

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. ED CV14-02504 JAK (SPx)

Date July 16, 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 Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) ORDER RE PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT; FEDERAL DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT; INTERVENOR-DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT (DKTS. 122, 146, 147, 149)

I. Introduction

Colorado River Indian Tribes (“CRIT,” or “Plaintiff”) is a federally recognized Indian tribe. NextEra Blythe Solar Energy Center, LLC (“NextEra,” or “Intervenor”) is an energy company. The Bureau of Land Management (“BLM”) approved the development by NextEra of a photovoltaic solar energy generation facility (“Blythe II,” or “Project”) on approximately 4,000 acres of land in the Mojave Desert.

On December 4, 2014, Plaintiff brought this action under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”). Dkt. 1. Plaintiff alleged that the BLM acted arbitrarily and capriciously in making certain approvals in connection with the Project, and violated the procedural requirements of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (“NHPA”), National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”) and Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (“FLPMA”). *Id.* ¶¶ 77-85.¹ Plaintiff sought the set-aside of these approvals as well as an injunction that would bar further construction. *Id.* ¶¶ 79, 82, 85, pp. 18-19. NextEra intervened as a Defendant. Dkt. 26.

On March 16, 2015, Plaintiff filed a motion for a preliminary injunction (“Injunction Motion”). Dkt. 37. In support of this motion, Plaintiff submitted over 4000 pages of documents from the administrative record, as well as declarations and other exhibits. Dkt. 39. These documents included the Project Draft Environmental Impact Statement (“DEIS”), Final Environmental Impact Statement (“FEIS”), Programmatic Agreement and Historic Properties Treatment Plan (“HPTP”). On June 11, 2015, the Injunction Motion was denied. Dkt. 150.² That order discussed Plaintiff’s likelihood of success on the

¹ The Complaint named BLM and several of its officials as defendants, as well as 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”). These parties are referred to collectively as “BLM,” or the “Government.”

² The June 11, 2015 Order is incorporated by this reference.

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merits of its claims. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the “sliding scale” approach to analyzing a request for injunctive relief, a less demanding “serious questions going to the merits” standard may apply where a plaintiff shows that the balance of hardships tips sharply in its favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). The June 11 Order denying the Injunction Motion determined that, even if this standard applied, Plaintiff had failed to meet its burden to show serious questions going to the merits of its claims under NHPA, NEPA and FLPMA. Dkt. 150 at 15-31.

On May 14, 2015, Plaintiff filed a motion for summary judgment (“Motion”). Dkt. 122. On June 4 and June 8, 2015, the Government and NextEra each filed a cross-motion for summary judgment (“Cross-Motions”). Dkts. 146, 147.³ A full administrative record of approximately 50,000 pages was submitted in connection with the Motion and Cross-Motions. See Dkt. 92-1.⁴

A hearing on the Motion and Cross-Motions was held on July 9, 2015, and they were taken under submission. Dkt. 156. For the reasons stated in this Order, Plaintiff’s Motion is **DENIED**, and Defendants’ Cross-Motions are **GRANTED**.

II. Overview

Many of the issues presented in the Motion and Cross-Motions were analyzed in detail in the June 11, 2015 Order. Thus, although in connection with the present motions the parties have cited certain additional materials from the complete Administrative Record, the essential documents, including the DEIS, FEIS, Programmatic Agreement and HPTP, were fully considered in connection with the June 11 Order. Similarly, the core legal arguments raised in the Motion and Cross-Motions were presented in the briefing as to the Injunction Motion. The analysis of, and conclusions as to, these arguments is the same as it was in the June 11, 2015 Order. Thus, for the same reasons Plaintiff failed to show a likelihood of success or raise serious questions on the merits in the Injunction Motion, it does not carry its burden to show arbitrary, capricious, procedurally unsound or otherwise unlawful agency action on the Motion.

The body of this Order does not repeat the detailed summary of the factual and procedural background or regulatory framework of this matter. Those were set forth in the prior order. Instead, this Order addresses only new arguments raised in the Motions and other issues that require further discussion. Thus, this Order adheres to the analysis and conclusions of the June 11, 2015 Order, but does not repeat it. Instead, relevant portions of the June 11, 2015 Order are excerpted in an Appendix to this Order.

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³ NextEra’s motion for joinder in the Government’s Cross-Motion is **GRANTED**. Dkt. 149.

⁴ This Order cites the administrative record by Bates number rather than by the page of the electronic docket.

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III. Analysis

A. Legal Standard

A motion for summary judgment will be granted where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In cases seeking review of a final agency determination under the APA, “the task of the reviewing court is to apply the appropriate APA standard of review 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, 744 (1985).

Agency action will be set aside where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(B), (D). “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 omitted). NEPA claims are assessed under a “rule of reason” standard based on 5 U.S.C. § 706(2)(D). *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003). This is “essentially applied in the same manner as the arbitrary and capricious standard,” and “consists only of ensuring that the agency has taken a ‘hard look’ at the environmental effects of the proposed action.” *Id.*

In this context, “the court’s review is limited to the administrative record,” to which Plaintiffs and Defendants have stipulated. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). Therefore, resolution of this matter does not require fact finding; summary judgment is the appropriate method by which the merits of the case can be decided. *Id.*

B. Application

1. NHPA Cause of Action

The NHPA requires BLM to consult with Indian tribes that attach religious and cultural significance to properties affected by an agency “undertaking” as defined by Section 106 of the NHPA. 16 U.S.C. §§ 470a(d), 470f (2013).⁵ Implementing regulations, which are published at 36 C.F.R. Part 800, define the scope of the obligation to consult. Subpart A describes the “purposes and participants” of Section 106 consultation. 36 C.F.R. §§ 800.1 – 800.2. Subpart B describes the default procedures that govern this process. 36 C.F.R. §§ 800.3 – 800.13. Subpart C describes “alternate procedures” that an agency may “substitute . . . for all or part of subpart B of this part,” and sets forth definitions of terms used in the regulations. 36 C.F.R. §§ 800.14 – 16. One permitted approach is to enter a programmatic agreement,

⁵ On December 19, 2014, the NHPA was recodified in several sections of the United States 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. It is not disputed that the earlier version of the statute applies to, and controls this action.

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which may be developed following “appropriate government-to-government consultation with affected Indian tribes.” 36 C.F.R. § 800.14(f). “Compliance 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” 36 C.F.R. § 800.14(b)(2)(iii).

Plaintiff is a “Concurring Party” to a programmatic agreement for the Project (“Programmatic Agreement”) that was executed in 2010. AR6213, 6252. The Programmatic Agreement was amended in 2013 to substitute NextEra for the previous owner of the Project site. AR43539-42. The Programmatic Agreement required BLM to prepare and implement a 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. AR6228-30. Plaintiff argues that the Programmatic Agreement did not, by itself, satisfy BLM’s obligation to consult under Section 106 of the NHPA. Mot., Dkt. 122-1 at 19-21; Reply, Dkt. 151 at 7-11. Plaintiff also contends that the other efforts that were made did not give it a meaningful opportunity to consult regarding the impact of the Project. Dkt. 122-1 at 16-19; Dkt. 151 at 11-14.

NextEra first requested a variance on June 21, 2013. BLM issued NextEra a Limited Notice to Proceed (“LNTP”) on August 13, 2014. BLM’s communications with Plaintiff during this period were not thorough.⁶ Although BLM characterizes them as “extensive,” it identifies only a series of form letters and three informational meetings at which several development projects were discussed. Dkt. 146-1 at 14-16. Nevertheless, it need not be decided whether these communications, standing alone, would satisfy the consultation obligations of BLM. The Programmatic Agreement set forth the governing consultation procedures.⁷ On its present Motion, Plaintiff does not argue that BLM failed to comply with them. Further, Plaintiff’s claim that additional procedures were required, but not adhered to, lacks support.

Plaintiff advances several arguments in support of its position. First, the Programmatic Agreement stated that BLM would “continue to consult with the Tribes throughout the implementation of this Agreement regarding the adverse effects to historic properties to which they attach religious and cultural significance.” AR6219, 6228. Second, in a comment letter on the DEIS, Plaintiff stated that it “requests that BLM modify the Programmatic Agreement, HPTPs and Discovery and Monitoring Plans to ensure that notification requirements are clear, Tribes have an opportunity to comment on implementation of these plans, and interested parties can hold the agency and the company accountable if plans are not properly implemented.” AR42819. Third, at the hearing on the Motions, Plaintiff argued that BLM’s own correspondence acknowledged an ongoing need to consult. Dkt. 156. Finally, Plaintiff argues that

⁶ The final HPTP was issued in March 2015, after the issuance of the LNTP but before the issuance of the Final Notice to Proceed.

⁷ Plaintiff also argues it was improper to proceed by programmatic agreement because BLM did not show that the Project was “complex,” because it already knew the location for the Project. Mot., Dkt. 122-1 at 21. As determined in the June 11, 2015 Order, BLM’s interpretation of its regulations, which is entitled to deference, was reasonable because of the complexity associated with the phased identification and evaluation of historic properties. Dkt. 150 at 17 (citing *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1233 (9th Cir. 2014)).

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Sections 101 and 106 of NHPA and regulations in Subparts A and C of 36 C.F.R. Part 800 create obligations to consult that were not changed by the Programmatic Agreement. These arguments are considered in this sequence.

First, although the Programmatic Agreement required ongoing consultation, it did not describe the form of that consultation, or state that it would parallel the requirements of Subpart B. See Dkt. 148 at 12, *Colo. River Indian Tribes v. U.S. Dep't of Interior*, CV 12-4291 GW (DTBx) (C.D. Cal. June 27, 2012) (finding consultation obligations satisfied where “PA and HPTP indicate that while these documents mandate *some* form of consultation, they do not mandate what . . . form that consultation must take.”). As discussed in detail in the June 11, 2015 Order, although the Programmatic Agreement required the preparation of a final HPTP before BLM could authorize a Final Notice to Proceed, it expressly permitted a degree of deferral that may not have been available under the default procedures. Dkt. 150 at 18-20. This modified procedure was timely followed, and a final HPTP completed with the input of Plaintiff before the issuance of the Final Notice to Proceed. Dkt. 150 at 18-21.

Second, Plaintiff’s comment on the DEIS cannot reasonably be construed as requiring BLM to modify the Programmatic Agreement. The Agreement provides that this requirement is triggered where BLM receives a “request to amend this Agreement” that includes a “proposed amendment.” AR6232-33. Although Plaintiff’s putative request set forth general goals for a modified Programmatic Agreement, it did not include a proposed amendment. Plaintiff also has not shown that it formally conveyed any intent to withdraw from the Agreement in a manner that would have triggered its termination or withdrawal procedures. AR6234-35.

Third, the BLM correspondence that Plaintiff identified at the hearing refers to BLM’s efforts to “inform and consult with Colorado River Indian Tribes pursuant to our government-to-government consultation responsibilities under Section 106 of the National Historic Preservation Act . . .”, as well as an invitation to further “government-to-government consultation.” AR 43578, 43602-04. To the extent this correspondence has any bearing on BLM’s substantive legal obligations, e.g., as an admission, it does not describe the substance of the consultation requirement. Indeed, it supports BLM’s position, because it refers to the Programmatic Agreement as defining certain of these obligations. See, e.g., AR 43603 (“Consistent with the Programmatic Agreement . . . we are contacting you regarding the newly proposed Project modification and seeking your views and comments, particularly with regard to any issues that may affect resources that are important to your Tribe.”).

Finally, Sections 101 and 106 of the NHPA do not support Plaintiff’s position. Section 101 describes an obligation to consult with tribes when an undertaking may affect properties of religious and cultural importance to a tribe, and Section 106 provides that before an undertaking is authorized, the head of an agency must “take into account the effect of the undertaking.” 16 U.S.C. §§ 470a, 470f. The NHPA implementing regulations give substance to these requirements. See 16 U.S.C. § 470a(a)(2) (Secretary’s general obligation to promulgate regulations); *id.* § 470a(d)(1) (“The Secretary shall establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties.”). Plaintiff does not argue that the implementing regulations exceed what is authorized by the statute.

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Nor has Plaintiff shown that the regulations in Subparts A and C created more consultation obligations that were not satisfied by BLM's compliance with the Programmatic Agreement. It argues that the June 11, 2015 Order concluded incorrectly that BLM could satisfy the NHPA by consulting after issuing the right-of-way, but before issuing the Final Notice to Proceed. Reply, Dkt. 151 at 11 n.5. In support of this position, Plaintiff relies on 36 C.F.R. § 800.1(c). It requires the Section 106 process to be completed "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." *Id.* Once again, the question is the type of required process. 36 C.F.R. § 800.14(a)(4) states that "[a]lternate procedures adopted pursuant to this subpart," which include those of a programmatic agreement, "substitute for the Council's regulations for the purposes of the agency's compliance with section 106" The regulations permit BLM to satisfy its Section 106 obligations by entering a programmatic agreement, including one that permits the deferral of some analysis between limited ground-breaking activities and final construction. For the same reason, the definition of "consultation" at 36 C.F.R. § 800.16(f) and the description of consultation obligations at 36 C.F.R. § 800.2(c) do not support Plaintiff's claim that "renewed consultation" distinct from that under the Programmatic Agreement was required.⁸

Plaintiff argues that, as a matter of policy under the NHPA, programmatic agreements "must provide an adequate substitute, not a gaping loophole." Dkt. 151 at 9. Thus, tribes would be "discourage[d] from signing programmatic agreements" if such agreements permitted BLM to avoid its obligation to consult with tribes. *Id.* at 8-9. The applicable regulations provide three safeguards that address this issue. First, any alternative procedures must be adequate substitutes for those of the NHPA and its regulations. 36 C.F.R. § 800.14(a). Second, a programmatic agreement may be promulgated only after public notice and consultation, and approval by the agency official, the appropriate historic preservation officers and the Advisory Council on Historic Preservation. 36 C.F.R. § 800.14(b). Third, a dissatisfied party to an agreement may seek to amend or withdraw from it; these are steps that Plaintiff did not take in the underlying proceedings. For these reasons, a review of the record shows that BLM did not abuse its discretion or exceed its legal authority in determining either that the Programmatic Agreement set forth adequate consultation procedures or that there was compliance with them.

For these reasons, Plaintiff has not shown that BLM's actions were arbitrary, capricious, procedurally improper, or otherwise contrary to the NHPA. Therefore, Plaintiff's Motion on the NHPA claim is **DENIED**, and Defendants' Cross-Motions are **GRANTED** as to this claim.

2. NEPA Cause of Action

a) Hard Look at Impact to Cultural Resources

NEPA requires administrative agencies to take "a 'hard look' at environmental consequences" of proposed actions. *WildEarth Guardians v. Montana Snowmobile Ass'n*, No. 12-35434, --- F.3d ---, 2015 WL 3824898, at *3 (9th Cir. June 22, 2015). Under the applicable regulations, this is done through an EIS, which is reviewed under a "rule of reason standard." *League of Wilderness Defenders-Blue Mountains*

⁸ Further, during the NEPA review process, BLM assessed, but rejected, the argument that the Genesis Project, at which a number of artifacts were discovered, presented new information relevant to the Project. AR3861, 3869-71.

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Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1075 (9th Cir. 2012). Effects on “cultural” resources are among those that must be evaluated. 40 C.F.R. § 1508.8.

The FEIS identified certain cultural resources in the Project area, but acknowledged that further research and analysis would be needed to determine the “boundaries, periods of significance, and contributing resources” of others. AR1083. BLM claimed that further identification would need to be conducted in phases because some trails in the area did not have defined physical boundaries, but were “songscares,” or locations referenced in songs. AR42719. In addition, the extent and location of “subsurface resources” could not be determined until some excavation had been completed. AR1088. BLM proposed to minimize risks to cultural resources through mitigation measures and Project Design Features, which included “the use of monitoring and measures to halt ground disturbance and implement curation . . . in the event of the discovery of a currently unknown subsurface resource.” AR1088-89; see AR187-192 (describing measures that would be taken).

The June 11, 2015 Order determined Plaintiff was unlikely to be able to raise a serious question on the merits of its claim that BLM failed to take a hard look at the Project’s potential impact on cultural resources. Dkt. 150 at 22-23. The Order relied in part on *HonoluluTraffic.com v. Federal Transit Administration*, 742 F.3d 1222 (9th Cir. 2014). There, the Ninth Circuit 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. 742 F.3d at 1233.

On its present Motion, Plaintiff’s arguments on this issue largely repeat those raised in the Injunction Motion. Plaintiff seeks to distinguish *HonoluluTraffic.com* on the ground that there, “the agency undertook sufficient pre-approval testing to ‘identify unknown burial sites and predict the likelihood of finding additional burial sites during different phases of the Project,’” but “[n]o similar analysis was conducted here.” Reply, Dkt. 151 at 15. This position is not persuasive.

The administrative record reflects that BLM made reasonable efforts to assess cultural resources in the Project area before issuing the FEIS. Plaintiff also seeks judicial notice of a “Memorandum of Understanding” between the Department of the Interior and other agencies. Dkt. 151 at 15 n.8. There, the Department agreed it was responsible for assessing the potential effects of undertakings on “sacred sites,” which may “occur within a larger landform or [be] connected through features or ceremonies to other sites or a larger sacred landscape.” Dkt. 151-2 at 2. Plaintiff did not timely include this document in the Administrative Record. Even if it were considered, BLM’s assessment of the potential impact on sacred sites was sufficient under a rule of reason analysis.

For these reasons, Plaintiff has not shown that that BLM did not take the required hard look at the impact of the Project.

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b) No-Action Alternative

An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives,” and “[i]nclude the alternative of no action.” 40 C.F.R. § 1502.14. The no-action alternative is 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 defined the No-Action Alternative as a scaled-down power plant using thermal parabolic trough technology for which the previous owner of the Project site had obtained a right-of-way. AR848. The June 11, 2015 Order found that Plaintiff raised serious questions whether this accurately reflected the no-action alternative. Dkt. 150 at 24. However, it also concluded that this error was likely harmless. Thus, the FEIS was tied to the 2010 FEIS analysis of three no-action alternatives in which no construction would be completed and the Original Project site would be subject to varying land-use classifications. Dkt. 150 at 24-25. For these reasons, “[t]he FEIS 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.” *Id.* at 25.

Plaintiff argues that this “false assumption” was not harmless because it “dramatically understat[e]d the environmental harm caused by approving the Project.” Mot., Dkt. 122-1 at 25. Plaintiff contends the Project approval must be set aside because BLM did not “clearly set forth the consequences of approving or denying [the] proposed project.” Dkt. 151 at 19. At the hearing on the Motion, Plaintiff argued that BLM’s error was analogous to that in *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581 (4th Cir. 2012). In that case, the Army Corps of Engineers (“Corps”) approved a permit to build a mooring facility and boat ramp 3,000 feet from a wildlife refuge. *Id.* at 583. The Corps determined that no FEIS was required, and prepared a less detailed Environmental Assessment that found no significant environmental impact. *Id.* at 584-86. This was premised on the assumption that a no-wake zone in which watercraft would be prohibited would remain in effect. *Id.* at 583. However, the record reflected that the no-wake zone was “entirely unenforced,” and “remained unmarked and undisclosed to the public nearly five years after its initial implementation.” *Id.* at 585, 588. Based on this record, the Fourth Circuit concluded that, “[a] material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision. . . . courts not infrequently find NEPA violations when an agency miscalculates the ‘no build’ baseline or when the baseline assumes the existence of a proposed project.” *Id.* at 588 (citation omitted). It found that such a misapprehension had occurred, and remanded to the district court so that it could, in turn, remand the matter to the Corps for the preparation of an EIS. *Id.* at 590.

There has been no showing here that the description in the FEIS of the No-Action Alternative reflected an inaccurate analysis of alternatives by BLM, or that it was likely to mislead the public. Rather, the record reflects that BLM properly considered no-action alternatives in the 2010 FEIS, and incorporated this discussion in the FEIS, but inaccurately described the likely status quo if the Project were not approved. The facts in *Friends of Back Bay* were different. There, the effectiveness of the no-wake zone was a “foundational proposition” upon which the [finding of no significant impact] was premised.” 681 F.3d at 588. Plaintiff does not show that BLM relied on the inaccurately described no-action alternative in determining the appropriate action. Further, common sense shows that it is implausible that either BLM or the public would conclude from the FEIS that the environmental impact of building a 4,000 acre solar facility in the desert would be less than that of leaving the land undeveloped.

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For these reasons, Plaintiff has failed to show that the error of BLM in defining the no-action alternative was prejudicial. “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.) (citations omitted), *cert. denied*, 134 S. Ct. 2877 (2014). Therefore, the description of the No-Action Alternative is not a basis on which Plaintiff may obtain relief.

c) Statement of Purpose and Need

NEPA regulations require a statement that “briefly specif[ies] 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).

Many of Plaintiff’s arguments regarding the FEIS Statement of Purpose and Need, i.e., that it was too narrow and adopted the goals of NextEra instead of those of the public, were rejected in the June 11, 2015 Order. See Dkt. 150 at 25-27.⁹ In part, this was because the analysis of the FEIS was “tiered” to that of the 2010 FEIS and Record of Decision (“ROD”), which analyzed a number of alternative locations, solar technologies and forms of energy. *Id.* at 27. Plaintiff argues that this conclusion was in error because the FEIS stated that the alternatives analyzed in the 2010 FEIS were not “revisited for purposes of the Level 3 variance now under consideration; these summaries are provided for informational purposes in order to facilitate comparison with previous BLM analysis of the [Project].” AR867. Plaintiff also argues that “obviously changed circumstances” were presented because the 2010 FEIS had rejected the technology that was chosen in the Project FEIS, and so other technologies should have been re-evaluated as well. Dkt. 151 at 21.

The FEIS stated, “[t]he BLM has tiered the analysis in this Final EIS to the 2010 PA/FEIS and Record of Decision (ROD) for the 2010 Approved Project to the extent that these documents inform the BLM’s consideration of the effects of the Grant Holder’s proposed Modified Project.” AR839. These were also included as appendices to the FEIS. That these options were not “revisited” does not show that the FEIS was not tiered to the 2010 FEIS, the options were not fully considered by BLM, or the earlier alternatives analysis had become inapplicable. Nor does Plaintiff show changed circumstances that would justify reopening the analysis. The 2010 FEIS recommended thermal parabolic trough technology instead of the photovoltaic technology of the Project. It did so because the 2010 FEIS was responsive to an application for a right-of-way grant to construct a thermal facility, and photovoltaic technology “would not reduce major impacts” of the project assessed in 2010. AR6502-03. It did not determine photovoltaic technology

⁹ The Statement appears at pages 25-26 of the Appendix.

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was less reliable or environmentally sound; rather, it took into account the preference of the developer of the predecessor to the Project to use thermal technology. It is not improper for a statement of purpose and need to consider “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 was not inconsistent for BLM to propose one technology when it was favored by one developer in 2010, and then propose a different technology when it was favored by a different developer in 2014. The record does not suggest that this change was due to an intervening technological change that would require reassessment. Nor does Plaintiff show that any other technologies rejected in 2010 and not reconsidered in 2014 had changed in the interim.¹⁰ Therefore, Plaintiff fails to demonstrate either procedural error or harm caused by the FEIS Statement of Purpose and Need and analysis of alternatives.

For these reasons, Plaintiff has failed to show that the actions of BLM were arbitrary, capricious, procedurally improper, or otherwise contrary to NEPA. Therefore, Plaintiff’s Motion on the NEPA claim is **DENIED**, and Defendants’ Cross-Motions are **GRANTED** as to this claim.

3. FLPMA Cause of Action

a) Class L Designation of the Project Site

The Project is to be built on lands designated as “Class L” under the California Desert Conservation Area (“CDCA”) Plan. AR1119. Class L designation “protects sensitive, natural, scenic, ecological, and cultural resource values,” and requires land to be “managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.” Dkt. 122-3 at 16. Plaintiff argues that the development of the Project is not consistent with the applicable development standards. The June 11, 2015 Order found this argument one on which Plaintiff was unlikely to succeed on the merits. Dkt. 150 at 28-29. A premise of this conclusion was that the CDCA Plan expressly permits the construction of solar power plants on Class L lands “if environmentally acceptable,” and BLM amended the CDCA Plan in 2010 to permit solar development on the Project site after making required findings of fact. *Id.*

On its Motion, Plaintiff essentially repeats its prior argument. Mot., Dkt. 122-1 at 27-29; Reply, Dkt. 151 at 22-24. Thus, it attempts to distinguish the cases cited by Defendants on the ground that those courts did not consider “the precise argument the Tribe has raised in this case: that the plain language of the Plan requires BLM to apply both the land use limitations contained in the definition of Class L lands as well as the ‘Multiple Use Guidelines.’” *Id.* at 23. It also argues “[m]ore was required to truly amend the Plan” than the 2010 Plan Amendment, which it contends was ineffective. *Id.*

Although the Ninth Circuit has not addressed this issue, every district court to consider it has determined that solar power plants may be built on Class L lands so long as environmental requirements are

¹⁰ Plaintiff contends “one of the arguments that was rejected in the FEIS was distributed generation, which would clearly have addressed [Plaintiff’s] broader concerns.” Dkt. 151 at 21. Plaintiff presents no evidence that the merits of this alternative changed in any material way between 2010 and 2014, or that the earlier analysis was deficient. See AR 899, 3858-59.

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satisfied. See Dkt. 146-1 at 29 (citing cases). Even if this issue were not presented to these courts precisely as Plaintiff has framed it, the result would be the same. See, e.g., *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.”), *aff'd*, 603 F. App'x 651 (9th Cir. 2015).¹¹ This is not, as Plaintiff argues, a case in which BLM's interpretation is “plainly contradictory to regulatory language.” Reply, Dkt. 151 at 22. The Class L definition and guidelines permit the evaluation of the benefit of development against the costs to a number of values. They are not plainly contradicted by an interpretation that permits the development of solar power plants, particularly in light of BLM's contrary determination at the time the CDCA Plan was promulgated. Therefore, as stated in the June 11, 2015 Order, BLM's interpretation is reasonable. Dkt. 150 at 28-29.

Nor is there force to Plaintiff's argument that the 2010 Plan Amendment was somehow ineffective. The sole authority on which Plaintiff relies, *Center for Biological Diversity v. U.S. Bureau of Land Management*, 746 F. Supp. 2d 1055 (N.D. Cal. 2009), concerned a purported Plan amendment that contradicted other terms of the Plan. Here, by contrast, the amendment was permitted and did not contradict other terms. In making the amendment, BLM reasonably considered the required criteria. See AR2554, 2560, 2578-90. Plaintiff fails to show that BLM violated the CDCA and FLPMA by permitting the development of the Project on Class L land.

b) Visual Resource Designation of the Site

BLM assigned to the Project an Interim Visual Resource Management (“VRM”) classification of III. Under this classification, BLM's “objective” was “partially [to] retain the existing character of the landscape. The level of change to the 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.” AR38104. The FEIS determined that this objective was satisfied from four of six key observation points (“KOPs”). 1210-13. However, it was not satisfied as to the two remaining KOPs because, even with mitigation measures in place, the Project would create a strong contrast with the surrounding landscape, and “attract the attention of even a casual observer.” *Id.* The McCoy Mountains are where one of the KOPs is located. They are a site of religious and cultural significance to members of Plaintiff.

The June 11, 2015 Order determined that, even if Interim VRM classifications create binding obligations on BLM -- a claim that BLM disputes -- this would not be reason to set aside agency action. Dkt. 150 at 30-31. The Order relied in part on *South Fork Bank Council v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009). In that case, the Ninth Circuit decided not to enjoin BLM's approval of a mining project in which some facilities would comply with VRM objectives, while others would not. *Id.* at 725. Through its Motion,

¹¹ The plaintiffs in *La Cuna* did not seek appellate review of the district court decision on their FLPMA claim. Therefore, that issue was not reached on appeal. 603 F. App'x at 652.

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Plaintiff argues that *South Fork Band Council* is distinguishable because there, BLM adopted measures that “ensured that the long-term effects of the project [would] be minimized through recontouring and revegetation.” Reply, Dkt. 151 at 25 (citing *S. Fork Band v. U.S. Dep’t of Interior*, 643 F. Supp. 2d 1192, 1211 (D. Nev.) *aff’d in part, rev’d in part*, 588 F.3d 718 (9th Cir. 2009)). This distinction is not material. In this matter, BLM adopted several mitigation measures that would reduce, but not entirely eliminate, adverse visual effects. AR4307-08. Plaintiff does not show that BLM’s failure fully to attain interim VRM objectives from two of six KOPs, where mitigation measures were in place, violates the CDCA or FLPMA.¹²

For these reasons, Plaintiff has failed to show that BLM’s actions were arbitrary, capricious, procedurally improper, or otherwise contrary to the FLPMA. Therefore, Plaintiff’s Motion on the FLPMA claim is **DENIED**, and Defendants’ Cross-Motions are **GRANTED** as to this claim.

IV. Conclusion

For the reasons stated in this Order, the Motion is **DENIED**. The Cross-Motions are **GRANTED**.

Counsel shall confer in an effort to agree on a form of judgment. Defendants shall lodge the proposed judgment within 14 days of the issuance of this Order. The notice shall state whether the parties have agreed on the form or whether Plaintiff will be filing objections. If there are objections to the proposed judgment, Plaintiff shall file them within 21 days of the issuance of this Order.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
ak _____

¹² Once again, it is not necessary to reach the question whether the Interim VRM classifications imposed any binding obligations on BLM.

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Appendix: Excerpts of June 11, 2015 Order

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

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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. § 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).

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.

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.

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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 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

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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 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

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.

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).

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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 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

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.

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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.*

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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

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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 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,

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

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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

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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.

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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.*

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.

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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 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

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.

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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 Jасulca, 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 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

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.

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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

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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 "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

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

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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.

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

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.

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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 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

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.

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.

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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 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

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

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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 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

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.

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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.

(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.

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.

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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").

* * *

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.

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

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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 “songscaapes,” 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) (“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

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.

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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”).

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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.

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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

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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

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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.

* * *

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

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.

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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. Env'tl. 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.

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(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

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))).

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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 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

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).

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.

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FLPMA claim.