JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE ADVISORY COMMITTEE; CALIFORNIANS FOR RENEWABLE ENERGY; ALFREDO ACOSTA FIGUEROA; PHILLIP SMITH; PATRICIA FIGUEROA; RONALD VAN FLEET; CATHERINE OHRIN-GREIPP; RUDY MARTINEZ MACIAS; and GILBERT LEIVAS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Case No. CV 11-00400 DMG (DTBx)

ORDER RE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND BRIGHTSOURCE'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the parties' cross-motions for summary judgment. Having duly considered the respective positions of the parties, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Plaintiff's motion is DENIED and Defendants' and motions are GRANTED.

I.

PROCEDURAL HISTORY

On November 23, 2011, Plaintiffs La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee ("La Cuna"), CAlifornians For Renewable Energy ("CARE"), Alfredo Acosta Figueroa ("Figueroa"), Patricia Figueroa, Phillip Smith, Ronald Van Fleet, Catherine Ohrin-Greipp, Rudy Martinez Macias, and Gilbert Leivas filed the operative Third Amended Complaint ("TAC") [Doc. # 96] against the United States Department of the Interior, Ken Salazar, United States of Bureau of Land Management ("BLM"), Robert Abbey, Teri Raml, Rusty Lee, United States Department of Energy ("DOE"), Steven Chu, United States Treasury, Timothy F. Geitner, and Federal Financing Bank (collectively the "Government"), as well as Solar Partners I, LLC, Solar Partners II, LLC, Solar Partners VIII, LLC, and BrightSource Energy, Inc. (collectively "BrightSource"). Plaintiffs seek declaratory, injunctive, and other equitable relief under the National Historic Preservation Act ("NHPA"), National Environmental Policy Act ("NEPA"), Federal Land Policy and Management Act ("FLPMA"), Religious Freedom Restoration Act ("RFRA"), Energy Policy Act of 2005 ("EPAct"), American Recovery and Reinvestment Act ("ARRA"), and public participation rights guaranteed by the Administrative Procedures Act ("APA").

Plaintiffs twice voluntarily amended their complaint, on February 8, 2011 and August 5, 2011. [Doc. ## 14, 72]. Parts of the Second Amended Complaint were dismissed with leave to amend on November 14, 2011 ("MTD Order") [Doc. # 94], before Plaintiffs filed the TAC.

Plaintiffs filed a motion for summary judgment on April 13, 2011 (Pl.'s Mot.) [Doc. # 109]. On June 1, 2012, the Government and BrightSource filed briefs in opposition to Plaintiff's motion for summary judgment and in support of summary judgment in their favor (respectively, "Gov't Mot." and "BrightSource Mot.") [Doc. ## 113, 114]. On July 20, 2012, Plaintiffs filed briefs in opposition to the Government's and BrightSource's cross-motions for summary judgment and in reply to their opposition to

Plaintiffs' motion for summary judgment (respectively, "Pl.'s Gov't Reply" and "Pl.'s BrightSource Reply") [Doc. ## 115, 116]. On August 17, 2012, the Government and BrightSource filed replies to Plaintiff's opposition to their cross-motions for summary judgment (respectively, "Gov't Reply" and "BrightSource Reply") [Doc. ## 117, 118].

II.

FACTUAL BACKGROUND

A. The ISEGS Solar Project

The Ivanpah Solar Electric Generating System ("ISEGS") is a 370-megawatt solar concentrating thermal power plant currently under construction on BLM-administered land in the Mojave Desert. It is located 4.5 miles southwest of Primm, Nevada and 0.5 miles west of the Primm Valley Golf Club, beyond which lies the Ivanpah Dry Lake. BLM, *California Desert Conservation Area Plan Amendment / Final Environmental Impact Statement for Ivanpah Solar Electric Generating System* ("FEIS") [1] 3-26 to 3-27 (July 2010); *Record of Decision for the Ivanpah Solar Electric Generating System Project* ("ROD")[2] 23 (October 2010) (The "Selected Alternative" is Mitigated Alternative 3 from the FEIS.). The project is being developed in three phases: Ivanpah unit 1 will occupy approximately 914 acres and generate 120 megawatts of electricity. Ivanpah units 2 and 3 are each designed to provide 125 megawatts of electricity and will occupy approximately 1,097 and 1,227 acres, respectively. FEIS at 3-27. All three phases will share an administration building, an operation and maintenance building, and a substation that will be located between Ivanpah 1 and 2. *Id*. The total project area, including roads, natural gas, water, and transmission lines, and construction staging areas, will occupy approximately 3,471 acres (5.4 square miles). ROD at 7.

The project is comprised of fields of heliostat mirrors focusing solar energy on boilers located in central power towers. FEIS at 1-2. Each mirror will track the sun

[1] A.R. at 474-1971 [Doc. # 105].

[2] A.R. at 83-377.

throughout the day and reflect solar energy onto the receiver boiler. *Id*. Each of the three Ivanpah units will have one 459-foot tower. Ivanpah 1 and 2 will have up to 55,000 heliostats, while Ivanpah 3 will have approximately 63,500 heliostats. *Id*. at 1-3, 3-28 to 3-29. Each of the three power plants will contain a power block with a steam turbine generator. *Id*. at 1-4, 3-29. Generator interconnection lines will tie each power plant into Southern California Edison's transmission grid via a new Ivanpah substation. *Id*. at 1-7.

Construction is taking place pursuant to certain plans and mitigation measures to avoid or minimize adverse impacts on the environment, including a raven management plan, a desert tortoise translocation/relocation plan, an application for incidental take permit, and a biological assessment. *Id*. at 1-8 to 1-9. An 8-foot high chain-link security fence topped with barbed wire surrounds the site. *Id*. at 1-6.

The Ivanpah Project has significant portions of the Salt Song Trails running through it. (Decl. of Alfredo Acosta Figueroa ("Figueroa Decl.") ¶ 9 [Doc. # 109-3]; Decl. of Philip R. Smith ("Smith Decl.") ¶ 7 [Doc. # 109-5].) The Salt Song Trails have significant historical, cultural, and religious value to several Indian Tribes, of which Plaintiffs are members. Plaintiffs Figueroa, Smith and Van Fleet are tribal members. (Figueroa Decl. ¶ 1; Smith Decl. ¶ 2; Decl. of Ronald Van Fleet ("Van Fleet Decl.") ¶ 2 [Doc. # 109-6].) Some Plaintiffs regularly visit the Project site. (Smith Decl. ¶ 4; Van Fleet Decl. ¶ 7.) Because of the fencing and guards, Plaintiffs have been unable to access the site since the beginning of construction. (Figueroa Decl. ¶ 23; Smith Decl. ¶ 14.)

B. <u>The BLM Approval Process</u>

On November 6, 2007, BLM published notice of its intent to prepare a joint environmental impact statement ("EIS") and final staff assessment, and to amend the California Desert Conservation Area ("CDCA") Plan. 72 Fed. Reg. 62671. On November 10, 2009, BLM published a Notice of Availability of its draft EIS ("DEIS")[3], which opened a review period for public comments that closed on February 11, 2010.

[3] A.R. at 2379-3641.

(ROD at 50.) The DEIS considered 23 alternatives to the proposed project and concluded that only the "No Action" alternative was both feasible and could potentially result in a lesser impact. (DEIS at 4-1.) The DEIS considered both the proposed and "No Action" alternatives in detail. (*Id.*)

BLM issued a supplemental draft EIS[4] ("SDEIS") on April 16, 2010 (ROD at 50), which analyzed two additional alternatives to the ISEGS project that BrightSource proposed: a reduced acreage option (the "Mitigated Ivanpah 3 Alternative") and a reconfigured option (the "Modified I-15 Alternative"). SDEIS at 2-3. On August 6, 2010, BLM published the proposed FEIS and opened a 30-day comment period. 75 Fed. Reg. 47619. On September 4, 2010, Plaintiff Boyd submitted a comment on behalf of Plaintiff CARE, protesting the fast-tracking of the ISEGS project. (A.R. at 24255-86.) BLM responded to Boyd's comments in the ROD. (ROD § 7.1, *passim*).

In October 2010, BLM issued the ROD, which approved decisions to: (1) "amend the CDCA Plan to include the ISEGS facility as an approved power generation location under the Energy Production and Utility Corridors Element of the CDCA Plan"; and (2) "grant four [right-of-way] authorizations for the selected Mitigated Ivanpah 3 Alternative, and to close certain routes of travel within the project site." (ROD at 4.) The ROD also concluded that the existing NEPA documentation (the draft EIS, supplemental draft EIS, and FEIS) was adequate. (ROD at 45.)

C. <u>The DOE Loan Guarantee Process</u>

Under the authority granted to DOE by section 1703 of the EPAct, in May 2007, DOE issued a "Notice of Proposed Rulemaking and Opportunity for Comment" for the addition of part 609 (§§ 609.1 to 609.18) to Title 10 of the Code of Federal Regulations. The proposed regulations were intended to address loan guarantees for "Eligible Projects," defined to mean new and innovative technology that is not a commercial technology and otherwise meets the requirements of Section 1703 of Title XVII of the

[4] A.R. at 1972-2270.

EPAct. 72 Fed. Reg. 27471, 27480. A final rule was issued on October 23, 2007. 72 Fed. Reg. 60116.

In February 2009, Congress passed ARRA, amending the EPAct to include section 1705, a temporary program allowing DOE to issue loan guarantees for certain types of projects involving technology that is currently available, as opposed to the requirement in section 1703 that the technology be new and innovative. 42 U.S.C. 16516. DOE did not issue new regulations under section 1705.

On July 29, 2009, DOE issued a "Loan Guarantee Solicitation Announcement," ("Announcement")[5] which stated that the project applications must conform to the regulations set out under section 1703, with the exception of the types of technology which were specified in section 1705. (Announcement at 7 ("In addition, Eligible Projects must meet all requirements of Title XVII (22 U.S.C. 16513), including Section 1703, the Final Regulations and the requirements of this Solicitation.")

BrightSource applied for a loan guarantee as indicated in the Solicitation, and on February 22, 2010, DOE announced conditional commitments for more than $1.37 billion in loan guarantees to BrightSource. FEIS at 2-14.

III.

LEGAL STANDARD

Summary judgment should be granted "if the movant shows that 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). All parties agree that this matter can be resolved on the record before the Court and that summary judgment is therefore appropriate.

[5] Pursuant to Fed. R. Evid. 201(c)(1), the Court takes judicial notice of the Announcement, Reference No, DE-FOA-0000140. The TAC refers to the Announcement (TAC ¶ 52), as does BrightSource (BrightSource Mot. at 20, n.16.), and it is a public document the accuracy of which cannot easily be questioned. Fed. R. Evid. 201. The Announcement is available at http://lpo.energy.gov/wp-content/uploads/2010/09/2009-ren-energy-sol.pdf.

When considering challenges to agency action for failure to adhere to the NEPA, FLPMA, or NHPA, or EPAct, district courts review the decision at issue under the APA. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011), *cert. denied*, __U.S.__, 132 S. Ct. 366, 181 L. Ed. 2d 232 (2011) (citing *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 581 F.3d 1063, 1070 (9th Cir. 2009); *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007)). The APA requires that the agency action be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)).

Review under the "arbitrary and capricious" standard is narrow—courts may not substitute their judgment for that of the agency. Rather, courts "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)), *overruled on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The APA thus mandates a "highly deferential standard" of review, and "[t]his deference is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise." *Allen*, 615 F.3d at 1130 (citing *McNair*, 537 F.3d at 993).

IV.

DISCUSSION

A. Plaintiffs' NEPA Claims

NEPA imposes procedural requirements rather than substantive environmental standards or outcomes. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) (citations omitted). These procedural requirements serve the statute's twin

purposes: "to ensure that the agency proposing major federal action 'will have available, and will carefully consider, detailed information concerning significant environmental impacts,'" and "to guarantee that the relevant information will be made available to the larger public audience." *S. Coast Air Quality Mgmt. Dist. v. FERC.*, 621 F.3d 1085, 1092 (9th Cir. 2010) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)) (citing 42 U.S.C. § 4332(C)).

Plaintiffs contend that Defendants violated the NEPA in two ways. First, they claim that Defendants defined the required statement of "purpose and need" too narrowly, thereby artificially constraining the proposed alternatives that could be considered for the Project. Second, Plaintiffs argue that Defendants were required to prepare a programmatic EIS regarding all the solar electricity projects being constructed in the CDCA and failed to do so.

1. BLM Adequately Defined a Public Purpose and Need for the ISEGS Project

Plaintiffs argue that the stated purpose and need – to respond to BrightSource's application – is too narrow. To satisfy NEPA requirements, an EIS must "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. The defined purpose and need "necessarily dictates the range of 'reasonable' alternatives." *Carmel-by-the-Sea*, 123 F.3d at 1156 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)). "Agencies enjoy 'considerable discretion' to define the purpose and need of a project." *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quoting *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998)), *cert. denied*, 131 S. Ct. 1783, 179 L. Ed. 2d 670 (2011).

BLM does not have, however, "unlimited" discretion—the Court evaluates BLM's statement of purpose and need under a "reasonableness standard." *Westlands Water Dist.*, 376 F.3d at 866 (citing *Friends of Se.'s Future*, 153 F.3d at 1066-67). BLM must define the purpose of the project "in a manner broad enough to allow consideration of a

reasonable range of alternatives" and cannot "define its objectives in unreasonably narrow terms." *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1071-72. "BLM may not circumvent this proscription by adopting private interests" in crafting a statement of purpose that is "so narrowly drawn as to foreordain approval of the [project]." *Id.* at 1072. Relying on *Nat'l Parks*, Plaintiff contends that BLM has failed to present public goals and has instead adopted a statement of public purpose and need that responds only to BrightSource's interests. (Pl.'s Mot. at 9-12.)

BLM's statement indicates that its purpose and need "is to respond to the applicant's application" and, "[i]n conjunction with the [Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761], BLM authorities include the relevant direction and policies noted above." FEIS at 2-6 to 2-7. The direction and polices include Executive Order 13212, "which mandates that agencies act expediently . . . to increase the production and transmission of energy in a safe and environmentally sound manner"; the Energy Policy Act of 2005, 119 Stat. 594, which requires DOI "to approve at least 10,000 [megawatts] of renewable energy on public lands by 2015"; DOI Instruction Memorandum 2007-097, which prioritizes BLM's processing of right-of-way applications by solar power developments; and Secretarial Order 3285, which "establishes the development of renewable energy as a priority for the [DOI]." FEIS 2-3 to 2-4 (internal quotation marks omitted).

Nothing prevents an agency from expressly incorporating goals stated elsewhere in its EIS into a statement of purpose and need. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812-13 (9th Cir. 1999) (*per curiam*) (upholding as "reasonable" statement of purpose, that "taken in complete isolation, would appear too narrow," because it expressly incorporated adequate policy goal). BLM's stated policy goal—encouraging renewable energy development on BLM lands—is reasonable.

Additionally, Plaintiffs claim that as a result of this alleged overly restrictive purpose and need statement, Defendants failed to consider a reasonable range of alternatives. Here, BLM developed and evaluated 25 alternatives to the proposed project.

It found only three of these alternatives "to be both feasible and have the potential to result in lesser impacts": (1) the selected "Mitigated Ivanpah 3" alternative, which would use fewer heliostats and reduce the total acreage of the ISEGS project; (2) a "Modified I-15" alternative, which would have moved the project location to the south, required less acreage and grading, and had less of an impact on the desert tortoise and vegetation; and (3) the "No Action" alternative. FEIS at 1-11 to 1-14. Once again, BLM acted reasonably in considering a wide range of options and narrowing down the choices for further review. Thus, the Court grants summary judgment for Defendants on this issue.

2. BLM Was Not Required to Prepare a Programmatic EIS

Plaintiffs next argue that Defendants violated NEPA by failing to "prepare a programmatic EIS for the other solar-electricity projects taking place in the CDCA around the same time." (Pl.'s Mot. at 12.) Plaintiffs assert that several solar projects were commissioned to achieve the EPAct's "goal of 10,000 megawatts of renewable energy on public land," and that, as a result, the projects are similar geographically, temporally, and substantively. (Pl.'s Gov't Reply at 3.) According to Plaintiffs, "it is hard to imagine a more paradigmatic case for programmatic environmental review." (*Id.* at 4.)

An agency must consider cumulative effects on a region where they are relevant. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 96 S. Ct. 2718, 2730, 49 L. Ed. 2d 576 (1976). In *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990), the Ninth Circuit stated as follows:

> NEPA requires that where several actions have a cumulative or synergistic environmental effect, this consequence must be considered in an EIS. A cumulative impact is the impact on the environment that results from "the incremental impact of the action when added to the other past, present and reasonably foreseeable future actions. . . ."

> Where there are large scale plans for regional development, NEPA requires both a programmatic and site-specific EIS. This court has held that where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS.

915 F.2d at 1312 (citations omitted). Understanding the difference between "large scale plans for regional development" and "several foreseeable similar projects" is critical in this case. The factual record in this case supports only the latter. FEIS Section 5 (assessing the cumulative impact of 30 planned or existing projects and discussing them as entirely distinct from each other).[6] Although Plaintiffs urge the Court to consider the projects "connected," under the Ninth Circuit's "independent utility" test, two projects are not connected if just "one of the projects might reasonably have been completed without the existence of the other." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). Thus, the projects at issue really are no more than foreseeable similar projects, and a "single" EIS addressing the cumulative impact is required, but it need not be a programmatic EIS.

Whether the considerations are to be addressed within a single EIS for each project or a programmatic EIS is a matter committed to the discretion of the agency. *Kleppe*, 427 U.S. at 413-14; *see also* Nevada v. Dep't of Energy, 457 F.3d 78, 92 (D.C. Cir. 2006) ("The decision whether to prepare a programmatic EIS is committed to the agency's discretion."). Accordingly, the decision not to prepare a programmatic EIS must satisfy the arbitrary and capricious standard. Fifty-six pages of the FEIS for the ISEGS are devoted to the cumulative effects of the solar energy projects within the CDCA. FEIS at 5-1 to 5-56. Moreover, there is a PEIS currently underway for the future projects. As the Court discussed in the MTD Order, BLM's decision to consider the cumulative impacts

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[6] Plaintiffs do not actually argue otherwise, stating only that there were several projects planned at the same time, not that there was a single large scale development plan. (Pl's Mot. at 13 ("In the case at hand, there were several similar solar-electricity projects on CDCA land that will have cumulative impacts and were being considered during the same time period.").)

in a single EIS for this project, and to proceed while the PEIS was being prepared for future projects was reasonable in light of the need to move quickly and implement the stimulus. (MTD Order at 7.) BLM considered cumulative impacts within a single EIS and this Court cannot say that this decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Therefore, the Court grants summary judgment to Defendants on Plaintiffs' NEPA claims.

B. Plaintiffs' FLPMA Claims

The FLPMA provides BLM with authority and direction concerning the use and management of federal lands. *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1220 (9th Cir. 2011). It requires BLM to "develop, maintain, and, when appropriate, revise land use plans," to ensure that land management is conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7) & 1712(a). The relevant land use plan here is the CDCA Plan,[7] which must "take into account the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights of way, and mineral development." *Id.* § 1781(d).

The CDCA Plan divides land into several multiple-use classes. The ISEGS is being constructed on Multiple-Use Class L "Limited Use" land. ROD at 14. "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." CDCA Plan at 13. Class L designation calls for judgment "in allowing consumptive uses only up to the point that sensitive natural and cultural values might be degraded." *Id.* at 21. The CDCA Plan specifically anticipates the construction of solar electricity generation facilities, and allows them on Class L lands if NEPA requirements are satisfied. *Id.* at 15.

[7] BLM Supp. A.R. 7-155.

The FLPMA "is primarily procedural in nature, and does not provide a private right of action." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006). Therefore, BLM's decisions are reviewed under the "arbitrary and capricious" standard of the APA. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 641 (9th Cir. 2010). Plaintiffs argue that BLM violated the FLPMA by failing to consider "scenic-resource values," air quality impacts, impacts to the desert tortoise, impacts to soil and water resources and "cultural values" of the Project site. (Pl.'s Mot. at 15-16.) Plaintiffs also assert that BLM has not only reached but exceeded the point at which "sensitive natural and cultural values" are being degraded.

The first argument is flawed, as BLM did, in fact, consider each of these potential impacts. This is evidenced by Plaintiffs' own motion, which points to places in the record that explicitly consider each of them, except the cultural values. *See* FEIS at 1-32 to 1-34, 4.13-1 to 4.13-53 (visual impact), 1-21 to 1-22, 4.1-1 to 4.1-60 (air quality), 1-23 (desert tortoises), 1-28 to 1-30, 4.10-1 to 4.10-58 (soil and water resources). Though Plaintiffs did not directly cite to the discussion in their brief, BLM considered the impacts to cultural resources as well. *Id.* at 4.4-1 to 4.4-77.

Plaintiffs' second argument is fundamentally a disagreement about policy outcomes. While BLM must consider each of these potential impacts, the mere existence of impacts is not enough to defeat the project. BLM may reasonably decide that the reasons to proceed with the project outweigh the impacts. 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. BLM has satisfied NEPA by considering alternatives and mitigation procedures to reduce the impacts.

While Plaintiffs may disagree with the outcome, a policy disagreement does not entitle Plaintiffs to block the project. *Hells Canyon Alliance v. U.S. Forest Serv.*, 227

F.3d 1170, 1177 (9th Cir. 2000) ("NEPA exists to ensure a process, not particular substantive results"). Plaintiffs reiterate that they disagree with the final policy outcome in their reply brief. (Pl.'s Gov't Reply at 5 ("Fundamentally, however, this is a problem with intensity, not the type of use.").) Defendants are required only to conform to the CDCA Plan, which in turn, permits this facility if BLM satisfies NEPA. *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007) ("Once a land use plan is developed, "[a]ll future resource management authorizations and actions . . . shall conform to the approved plan." (quoting 43 C.F.R. § 1610.5–3(a))).

The Court has already granted summary judgment to Defendants on Plaintiffs' NEPA claims. Because BLM satisfied NEPA requirements and the siting of the ISEGS conforms to the CDCA Plan, BLM is in compliance with the FLPMA. Therefore, Defendants are entitled to summary judgment on Plaintiffs' FLPMA claim.

C. Plaintiffs' NHPA Claims

In the MTD Order, the Court dismissed Plaintiffs' NHPA claims with leave to amend because Plaintiffs did not allege that they represent any federally recognized Indian tribe, and thus the requirement under the NHPA for government-to-government consultation was not triggered. MTD Order at 6. In their motion, Plaintiffs do not reassert a claim for government-to-government consultation rights. Instead, they argue that Plaintiff Smith was an interested member of the public and, by failing to engage with him, BLM violated the NHPA.

Section 106 of the NHPA requires federal agencies to "take into account the effect of [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]." 16 U.S.C. § 470f. It is a "'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (quoting *Muckleshoot Indian Tribe*, 177 F.3d at 805.

Under section 106, federal agencies must engage in consultation with "other parties with an interest in the effects of the undertaking on historic properties." 36 C.F.R.

§ 800.1(a). The participants in this consultation effort include the agency proposing to undertake the federal action, the Advisory Council on Historic Preservation, and "consulting parties." *Id.* at § 800.2. The "consulting parties" *must* include the State Historic Preservation Officer ("SHPO") and Indian tribes. *Id.* at § 800.2(c)(1)-(2). Other parties – representatives of local government and the applicant for federal approval – are "*entitled*" to participate in the consultation process. *Id.* at § 800.2(c)(3)-(4). Other "individuals and organizations with a demonstrated interest in the undertaking *may* participate as consulting parties," by written request, but their participation is subject to the discretion of the agency. *Id.* at §§ 800.2(c)(5) & 800.3(f)(3) (emphasis added).

Smith contacted BLM in person expressing concern over the ISEGS and other solar projects in the area. A.R. at 10002-05. He did not request in writing, however, to be a consulting party, and thus BLM had no obligation to consult with him specifically. Plaintiffs nonetheless argue that BLM violated the regulation requiring that it "seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." 36 C.F.R. § 800.4(a)(3). The words "as appropriate" demonstrate that the extent of information gathering in this regulation is committed to the discretion of the agency.

BLM performed significant public outreach in an attempt to acquire information from interested members of the public. "BLM solicited interested members of the public and agencies through the NEPA scoping process." FEIS at 2-18. "Following the scoping period, the Energy Commission and BLM held additional joint Issue Resolution workshops which were announced and made available to the public." *Id.* "The BLM public participation process included soliciting comments regarding the scope of the analysis from other government agencies, the public, and non-governmental organizations." *Id.* "During the public comment period, a variety of activities occurred in which BLM received additional information regarding the proposed project and

potential alternatives, impacts, and mitigation measures," including receipt of comments, public testimony, workshops, and submission of additional technical reports, project design information, impact analyses, and applicant-proposed mitigation measures by BrightSource." *Id.* at 2-18 to 2-19. Plaintiffs have cited no legal authority which suggests that because BLM did not engage Smith in particular, they have failed to seek information appropriately, as required by regulation. Accordingly, Defendants are entitled to summary judgment on Plaintiff's NHPA claims.

D. Plaintiffs' RFRA Claims

Plaintiffs next argue that the construction of the ISEGS violates RFRA, because it subjects them to criminal trespass sanctions for using the land that is required for their religious rituals. To establish a *prima facie* claim under RFRA, a plaintiff must allege that a government action "substantially burdens" the plaintiff's exercise of religion. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (*en banc*). A "substantial burden" is imposed when individuals are either (1) forced to choose between following the tenets of their religion and receiving a governmental benefit or (2) are coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation*, 535 F.3d at 1069-70.

This Court previously addressed the RFRA claim in the MTD Order:

> The Ninth Circuit has held that interference with religious practice is not a substantial burden. *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1214 (9th Cir. 2008). In *Snoqualmie Indian Tribe*, the tribe alleged that a hydroelectric project deprived the tribe of access to a waterfall for vision quests, eliminated the required mist, and altered the sacred water cycle. *Id.* at 1213. Despite these allegations, the Ninth Circuit held that "[t]he Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to

> whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch–22 situation: exercise of their religion under fear of civil or criminal sanction." *Id*. at 1214.
>
> Here, Plaintiffs allege that the Ivanpah project will destroy or make inaccessible sacred objects and stops along the Salt Song Trails, a course for their religious pilgrimages. Yet, Plaintiffs fail to allege facts showing that they were either forced to choose between benefits and their religion or coerced to act contrary to their beliefs.

MTD Order at 8. The Court then dismissed the claim with leave to amend.

Plaintiffs amended the complaint to allege that they are being put to a choice between practicing their religion and being subject to criminal trespass. Under *Navajo Nation*, however, denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim, regardless of how that denial of access is accomplished. 535 F.3d at 1063. Though Native Americans may have some rights to use sacred sites, "those rights do not divest the Government of its right to use what is, after all, its land." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453, 108 S. Ct. 1319, 1327, 99 L. Ed. 2d 534 (1988). Thus, sad as it may be that access to some parts of the Salt Song Trails will be impaired, Plaintiffs face no civil or criminal sanction for practicing their religion—the choice to use those parts of the Salt Song Trails is simply not available to them.

Plaintiffs additionally allege that they are being denied a government benefit conferred by the CDCA – namely, access to the land. Denial of a government benefit, however, only implicates RFRA if the denial is a response to Plaintiffs' religious

practices or, in other words, if a governmental benefit were "conditioned . . . upon conduct that would violate the Plaintiffs' religious beliefs." *Navajo Nation*, 535 F.3d at 1063. Yet, Plaintiffs have not provided any evidence that the ISEGS is being built *in response to* Plaintiffs' religious practices. Thus, Defendants are entitled to summary judgment on Plaintiffs' RFRA claim.

E. Plaintiffs' EPAct and ARRA Claims

Plaintiffs further argue that DOE violated the EPAct and ARRA by issuing loan guarantees to Brightsource pursuant to section 1705 of Title XVII of the EPAct without first promulgating regulations and providing a notice and comment period. Defendants respond first that Plaintiffs do not have constitutional or prudential standing to make this claim and, second, that additional regulations were not required under section 1705.

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1147, 185 L. Ed. 2d 264 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. ___, 130 S. Ct. 2743, 2752, 177 L. Ed. 2d 461 (2010)). If a plaintiff alleges a procedural injury, the causation and redressability requirements are somewhat more relaxed, but the injury must still be tied to some concrete interest. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008) ("A showing of procedural injury lessens a plaintiff's burden on the last two prongs of the Article III standing inquiry, causation and redressibility." (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S. Ct. 1142, 1151, 173 L. Ed. 2d 1 (2009) ("Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'" (emphasis in original; quoting *Lujan* 504 U.S. at 572)).

An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests at

stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Kraayenbrink*, 632 F.3d at 482-83 (quoting *Laidlaw Envtl. Servs.*, 528 U.S. at 181). In the MTD Order, the Court found that all seven individual plaintiffs had alleged injury for standing purposes because they use the land for aesthetic, recreational, and religious purposes. (MTD Order at 4.) The Court also found that because Figueroa is a member of both CARE and La Cuna (Figueroa Decl. ¶¶ 2-3), each organization had adequately demonstrated the first element of associational standing. (*Id.*) As of the date of the MTD Order, CARE had adequately alleged the second element of associational standing, but La Cuna had not. (*Id.*) Unlike the Second Amended Complaint, however, the TAC alleges that La Cuna "protect[s] geoglyphs and other sacred sites in Southern California, Nevada, and Arizona." (TAC ¶ 1.)

The evidence before this Court states that La Cuna "advocates for the preservation of . . . physical sites and the protection of culturally and religiously significant plant and animal species," with no reference to geographic limitations. (Figueroa Decl. ¶ 2; Smith Decl. ¶ 3). Therefore, unlike in the MTD Order, the Court finds that the protection of the site of the Ivanpah Project is germane to La Cuna's interests. Finally, the Court previously found that the third element was satisfied because Plaintiffs seek only declaratory and injunctive relief. (MTD Order at 4.) Therefore, each Plaintiff has adequately alleged injury.

Because Plaintiffs allege a procedural injury, the causation and redressability requirements are more relaxed. Plaintiffs need not allege that their ultimate injury – the building of the ISEGS or issuance of the loan guarantee – would not have occurred if they were allowed to comment, but merely that their comment could have reduced the probability of such an outcome. *Salmon Spawning*, 545 F.3d at 1226 ("Plaintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.'" (quoting *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005) (emphasis in original), *overruled on other grounds by Nat'l*

Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007))).

Given the opportunity, CARE would have advocated for prioritizing other solar projects and would have submitted evidence in support of their position. (Boyd Decl. ¶ 8.) Regardless of how persuasive this evidence would have been to DOE, this proposed comment ties the denial of a notice and comment procedure to CARE's injury. Thus, the element of causation is present with respect to CARE and its members. On the other hand, there is no evidence that La Cuna or any of the other individual plaintiffs would have made any comment related to energy or loan guarantees. Their comments all related to the religious and cultural importance of the site. (Figueroa Decl. ¶¶ 7-12; Smith Decl. ¶¶ 5-9; Van Fleet Dec; ¶¶ 8-11.) Thus, absent causation, La Cuna and the individual plaintiffs, other than Figueroa and Boyd, do not have standing to make this claim.

Nor do CARE, Boyd, and Figueroa have standing, as this Court is without the ability to redress their procedural injury. DOE's authority to issue loan guarantees under section 1705 and, consequently, its ability to issue regulations related to loan guarantees under that section, expired on September 30, 2011. 42 U.S.C. § 16516(e). Even if the Court were to find that section 1705 required DOE to issue regulations, it could not now order DOE to undertake actions which it is without statutory authority to perform. The Court cannot simply order that work on the project be halted, because that does not address the procedural injury. Plaintiffs would still not have an opportunity to comment, with the only difference being that the project would remain half-completed. As the Court is unable to fashion a remedy due to expiration of the statute, Plaintiffs do not have Article III standing to make this claim.

Because none of the Plaintiffs have standing, the Court does not address either Defendants' arguments regarding prudential standing or mootness, or the merits of the underlying EPAct and ARRA claims. Plaintiffs' EPAct and ARRA claims are dismissed without prejudice.

V.

CONCLUSION

In light of the foregoing, Plaintiffs' motion for summary judgment is **DENIED** and Defendants' and Intervenor's motions for summary judgment are **GRANTED**, with the exception of the EPAct and ARRA claims, which are **DISMISSED** without prejudice.

IT IS SO ORDERED.

DATED: August 16, 2013

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE