is currently scheduled to be completed in November 2016. *Id.* ¶ 2. If construction is halted for two months, NextEra's may lose certain cash grants under Section 1603 of ARRA, the value of

which it estimates at $6.4 million. *Id.*[26] These would be in jeopardy because "commercial solar energy projects are only eligible for the cash grant if they are in commercial operation by December 31, 2016." *Id.*

Second, an injunction could disrupt negotiations with third parties and "energy off-takers for a power sales agreement for Unit 2 of the Project." *Id.* ¶ 3. If this agreement is not reached at this time, Busa represents that "it is likely that the construction of Unit 2 will not go forward at all because NextEra would not want to construct a project for which no power sales agreement was in place." *Id.* If this construction does not occur, the output of the project would be reduced from 485 MW to 360 MW, which would permanently deprive NextEra of future revenue and deprive the public of clean energy. *Id.*

Third, Unit 1 of the Project is currently scheduled to begin producing energy in December 2015. *Id.* ¶ 4. A two-month delay would prevent NextEra from profiting from the sale of energy during this time; Busa estimates that NextEra would lose "approximately $4.9 million from a two-month delay." *Id.*

Fourth, Busa claims that NextEra would incur "significant costs related to demobilization" under the engineering, procurement and construction contract pursuant to which the Project is being constructed, an estimated $1.5 million. *Id.* ¶ 5.

Finally, "at present, Southern California Edison Company is constructing a breaker bay so that the Project can interconnect to the Colorado River Substation starting on December 1, 2015." *Id.* ¶ 6. If construction was delayed for two months, this would "jeopardize NextEra's ability to meet this interconnection milestone," and "cause further delay in Project construction and cause significant financial harm." *Id.*

Plaintiff characterizes all of these claims as "conclusory statements," and argues that, even if they had evidentiary support, the "temporary financial impacts" claimed by Busa would not weigh against granting the preliminary injunction. Reply, Dkt. 74 at 25-26.

NextEra presents evidence that it could incur economic harm if the injunction issued, even if it were vacated after the cross-motions for summary judgment are heard. Although much of Busa's declaration is not based on solid facts, this statement of the "personal knowledge" of a business development executive about the state and effect of contract negotiations, made under penalty of perjury, is more than purely "conclusory." However, different versions of the Project have been under review since 2010, with little progress to date. Further, if only a two- or three-month delay occurred, it does not follow that the ultimate

[26] Section 1603 of ARRA provides that credits are available for qualifying solar properties that are "placed in service" by the deadline, subject to certain conditions. 26 U.S.C. § 48. Department of Treasury guidance on Section 1603 states, "[p]laced in service means that the property is ready and available for its specific use." *See* Off. of Fiscal Ass't Sec'y, U.S. Treasury Dep't, *Payments for Specified Energy Property in Lieu of Tax Credits Under the American Recovery and Reinvestment Act of 2009: Program Guidance* at 5 (2011), *available at* http://www.treasury.gov/initiatives/recovery/Documents/GUIDANCE.pdf. Even if the Project were only partially operational at the time of the deadline, NextEra could be entitled to a partial credit. *See id.* at 14 ("In cases where the applicant treats multiple units of property as a single unit, failure to complete the entire planned unit will not preclude receipt of a Section 1603 payment. For example . . . if only 40 of the planned 50 turbines [on a hypothetical wind farm] were placed in service by the credit termination date, an otherwise eligible applicant would be eligible for a payment based on the 40 turbines placed in service.").

completion of the Project would be delayed by that length of time, as NextEra has not shown it could not accelerate its construction efforts; and that certain losses could not potentially be recouped.[27] For these reasons, although NextEra has shown that some economic harm is likely if the requested injunctive relief is granted, the amount of harm has not been quantified with any certainty.

Although economic losses are given some weight in the process of balancing the equities, they are frequently outweighed by environmental, cultural and dignitary interests, particularly where the economic losses are "temporary." *See S. Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (affirming injunction under NEPA and the APA where environmental effects of mining were not adequately studied and mitigation measures not adequately considered, and the principal hardship to the project developer was "economic" and "may for the most part be temporary"); *see also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005) ("when environmental injury is sufficiently likely, the balance of harms [versus "concrete" "financial hardship"] will usually favor the issuance of an injunction to protect the environment") (citations and internal quotation marks omitted).

Plaintiff has not shown that the balance of equities tips in its favor. A showing of likely irreparable harm to the cultural and environmental interests advanced by Plaintiff could outweigh the pecuniary interests of NextEra and the policy interests of the Government. But, as discussed, Plaintiff has not shown that irreparable harm is likely if an injunction is not issued. NextEra has shown that it is likely to incur economic harm if an injunction is issued. Because Plaintiff asserts very limited evidence as to claimed harms to interests of greater weight than those identified by the Government and NextEra with more supporting evidence, this factor is in equipoise.

4. Whether an Injunction Would Be in the Public Interest

The public interest inquiry is distinct from the balancing of equities, and "primarily addresses impact on non-parties rather than parties." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). These factors may merge where the Government is a party, but they are appropriate to consider separately when an intervenor asserts distinct interests, as is the case here. *Id.* Before an injunction will issue, the court must consider whether public interests in favor of injunction "outweigh other public interests that cut in favor of not issuing the injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). If they do not, no injunction will issue. *Id.* "The plaintiffs bear the initial burden of showing that the injunction is in the public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008)).

The parties assert competing, and substantial, interests. Plaintiff contends that it has a strong interest in "preserving cultural resources," and argues that the public has an interest in "understand[ing] the history and culture of the American Indians in the past." Mot., Dkt. 37-1 at 30 (citation omitted). In addition, there is a significant public interest, which is given force by the NHPA, in the consultation with Indian tribes

[27] At the hearing on the Motion, NextEra suggested that it could not recoup lost profits by raising rates, because certain agreements that it had entered fixed the permissible range of rates for 5, 10, and 20 years. However, evidence of this was not presented on this Motion. Further, in his declaration, Busa stated that a power sales agreement was not yet in place for Unit 2. Busa Decl., Dkt. 79, ¶ 3.

where public actions are undertaken that implicate their sovereignty and cultural patrimony. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010) ("[I]n enacting NHPA Congress has adjudged the preservation of historic properties and the rights of Indian tribes to consultation to be in the public interest."). As noted, Plaintiff fails clearly to establish a causal link between the issuance of an injunction and the protection of this interest. *See Colo. River Indian Tribes v. U.S. Dep't of the Interior, et al.*, CV 12-04291-GW (SSx), Dkt. 92, at 13 (C.D. Cal. June 25, 2012) ("[T]he public interest in preserving the resources necessarily shifts in accordance with what those resources are; the Court's concerns regarding the significance of the artifacts at the Site remain a hurdle for Plaintiffs even in the public interest prong of the test."). Nevertheless, this interest weighs in favor of issuing the injunction.

There is a competing public interest in renewable energy and the creation of jobs around the site of the Project. *See La Cuna*, LA CV11-04466 JAK (OPx), Dkt. 74, at 13-14 (C.D. Cal. Aug. 11, 2011). As NextEra states, the public interest in renewable energy has been expressed in several recent executive and legislative actions. NextEra Opp'n, Dkt. 59 at 35. Among them is ARRA, under which the Department of Treasury has awarded more than $10 billion in grants to developers of renewable energy properties, and the Department of Energy has guaranteed over $12 billion in loans to solar projects. *See* King Decl., Dkt. 39, Ex. C08 at 6011-12. Others include Interior Department Order No. 3285, which declared that "[e]ncouraging the production, development, and delivery of renewable energy is one of the Department's highest priorities"; the Energy Policy Act of 2005, which declared it the "sense of Congress" that the Secretary of the Interior should approve renewable energy projects "on the public lands with a generation capacity of at least 10,000 megawatts of electricity" by 2015, *see* Pub. L. No. 109-58, § 211, 119 Stat. 594, 660; and Executive Order 13212, which declared a significant public policy the "increased production and transmission of energy in a safe and environmentally sound manner." 66 Fed. Reg. 28,357 (May 22, 2001).

In the ROD, BLM anticipated that the Project would "generate up to 485 MW of electricity annually" and "create 628 jobs during the construction period and 24 permanent, full-time jobs" once Blythe II becomes operational. King Decl., Dkt. 39, Ex.A05 at 4178-79. Plaintiff argues that these interests should be given less weight because several other renewable energy milestones have already been met. Reply, Dkt. 74 at 26 (citing Supp. King Decl., Dkt. 74-7).[28] Even if this argument is accepted, it does not vitiate the public policy that supports the advancement of renewable energy.

On balance, these competing public interests are in equipoise. *See Colo. River Indian Tribes v. U.S. Dep't of the Interior, et al.*, CV 12-04291-GW (SSx), Dkt. 92, at 13 (C.D. Cal. June 25, 2012) (same conclusion). Because it is the burden of Plaintiff to show that the injunction is in the public interest, the neutrality of this factor weighs against granting the injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011).

[28] According to a Department of the Interior press release, the Department authorized 10,000 megawatts of renewable power on public lands between 2009 and 2012. Dkt. 74-7.

V. Conclusion

For the reasons stated in this Order, the Motion is **DENIED**.

IT IS SO ORDERED.

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Initials of Preparer ak

Appendix: Glossary of Abbreviations and Acronyms

APA:	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
APE:	Area of Potential Effects
ARRA:	American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5
BLM:	Bureau of Land Management
Blythe I:	*See* Original Project
Blythe II:	*See* Modified Project
CDCA:	California Desert Conservation Area
CDCA Plan:	California Desert Conservation Area Plan
CEC:	California Energy Commission
Council:	Advisory Council on Historic Preservation
CRIT:	Colorado River Indian Tribes
DEIS:	Draft Environmental Impact Statement
DOI:	Department of the Interior
EIS:	Environmental Impact Statement
FEIS:	Final Environmental Impact Statement
FLPMA:	Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*
Forty Questions:	Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981)
HPTP:	Historic Properties Treatment Plan
IBLA:	Interior Board of Land Appeals
La Cuna:	*La Cuna de Aztlan Sacred Sites Protection Circle Advisory Comm. et al. v. U.S. Dep't of Interior, et al.*, LA CV11-04466 JAK (OPx)
LNTP:	Limited Notice to Proceed
KOP:	Key Observation Point
MDP:	Monitoring and Discovery Plan
Modified Project:	*See* Project
NEPA:	National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
NextEra:	Intervenor NextEra Blythe Solar Energy Center, LLC
NHPA:	National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*
NRHP:	National Register of Historic Places
Original Project:	Blythe Solar Power Project
Palo Verde	Palo Verde Solar I, LLC
Plan:	CDCA Plan
Project:	Modified Blythe Solar Power Project
PV:	Photovoltaic
ROD:	Record of Decision
ROW:	Right-of-Way
Secretary:	Secretary of the Interior
SHPO:	State Historic Preservation Officer
TPP:	Tribal Participation Plan
VRM:	Visual Resource Management
Work Plan:	Limited Notice to Proceed Activities Work Plan