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10 **UNITED STATES DISTRICT COURT**
 11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
 12 **WESTERN DIVISION**

13 CENTER FOR BIOLOGICAL
DIVERSITY, *et al.*,

14 Plaintiffs,

15 v.

17 U.S. BUREAU OF LAND
MANAGEMENT, *et al.*,

18 Defendants,

19 and

20 CADIZ, INC., *et al.*,

22 Defendant-Intervenors
23

Case No. 2:21-cv-02507-GW-AS

**DEFENDANTS' NOTICE OF
 MOTION FOR VOLUNTARY
 REMAND AND MEMORANDUM
 IN SUPPORT**

Hearing Date: March 24, 2021

Time: 8:30 am

Courtroom: 9D

Judge: Honorable George H. Wu

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MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
22
23
24
25
26
27
28

INTRODUCTION 1

BACKGROUND 1

 I. Factual Background..... 1

 II. Legal Background 7

 A. The Federal Land Policy and Management Act 7

 B. Mineral Leasing Act..... 7

 C. National Environmental Policy Act..... 8

 D. National Historic Preservation Act 9

APPLICABLE LEGAL STANDARD 11

ARGUMENT 12

 I. A Remand of BLM’s Right-of-Way Decision Is Appropriate... 12

 A. BLM Did Not Comply With NEPA Prior to the Approval
 of Right-of-Way Grants to Cadiz..... 12

 B. BLM Did Not Comply With Section 106 of the NHPA
 Prior to the Approval of Right-of-Way Grants to Cadiz . 16

 C. BLM Lacked Sufficient Information to Determine
 Whether Cadiz’s Use of the Rights-of-Way Complied
 With FLPMA 20

 II. The Court Should Vacate BLM’s Decision Granting Rights-of-
 Way to Cadiz..... 21

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

Alaska Ctr. for Envt. v. U.S. Forest Serv.,
 189 F.3d 851 (9th Cir. 1999)..... 13, 14

Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,
 988 F.2d 146 (D.C.Cir.1993)12

Cal. Cmty's. Against Toxics v. U.S. Envtl. Prot. Agency,
 688 F.3d 989 (9th Cir. 2012)..... 11, 12, 21

California v. Norton,
 311 F.3d 1162 (9th Cir. 2002).....15

Coast Rivers All. v. U.S. Dep’t of the Interior,
 No. 1:16-cv-307-LJO-MJS, 2016 WL 8673038 (E.D. Cal. Dec. 16, 2016)11

Crutchfield v. U.S. Army Corps of Eng’rs,
 154 F. Supp. 2d 878 (E.D. Va. 2001).....19

Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.,
 No. 2:14-cv-00226-APG-VCF, 2017 WL 3667700 (D. Nev. Aug. 23, 2017)15

Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.,
 No. CV 17-8587-GW(ASx), 2019 WL 2635587 (June 20, 2019).....2

Fla. Power & Light Co. v. Lorion,
 470 U.S. 729 (1985)21

Idaho Farm Bureau Fed’n v. Babbitt,
 58 F.3d 1392 (9th Cir.1995).....12

Jones v. Gordon,
 793 F.2d 821 (9th Cir. 1986).....15

Klamath–Siskiyou Wildlands Ctr. v. Nat’l Oceanic and Atmospheric Admin.,
 109 F. Supp. 3d 1238 (N.D. Cal. 2015) 21, 22

Lute v. Singer Co.,
 678 F.2d 844 (9th Cir.1982).....11

Muckleshoot Indian Tribe v. U.S. Forest Serv.,
 177 F.3d 800 (9th Cir. 1999)..... 9, 10

1 *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior,*
 2 275 F. Supp. 2d 1136 (C.D. Cal. 2002).....11
 3 *Nat'l Family Farm Coal. v. U.S. Env'tl. Prot. Agency,*
 4 960 F.3d 1120 (9th Cir. 2020)..... 21, 22
 5 *Native Ecosystems Council v. Dombeck,*
 6 304 F.3d 886 (9th Cir. 2002).....19
 7 *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.,*
 8 56 F.3d 1060 (9th Cir. 1995).....19
 9 *Pollinator Stewardship Council v. U.S. Env'tl. Prot. Agency,*
 10 806 F.3d 520 (9th Cir. 2015).....23
 11 *Robertson v. Methow Valley Citizens Council,*
 12 490 U.S. 332 (1989)8
 13 *Rusty Coal Blackwater v. Sec. of the Interior,*
 14 No. 3:14-cv-244-LRH-VPC, 2015 WL 506475 (D. Nev. Feb. 5, 2015) 11, 16
 15 *San Luis & Delta-Mendota Water Auth. v. Jewell,*
 16 747 F.3d 581 (9th Cir. 2014).....21
 17 *Save Our Heritage v. Federal Aviation Administration,*
 18 269 F.3d 49 (1st Cir. 2001)18
 19 *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Army Corps of*
 20 *Eng'rs,*
 21 No. 3:11-CV-03026-RAL, 2016 WL 5478428 (D.S.D. Sept. 29, 2016)18
 22 *SKF USA Inc. v. United States,*
 23 254 F.3d 1022 (Fed. Cir. 2001)11
 24 *Summit Lake Paiute Tribe of Nev. v. U.S. Bureau of Land Mgmt.,*
 25 496 F. App'x. 712 (9th Cir. 2012)..... 10, 11
 26 *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior,*
 27 608 F.3d 592 (9th Cir. 2010)..... 17, 18
 28 *Trujillo v. Gen. Elec. Co.,*
 621 F.2d 1084 (10th Cir.1980).....11

Statutes

30 U.S.C. § 185(a)7
 42 U.S.C. § 4332(2)(C).....8

1
2
3
4
5
6
7
8
9
10
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12
13
14
15
16
17
18
19
20
22
23
24
25
26
27
28

43 U.S.C. § 1701(a)(7).....7

54 U.S.C. § 300320..... 10, 17, 19

54 U.S.C. § 3041019

54 U.S.C. § 306108..... 9, 17

Regulations

36 C.F.R. § 800.16(d)10

36 C.F.R. § 800.16(l)(1).....10

36 C.F.R. § 800.3(a).....17

36 C.F.R. § 800.3(a)(1)..... 16, 18

36 C.F.R. § 800.4(a)(1).....10

36 C.F.R. § 800.4(d)(2).....10

36 C.F.R. §§ 800.4-800.6.....17

40 C.F.R. § 1501.38

40 C.F.R. § 1501.413

43 C.F.R. § 2885.12(a).....7

43 C.F.R. § 46.205(c).....13

43 C.F.R. § 46.2109

43 C.F.R. § 46.215(f) 13, 15

43 C.F.R. §§ 2804.25(c).....16

Other Authorities

51 Fed. Reg. 15,618 (Apr. 25, 1986)8

65 Fed. Reg. 77,69 (Dec. 12, 2000).....19

85 Fed. Reg. 43,304 (July 16, 2020).....8

1 **INTRODUCTION**

2 Defendants request that the Court remand the U.S. Bureau of Land
3 Management’s (“BLM”) issuance of right-of-way grants to Cadiz Real Estate, LLC
4 (“Cadiz”) to allow it to operate a pipeline to transport water between Cadiz and
5 Wheeler Ridge, California. The potential impacts of granting such a right-of-way
6 were not properly evaluated in accordance with the National Environmental Policy
7 Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). Due to the
8 lack of analysis, the agency does not know the source of the water that will be
9 transported through the pipeline and therefore could not have analyzed the
10 potential impacts on the environment or historic properties of drawing down the
11 water at its source. Cadiz did not provide specific information about its plans, and
12 the agency, nevertheless, proceeded to grant a right-of-way without knowing either
13 the specifics of Cadiz’s plans or evaluating the potential impacts of Cadiz’s
14 operations. The resulting decision violated NEPA and the NHPA. Defendants
15 further request that BLM’s decision and the underlying right-of-way grants be
16 vacated due to the seriousness of the agency’s legal errors.

17 **BACKGROUND**

18 **I. Factual Background**

19 For more than twenty years, Cadiz has pursued a project to extract water
20 from an aquifer underlying its land in southeastern California and transport it to
22 urban areas in and around Los Angeles. Cadiz’s property is located in the vicinity
23 of Mojave National Preserve and surrounded by Mojave Trails National
24 Monument. Cadiz2020-02384. In order to transport the water to urban water
25 districts, Cadiz must cross federal lands. Two avenues are available: a southern
26 route connecting the Cadiz Project to the Colorado River Aqueduct near Rice,
27 California, or a northern route extending westward to the California Aqueduct near
28 Wheeler Ridge, California. Cadiz2020-02449-50.

1 In order to pursue the southern route, Cadiz leased a portion of a railroad
2 right-of-way from the Arizona California Railroad, which had been granted under
3 the General Railroad Right-of-Way Act of 1875 (“1875 Act”). *See Ctr. for*
4 *Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. CV 17-8587-GW(ASx),
5 2019 WL 2635587, at *1 (June 20, 2019). Cadiz asserted that, because the right-
6 of-way for the railroad right-of-way was granted under the 1875 Act and its use of
7 the line would further a railroad purpose, it did not need to seek permission from
8 BLM to use the right-of-way for a water pipeline. *Id.* at *3. BLM agreed in 2017,
9 and determined that Cadiz had shown that its proposed water pipeline would serve
10 a railroad purpose. *Id.* at *6-7. BLM’s determination was challenged, and in June
11 2019, this Court held that the determination was arbitrary and capricious and
12 remanded the matter to the agency. *Id.* at *31-32. In February 2020, BLM
13 reaffirmed its determination that Cadiz’s water pipeline would serve a railroad
14 purpose, but Cadiz has not built a pipeline along that route and that determination
15 is not at issue here.¹

16 Cadiz also pursued a potential northern route for the transport of water,
17 which is at issue here. In May 2020, Cadiz approached BLM about the potential
18 conversion of an existing right of way grant for a natural gas pipeline to use for
19 water transport. Cadiz2020-02444. That pipeline, the rights to which Cadiz
20 purchased from the El Paso Natural Gas Company (“EPNG”), runs from Cadiz,
22 California to Wheeler Ridge, California. *Id.*; *see also* Cadiz2020-02450. Cadiz
23 informed BLM that it planned to use the existing pipeline, which previously had
24 been used to transport natural gas, to transport water. Cadiz2020-02444.
25 According to Cadiz, the pipeline “has the capacity to transport approximately
26

27 ¹ It is Defendants’ understanding that a legal dispute with the State of California
28 has prevented Cadiz from moving forward along the southern route.

1 30,000 [acre-feet per year (“AFY”)] between Palmdale and Barstow and 25,000
2 AFY between Barstow and Cadiz.” *Id.* Cadiz further explained that the “[u]se of
3 the pipeline for water transport would facilitate groundwater storage in adjacent
4 basins,” and would diversify the “sources of water for communities that presently
5 lack access to reliable water sources, including state-designated disadvantaged
6 communities.” *Id.* Cadiz also submitted maps showing the existing EPNG line
7 and the potential route of the water pipeline in relation to existing aqueducts.
8 Cadiz20202449-50.²

9 In June 2020, BLM sent Cadiz some initial questions about their planned
10 project. Cadiz2020-02429. Cadiz responded on July 20, 2020, but provided few
11 details about its plans to transport water through the pipeline. Cadiz2020-02417.
12 It stated that its proposed plan was “a separate project that is not part of the Cadiz
13 Water Project that has been planned to deliver water from Cadiz’s holdings to the
14 Colorado River Aqueduct for delivery to communities in Southern California.” *Id.*
15 Instead, it asserted that its plans with respect to the EPNG line involved
16 transporting water from Cadiz to Wheeler Ridge, but stated that the “project [was]
17 in the early stages.” *Id.* Further, Cadiz explained that, if it obtained approval from
18 BLM to use the pipeline for transporting water, it would seek to enter into
19 contracts with water providers and water users for the transport of water. *Id.*
20 Cadiz did not explain where the water would come from.

22
23
24 ² In a 2018 filing with the Securities and Exchange Commission, Cadiz stated that
25 it currently owned a 96-mile abandoned oil and gas line extending from Cadiz to
26 Barstow, California, and that it planned to acquire an additional 124-mile segment
27 from Barstow to Wheeler Ridge, California, which would allow Cadiz to “transport
28 between 18,000 and 30,000 acre-feet of water per year between the Water Project
area and the Central and Northern California water transportation networks.”
Cadiz2020-01474.

1 On July 30, 2020, Cadiz submitted an application to BLM for a right-of-
2 way. Cadiz2020-02382. Cadiz sought approval of the assignment of a right-of-
3 way granted to EPNG for a right-of-way spanning a 216-mile route from Cadiz to
4 Wheeler Ridge and amendment of the right-of-way grant to allow Cadiz to use the
5 pipeline for water transport. *Id.* The application stated that Cadiz “owns 45,000
6 acres of land and water rights in eastern San Berna[r]dino County, California.” *Id.*
7 The application further stated that the conversion of the oil and gas pipeline to a
8 water pipeline would provide an alternative source of water to water providers and
9 particularly rural areas and disadvantage communities. Cadiz2020-02383. It also
10 provided a map of the “Cadiz Northern Pipeline,” which showed a route extending
11 from Cadiz to Wheeler Ridge. Cadiz2020-02384. Attached to the application was
12 a “Plan of Development,” which stated, “Water will be transported through the
13 pipeline to serve water conveyance needs of various municipal, agricultural, and
14 industrial interests along the route of the pipeline.” Cadiz2020-02396. No other
15 details about Cadiz’s plans to use the pipeline for water transport were provided.

16 On September 23, 2020, Cadiz sent an e-mail to BLM regarding the
17 assignment of the EPNG right-of-way. Cadiz2020-02259. In the e-mail, Cadiz
18 advised BLM that the closing on the agreement regarding the EPNG pipeline and
19 right-of-way was “predicated on BLM’s approval of the assignment of the ROW to
20 Cadiz.” *Id.* In a subsequent e-mail on October 12, 2020, Cadiz offered input on
22 potential options for processing its right-of-way application: under one option
23 BLM would process the application all at once and amend the existing right-of-
24 way, and in the other, BLM would take two separate actions—reassigning the
25 existing right-of-way for the natural gas pipeline and granting a new right-of-way
26 under the Federal Land Policy and Management Act (“FLPMA”) for a water
27 pipeline. Cadiz2020-02184-86. Cadiz emphasized the need to process the
28 application quickly. Cadiz2020-02185. After subsequent meetings with Cadiz,

1 BLM committed to completing a decision regarding the right-of-way by the end of
2 December 2020. Cadiz2020-02112.

3 BLM chose to process the application in two steps: the reassignment of the
4 existing Mineral Leasing Act (“MLA”) right-of-way for oil and gas transport and
5 the grant of a new FLPMA right-of-way for water transport. On December 11,
6 2020, BLM prepared two categorical exclusions (“CX”), one for each step. *See*
7 Cadiz2020-00583, Cadiz2020-00650. For the MLA right-of-way, BLM relied on a
8 CX specified in the U.S. Department of the Interior’s manual, 516 DM 11.9 E.(9),
9 which applies to renewals of rights-of-way “where no additional rights are
10 conveyed beyond those granted by the original authorizations.” Cadiz2020-00584.
11 For the FLPMA right-of-way, BLM relied on the CX in 516 DM 11.9 E.(12),
12 which applies to “[g]rants of right-of-way wholly within the boundaries of other
13 compatibly developed rights-of-way.” Cadiz2020-00650. For each CX, BLM
14 concluded that there were no extraordinary circumstances associated with the
15 actions that would require the preparation of an environmental analysis.
16 Cadiz2020-00587; Cadiz2020-00654.

17 As for NHPA compliance, BLM determined that both right-of-way grants
18 fell within Exemption B8 of the California Protocol Agreement (“PA”),³ meaning
19 that a separate review of potential adverse effects on historic properties pursuant to
20 section 106 of the NHPA was not required. Cadiz2020-01260-61 (MLA right-of-
22 way); Cadiz2020-00950-51 (FLPMA right-of-way). On December 10, 2020, the
23

24
25 ³ The California PA serves as the alternative process by which the BLM in
26 California satisfies its responsibilities under section 106 of the NHPA, consistent
27 with the National Programmatic Agreement between the BLM, Advisory Council
28 on Historic Preservation (“ACHP”) and the National Conference of State Historic
Preservation Officers. Cadiz2020-00950 n.1. The California PA is attached as Ex.
1.

1 Native American Land Conservancy and the National Parks Conservation
2 Association (collectively, “NALC”), both of whom are now Plaintiffs, submitted a
3 formal objection to the BLM’s use of Exemption B8 in accordance with section
4 8.1(P) of the California PA, which triggered a consultation process with the
5 California State Historic Preservation Officer (“SHPO”). Cadiz2020-00344; *see*
6 *also* California PA at 16-17. NALC asserted that Exemption B8 was inapplicable
7 because BLM did not consider potential impacts to historic properties associated
8 with Cadiz’s water extraction project as directly associated with the right-of-way
9 authorization. Cadiz2020-00345. On December 15, 2020, the California SHPO
10 also sent BLM an e-mail in response to NALC’s objections. Cadiz2020-00182.

11 On December 21, 2020, BLM responded to the California SHPO’s concerns
12 and NALC’s objection, explaining that it was no longer relying on Exemption B8
13 and was instead relying on the applicable regulations at 36 C.F.R. pt. 800,
14 consistent with Stipulation 5.1(A) of the California PA. Cadiz2020-00195 (letter
15 to SHPO); Cadiz2020-00193 (letter to NALC). BLM concluded that the right-of-
16 way had “independent utility,” *i.e.*, was not related to any other authorization for
17 the use of public or private land and, specifically, was “not linked to the use of the
18 groundwater under private lands held by Cadiz.” *Id.*

19 On December 21, 2020, BLM also issued a decision transferring a portion of
20 the EPNG MLA right-of-way to Cadiz and simultaneously granting a new,
21 coextensive FLPMA right-of-way to Cadiz. Cadiz2020-00001-37. The rights-of-
22 way cover approximately 58 and 53 miles of discontinuous federal land,
23 respectively, between Cadiz and Wheeler Ridge, California. Cadiz2020-00021
24 (MLA grant); Cadiz2020-00005 (FLPMA grant); *see also* Cadiz2020-02449
25 (indicating the approximate location of the rights-of-way); Cadiz2020-01140-64
26 (plats of the land crossed by the rights-of-way).
27
28

1 **II. Legal Background**

2 **A. The Federal Land Policy and Management Act**

3 Pursuant to FLPMA, BLM is charged with managing federal public lands for
4 a variety of uses while protecting environmental, ecological, and recreational
5 values. *See* 43 U.S.C. § 1701(a)(7). Under Title V of FLPMA, BLM may grant
6 rights-of-way across public land for various uses, including pipelines for the
7 transportation of water. *Id.* § 1761(a)(1). An entity seeking a right-of-way must
8 submit an application disclosing the intended use of the right-of-way, plans, and
9 any other information deemed necessary by the Secretary. *Id.* § 1761(b)(1). If
10 approved, a right-of-way grant should include terms and conditions ensuring that
11 that applicant minimizes potential environmental impacts and complies with
12 relevant federal and state air and water quality standards, among other things. *Id.* §
13 1765.

14 **B. Mineral Leasing Act**

15 Under the Mineral Leasing Act, BLM may grant rights-of-way across federal
16 lands for pipelines to transport oil or gas. 30 U.S.C. § 185(a); 43 C.F.R. pt. 2880.
17 BLM may grant the right-of-way so long as the applicant possesses the requisite
18 qualifications and BLM determines that the right-of-way is consistent with the
19 purposes of the affected federal land. 30 U.S.C. §§ 185(a), (b)(1). A grant
20 conveys to the grantee only those rights expressly contained in the grant and
22 includes, among other things, the right to “[u]se the described lands to construct,
23 operate, maintain, and terminate facilities within the right-of-way or TCP
24 [temporary use permit] area for authorized purposes under the terms and conditions
25 of the grant or TUP,” and “[a]ssign the grant or TUP to another, provided that [the
26 grantee] obtain the BLM’s prior written approval, unless [the grantee’s] grant or
27 TUP states that such approval is unnecessary.” 43 C.F.R. § 2885.12(a), (e). A
28 proposed assignee of a grant “must file an application and satisfy the same

1 procedures and standards as for a new grant or TUP.” *Id.* § 2887.11(b). Until
2 approved in writing, BLM will not recognize an assignment. *Id.* § 2887.11(e).

3 **C. National Environmental Policy Act**

4 NEPA serves the dual purpose of informing agency decision-makers of the
5 significant environmental effects of proposed major federal actions and ensuring
6 that relevant information is made available to the public so that they “may also
7 play a role in both the decisionmaking process and the implementation of that
8 decision.” *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349
9 (1989). To meet the procedural goals of the statute, NEPA requires that an agency
10 prepare a comprehensive EIS for “major Federal actions significantly affecting the
11 quality of the human environment.” 42 U.S.C. § 4332(2)(C).

12 An EIS, however, is not required in every instance. In accordance with the
13 Council on Environmental Quality’s (“CEQ”) regulations implementing NEPA, an
14 agency should first determine the appropriate level of environmental review. *See*
15 40 C.F.R. § 1501.3.⁴ If an action typically would not have significant
16 environmental effects, then it may be categorically excluded from the requirement
17 to prepare an EIS. *Id.* § 1501.3(a)(1). Each agency shall promulgate its own
18 regulations regarding the types of actions subject to categorical exclusions (“CX”).
19 *Id.* § 1501.4(a). If a proposed action falls within a CX identified by the agency’s
20 regulations, then the agency must evaluate whether extraordinary circumstances
21

22
23
24 ⁴ CEQ promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55,978
25 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986,
26 51 Fed. Reg. 15,618 (Apr. 25, 1986). In 2020, CEQ published a final rule
27 substantially revising the 1978 regulations. 85 Fed. Reg. 43,304 (July 16, 2020).
28 The NEPA review challenged in this case was conducted pursuant to the 2020
regulations, and therefore the citations to CEQ’s regulations in this brief refer to
those regulations.

1 are present. *Id.* § 1501.4(b)(1). If extraordinary circumstances are present, then
2 the agency may not rely on a CX and instead must prepare an environmental
3 assessment (“EA”) or an EIS. *Id.* § 1501.4(b)(2).

4 The Department of the Interior’s NEPA regulations designate categories of
5 actions subject to categorical exclusions. 43 C.F.R. § 46.210. Interior’s
6 regulations provide for a review of extraordinary circumstances. *Id.* § 46.215.
7 Categorical exclusions applicable to BLM are set forth in Interior’s Departmental
8 Manual (“DM”) at 516 DM 11.9.⁵

9 **D. National Historic Preservation Act**

10 Section 106 of the NHPA requires federal agencies to consider the potential
11 effects of federal “undertakings” on historic properties. 54 U.S.C. § 306108.
12 Section 106 requires BLM to “take into account the effect of the undertaking on
13 any historic property.” *Id.* Section 106 of the NHPA “is a stop, look, and listen
14 provision that requires each federal agency to consider the effects of its programs.”
15 *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).
16 The ACHP administers the NHPA, *see* 54 U.S.C. § 304101, and has promulgated
17 regulations to govern federal agency compliance with section 106, codified at 36
18 C.F.R. Part 800.

19 The ACHP’s regulations direct agencies to determine whether a project
20 qualifies as an “undertaking” and is a “type of activity that has the potential to
22 cause effects on historic properties.” *Id.* § 800.3(a).⁶ The NHPA broadly defines
23

24 ⁵ The relevant manual section is attached as Ex. 2.

25 ⁶ The regulations define historic properties as “any prehistoric or historic district,
26 site, building, structure, or object included in, or eligible for inclusion in, the
27 National Register of Historic Places maintained by the Secretary of the Interior”
28 and includes “properties of traditional religious and cultural importance to an
Indian tribe or Native Hawaiian organization that meet the National Register

1 “undertaking” to include “a project, activity, or program funded in whole or in part
2 under the direct or indirect jurisdiction of a Federal agency, including – (1) those
3 carried out by or on behalf of the agency; . . . (3) those requiring a Federal permit,
4 license, or approval” 54 U.S.C. § 300320. If an undertaking is the type of
5 activity with the potential to cause effects on historic properties, then the agency
6 must consult with the SHPO and other consulting parties, including
7 “[d]etermin[ing] and document[ing] the area of potential effects.” 36 C.F.R. §
8 800.4(a)(1); *see also id.* § 800.16(d). The agency also must “consult with any
9 Indian tribe or Native Hawaiian organization that attaches religious and cultural
10 significance to historic properties that may be affected by an undertaking,” *id.* §
11 800.2(c)(2)(ii), and must provide such tribes or organizations a reasonable
12 opportunity to identify historic properties and provide input regarding potential
13 adverse effects on such properties. *Id.* § 800.2(c)(2)(ii)(A).

14 An agency must “make a reasonable and good faith effort” to identify
15 historic properties within the undertaking’s area of potential effects.⁷ *Id.* §
16 800.4(b)(1); *see also Summit Lake Paiute Tribe of Nev. v. U.S. Bureau of Land*
17 *Mgmt.*, 496 F. App’x. 712 (9th Cir. 2012). If the agency finds that historic
18 properties may be affected, it must further consult with all consulting parties. 36
19 C.F.R. § 800.4(d)(2). The agency then applies the regulatory criteria to determine
20 if there is an adverse effect, *id.* § 800.5(a), and if so, engages in further
22 consultation regarding the resolution of any such adverse effects, *id.* § 800.6. In
23 certain circumstances, an agency may negotiate a programmatic agreement with
24 _____
25 criteria.” 36 C.F.R. § 800.16(d)(1).

26 ⁷ The regulations define an area of potential effects to mean “the geographic area
27 or areas within which an undertaking may directly or indirectly cause alterations in
28 the character or use of historic properties, if any such properties exist.” 36 C.F.R.
§ 800.16(d).

1 the ACHP for compliance with section 106. *Id.* § 800.14(b). Where a
2 programmatic agreement exists for an agency program, compliance with the
3 agreement serves as compliance with the statute. *Id.* § 800.14(b)(2)(iii).

4 **APPLICABLE LEGAL STANDARD**

5 Courts have long recognized the propriety of voluntarily remanding a
6 challenged agency action without judicial consideration of the merits. “A federal
7 agency may request remand in order to reconsider its initial action.” *Cal. Cmty.*
8 *Against Toxics v. U.S. Env'tl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012)
9 (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)).
10 “Voluntary remand is consistent with the principle that “[a]dministrative agencies
11 have an inherent authority to reconsider their own decisions, since the power to
12 decide in the first instance carries with it the power to reconsider.” *Nat. Res. Def.*
13 *Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal.
14 2002) (quoting *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir.1980));
15 *see also Lute v. Singer Co.*, 678 F.2d 844, 846 (9th Cir.1982).

16 In determining whether to grant a voluntary remand, courts within the Ninth
17 Circuit have looked to the Federal Circuit’s decision in *SKF USA* for guidance.
18 *See, e.g., Cal. Cmty. Against Toxics*, 688 F.3d at 992; *N. Coast Rivers All. v. U.S.*
19 *Dep't of the Interior*, No. 1:16-cv-307-LJO-MJS, 2016 WL 8673038, at *3 (E.D.
20 Cal. Dec. 16, 2016). In *SKF USA*, the court indicated that, when an agency action
22 is challenged, “the agency may request a remand, without confessing error, to
23 reconsider its previous position” or “the agency may request a remand because it
24 believes that its original decision was incorrect on the merits and it wishes to
25 change the result.” *N. Coast Rivers All.*, 2016 WL 8673038, at *3 (quoting *SKF*
26 *USA*, 254 F.3d at 1027-28). “Generally, courts only refuse voluntarily requested
27 remand when the agency's request is frivolous or made in bad faith.” *Cal. Cmty.*
28 *Against Toxics*, 688 F.3d at 992; *see also Rusty Coal Blackwater v. Sec. of the*

1 *Interior*, No. 3:14-cv-244-LRH-VPC, 2015 WL 506475, at *2 (D. Nev. Feb. 5,
2 2015).

3 If a court grants a voluntary remand, it should then decide whether the
4 agency's action should be vacated during the remand. "[W]hen equity demands,
5 the [agency's action] can be left in place while the agency follows the necessary
6 procedures" to correct its action." *Cal. Communities Against Toxics*, 688 F.3d at
7 992 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th
8 Cir.1995)). "Whether agency action should be vacated depends on how serious the
9 agency's errors are "and the disruptive consequences of an interim change that
10 may itself be changed." *Cal. Communities Against Toxics*, 688 F.3d at 992
11 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146,
12 150-51 (D.C.Cir.1993) (internal quotation marks omitted)).

13 ARGUMENT

14 I. A Remand of BLM's Right-of-Way Decision Is Appropriate

15 The Court should remand BLM's decision to grant rights-of-way to Cadiz
16 for purposes of transporting water across federal land. BLM rushed the approval
17 process and, in doing so, short-circuited necessary reviews and violated the
18 procedural requirements of the NEPA and the NHPA. And because the agency did
19 not conduct the required reviews, it lacked sufficient information to decide whether
20 allowing the rights-of-way would violate the provisions of applicable land use
22 plans and therefore violate FLPMA. Accordingly, BLM's decision should be
23 remanded.

24 A. BLM Did Not Comply With NEPA Prior to the Approval of 25 Right-of-Way Grants to Cadiz

26 BLM did not comply with NEPA because it relied on CXs without
27 adequately evaluating whether extraordinary circumstances existed. BLM had
28 sufficient information to know that Cadiz intended to transport water through the

1 pipeline in the right-of-way, but BLM did not evaluate the withdrawal of the water
2 from its source and associated environmental impacts. Therefore, BLM violated
3 NEPA.

4 An agency may rely on a CX for NEPA compliance only if it conducts an
5 extraordinary circumstances review to determine whether the proposed action may
6 have significant impacts on the environment. 40 C.F.R. § 1501.4; 43 C.F.R. §
7 46.205(c); *see also Alaska Ctr. for Env't. v. U.S. Forest Serv.*, 189 F.3d 851, 858
8 (9th Cir. 1999). The Department of the Interior's NEPA regulations governing
9 extraordinary circumstances require BLM to consider a range of factors, including
10 whether the proposed action has "a direct relationship to other actions with
11 individually insignificant but cumulatively significant environmental effects."
12 43 C.F.R. § 46.215(f).

13 Here, in both CXs, BLM went through each of the factors in its regulations
14 and determined that no extraordinary circumstances existed for any of them.
15 Cadiz2020-00584-86; Cadiz2020-00650-53. In doing so, BLM relied primarily on
16 the notion that the rights-of-way would not involve new surface disturbance at
17 present. *See, e.g.*, Cadiz2020-00651 (stating that the proposed action "would not
18 include any new construction or ground disturbing activities"). That assumption
19 allowed BLM to find, for example, that there would be no significant impacts on
20 natural resources, drinking water aquifers, prime farmlands, historic or cultural
22 resources, or threatened or endangered species, and that there would be no highly
23 uncertain or controversial significant impacts. Cadiz2020-006751-53.

24 BLM lacked sufficient information to make those determinations regarding
25 extraordinary circumstances, and the information that it had belied its conclusions.
26 At the outset of the approval process, Cadiz informed BLM that it planned "to
27 convey water along the pipeline route for any of a variety of municipal,
28 agricultural or industrial uses." Cadiz2020-02444. And Cadiz informed BLM that

1 it had obtained the pipeline from EPNG, running from Cadiz to Wheeler Ridge,
2 California, for the purpose of transporting up to 30,000 AFY of water. *Id.* Further,
3 in the plan of development submitted with its application, Cadiz acknowledged
4 that, although no development was planned at the time, later development would
5 occur. Cadiz2020-02396. But instead of explaining what sort of development
6 might be planned in the future, Cadiz stated that, if “an agreement to convey water
7 is reached, the impacts of conveyance, if any, will be assessed at that time.”
8 Cadiz2020-02397. In other words, Cadiz sought to secure a right-of-way first and
9 have the environmental impacts analyzed later.

10 The record show analytical gaps in BLM’s decision-making. The CX for the
11 FLPMA right-of-way stated that, if alterations to the pipeline were planned later,
12 BLM could consider a proposal for such alterations and analyze potential
13 environmental impacts at the time. Cadiz2020-00651-52. But this overlooked
14 that, by issuing the right-of-way grant to Cadiz, BLM would grant Cadiz the “right
15 to construct, operate, maintain, and terminate a Water Pipeline.” Cadiz2020-
16 00005. While BLM may need to approve further construction, Cadiz would
17 already be authorized to use the pipeline to transport water.

18 Despite granting Cadiz such a right, BLM never considered the impacts of
19 Cadiz transporting water through the pipeline. BLM was aware that Cadiz has
20 sought to develop a means to transport water from its holdings to water authorities
22 in Southern California and that the application identified a right-of-way from Cadiz
23 to Wheeler Ridge, which is in the proximity of the California Aqueduct and the
24 Los Angeles Aqueduct. Cadiz2020-02384; *see also* Cadiz2020-02449-50. But in
25 its analysis, BLM did not identify the source of the water that would be transported
26 or evaluate the potential environmental impacts of withdrawing water from such
27 sources. Thus, for example, the BLM did not analyze whether there would be any
28 impacts to the Mojave Trails National Monument, Mojave National Park, or

1 Joshua Tree National Park because the BLM lacked sufficient information to
2 ascertain whether there could be impacts.

3 Despite lacking information regarding the source of the water, BLM
4 concluded that its grant of the rights-of-way to Cadiz would have no significant
5 impacts on “drinking water aquifers, prime farmlands, wetlands, or floodplains in
6 the project area” or “the Mojave Trails National Monument.” Cadiz2020-00651.
7 By limiting its inquiry to the project footprint, BLM violated the Department of the
8 Interior’s NEPA regulations requiring it to evaluate whether the proposed action
9 has “a direct relationship to other actions with individually insignificant but
10 cumulatively significant environmental effects.” 43 C.F.R. § 46.215(f). Further,
11 because the agency never actually looked at the potential impacts associated with
12 other actions having a direct relationship to the proposed right-of-way, its reliance
13 on a CX was improper. *See Jones v. Gordon*, 793 F.2d 821, 828 (9th Cir. 1986)
14 (“An agency cannot avoid its statutory responsibilities under NEPA merely by
15 asserting that an activity it wishes to pursue will have an insignificant effect on the
16 environment.”) (internal quotation marks, ellipsis, and citation omitted); *see also*
17 *California v. Norton*, 311 F.3d 1162, 1176-77 (9th Cir. 2002) (finding that a CX
18 could not be applied where the record showed the potential for highly controversial
19 environmental impacts).

20 Because it was a reasonably foreseeable effect of granting the right of way,
22 in these circumstances, BLM should have evaluated the potential impacts of
23 drawing down water, which may have resulted in the preparation of an EA or EIS.
24 BLM has conducted such an analysis in other instances. For a proposed
25 groundwater project in Nevada, for example, BLM prepared an EIS before
26 deciding whether to grant a right-of-way for a water pipeline and associated
27 pumping facilities. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*
28 No. 2:14-cv-00226-APG-VCF, 2017 WL 3667700, at *1-4 (D. Nev. Aug. 23,

1 2017). A significant issue in the case was whether BLM had adequately analyzed
2 the long term impacts of pumping the groundwater that would flow through the
3 proposed pipeline. *Id.* at *7-8. While the Nevada groundwater project was
4 massive, and Defendants are not suggesting that Cadiz's plans to transport water
5 through the right-of-way at issue here are on the same scale, BLM was nonetheless
6 required by NEPA to at least evaluate the potential impacts of drawing down water
7 from its source and transporting it through the pipeline.

8 BLM did not have the information it needed to conduct such an analysis, but
9 it could have gathered that information. It had the discretion to request additional
10 information from Cadiz to facilitate its review of the right-of-way application. *See*
11 43 C.F.R. §§ 2804.25(c), 2884.11(c). When BLM did so, Cadiz provided only a
12 vague response about potential future plans. Cadiz2020-02417. Cadiz also urged
13 BLM to process its application quickly, Cadiz2020-02185, even though Cadiz
14 claimed to have no plans for development at the time. Cadiz2020-02396. The
15 result was a rushed process without adequate information, and BLM was unable to
16 complete an appropriate analysis of environmental impacts to comply with NEPA.

17 **B. BLM Did Not Comply With Section 106 of the NHPA Prior to the**
18 **Approval of Right-of-Way Grants to Cadiz**

19 In attempting to comply with section 106 of the NHPA, under the
20 circumstances presented here, BLM failed to adequately evaluate potential impacts
22 to historic properties from the grant of a right-of-way for a water pipeline. BLM
23 erred by defining the undertaking too narrowly and necessarily excluding from
24 consideration aspects of the new activity approved, *e.g.*, potential effects
25 associated with the transported water. Because of that, BLM improperly
26 concluded that the right-of-way grant was not the type of activity that had the
27 potential to cause effects to historic properties. *See* 36 C.F.R. § 800.3(a)(1). BLM
28 only reached that conclusion by focusing solely on whether there would be new

1 ground disturbance within the right-of-way itself, rather than considering the
2 entirety of a new activity not previously considered. This initial determination,
3 which allowed BLM to conclude its section 106 responsibilities without any
4 consultation or consideration of effects to historic properties, cannot be squared
5 with the regulations or the facts.

6 The NHPA requires federal agencies to consider the potential effects of the
7 project on any historic properties listed on or eligible for the National Register of
8 Historic Places and provide, where appropriate, the ACHP an opportunity to
9 comment on the undertaking. 54 U.S.C. § 306108; *Te-Moak Tribe of W. Shoshone*
10 *of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 607 (9th Cir. 2010). Section
11 106 requires an agency to first examine whether its action is an undertaking and is
12 “a type of activity that has the potential to cause effects on historic properties.” 36
13 C.F.R. § 800.3(a). An undertaking is defined as the activity in its entirety that
14 requires agency approval to move forward, including those components of the
15 activity that may be “under the direct or indirect jurisdiction” of an agency. 54
16 U.S.C. § 300320. If an agency determines there is an undertaking that is a type of
17 activity with the potential to cause effect on historic properties, then it must
18 complete the steps of the section 106 process (set forth in the ACHP regulations)
19 through consultation with appropriate parties regarding the designation of the area
20 of potential effects, identification and evaluation of historic properties within that
21 area, determination of effects on those properties, and any means to avoid,
22 minimize or mitigate any adverse effects. *See* 36 C.F.R. §§ 800.4-800.6.

24 Here, BLM did not go through the regulatory steps set forth in 36 C.F.R. §§
25 800.4-800.6 because it concluded that it was not required to do so. BLM initially
26 relied on Exemption B8 of the California PA, which exempts from further section
27 106 compliance the “[i]ssuance of permits, leases, and rights-of-way where no
28 surface disturbance is authorized, that have no potential for adverse effects, and

1 that do not have the potential to affect access to or use of resources by American
2 Indians.” Cadiz2020-00951. NALC submitted a formal objection to BLM’s
3 reliance on Exemption B8, however, on the basis that BLM had not evaluated
4 Cadiz’s water extraction project as directly associated with the right-of-way
5 authorization. Cadiz2020-00345. Based on the objection, the California SHPO
6 informed BLM that NALC’s objection required BLM “to initiate consultation with
7 the SHPO in order to determine how to proceed.” Cadiz2020-00183.

8 Instead of initiating consultation, BLM sent letters to both the California
9 SHPO and NALC explaining that it was no longer relying on Exemption B8 and
10 was instead relying on 36 C.F.R. § 800.3(a)(1). Cadiz2020-00195; Cadiz2020-
11 00193 (letter to NALC). Referencing this provision, BLM evaluated the right-of-
12 way as proposed, narrowly defined the undertaking as only a right-of-way allowing
13 for the transport of water through an existing pipeline, and concluded that the
14 right-of-way had “independent utility,” *i.e.*, was not related to any other
15 authorization for the use of public or private land and, specifically, was “not linked
16 to the use of the groundwater under private lands held by Cadiz.” *Id.* Based on
17 this independent utility finding, BLM determined that allowing the transport of
18 water in the existing pipeline (the defined undertaking) “has no potential to cause
19 an adverse effect to historic properties.” *Id.* Under the circumstances here, BLM’s
20 conclusion was legally and factually flawed.

22 When properly considered, the right-of-way grant for a water pipeline is the
23 type of activity that has the potential to affect historic properties. *See Save Our*
24 *Heritage v. Federal Aviation Administration*, 269 F.3d 49, 63 (1st Cir. 2001); *see*
25 *also Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Army*
26 *Corps of Eng’rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *7 (D.S.D.
27 Sept. 29, 2016), *aff’d sub nom. Sisseton-Wahpeton Oyate of Lake Traverse*
28 *Reservation v. U.S. Army Corps of Eng’rs*, 888 F.3d 906 (8th Cir. 2018). Whether

1 an activity is the type of activity that has the potential to affect historic properties is
2 determined based on the “type and nature” of the undertaking, not case-specific
3 issues. *See* Protection of Historic Properties, 65 Fed. Reg. 77,698, 77,703 (Dec.
4 12, 2000). Further, the definition of an undertaking includes activities that are
5 “under the direct or indirect jurisdiction of a Federal agency,” not just activities
6 that are directly authorized by an agency. 54 U.S.C. § 300320. BLM defined the
7 undertaking too narrowly to include only the transport of water through the
8 segment of pipeline within the right-of-way. BLM’s definition of the undertaking
9 was based on the principle that the right-of-way had independent utility apart from
10 Cadiz’s plans to withdraw water on its private land, Cadiz2020-00195, but that
11 conclusion is not supported by the record.

12 The concept of independent utility is borrowed from the NEPA case law. In
13 general, where multiple actions are connected, the impacts of such actions must be
14 analyzed in a single NEPA document. *See Native Ecosystems Council v.*
15 *Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002). Where two actions “would have
16 taken place with or without the other, each has ‘independent utility’ and the two
17 are not considered connected actions.” *Id.* (citation omitted); *see also Nw. Res.*
18 *Info. Ctr., Inc. v. Nat’l Marine Fisheries Serv.*, 56 F.3d 1060, 1069 (9th Cir. 1995)
19 (evaluating whether two actions were “interdependent . . . parts of [a] larger
20 action”); *see Crutchfield v. U.S. Army Corps of Eng’rs*, 154 F. Supp. 2d 878, 905
22 (E.D. Va. 2001) (in the NHPA context, finding that two aspects of a project were
23 part of the same undertaking and therefore needed to be evaluated together); *see*
24 *also id.* at 889, 902 (discussing the independent utility standard).

25 BLM erred in concluding that the segment of the pipeline between Cadiz
26 and Wheeler Ridge has independent utility—without water to transport through the
27 pipeline, it has no utility at all. Indeed, Cadiz’s statements to BLM make plain its
28 plans to transport water from its holdings through the pipeline. In response to

1 BLM’s initial request for information, Cadiz explained that it planned to use the
2 existing pipeline to transport “approximately 30,000 AFY of water between
3 Palmdale and Barstow and 25,000 AFY between Barstow and Cadiz.” Cadiz2020-
4 02444. When Cadiz later submitted its right-of-way application, Cadiz stated that
5 it “owns 45,000 acres of land and water rights in eastern San Berna[r]dino County,
6 California” and that the conversion of the oil and gas pipeline to a water pipeline
7 would allow it to transport water to providers in certain communities. Cadiz2020-
8 02383; *see also* Cadiz2020-02384 (map showing a proposed “Cadiz Northern
9 Pipeline,” extending from Cadiz to Wheeler Ridge). BLM’s conclusion that the
10 pipeline had its own independent utility—separate from Cadiz’s plans to transport
11 water from its holdings—cannot be squared with the record. As a consequence,
12 BLM erred by defining the undertaking too narrowly and thus concluding that
13 Cadiz’s right-of-way application was not the type of activity that had the potential
14 to adversely affect historic properties.

15 **C. BLM Lacked Sufficient Information to Determine Whether**
16 **Cadiz’s Use of the Rights-of-Way Complied With FLPMA**

17 Plaintiffs also claim that BLM violated FLPMA by failing to: (1) prevent
18 unnecessary or undue degradation of areas within the California Desert
19 Conservation Area (“CDCA”), which includes the Mojave Trails National
20 Monument; (2) include terms and conditions in the right-of-way grant that
22 minimize damage to resources and protect Federal property and economic
23 interests; and (3) ensure the ROW conforms to the applicable resource
24 management plan. *See* Compl. ¶¶ 190-200, *Native American Land Conservancy*,
25 No. 5:21-cv-496, ECF No. 1; Compl. ¶¶ 64-74, *Center for Biological Diversity*,
26 No. 2:21-cv-2507, ECF No. 1. It is unclear whether BLM’s approval of the statute
27 violated FLPMA for the reasons alleged by Plaintiffs because BLM conducted no
28 analysis of the potential impacts of water drawdowns on the Mojave Trails

1 National Monument or other federal lands. Because BLM proceeded to take action
2 without conducting such an analysis, its decision to nevertheless grant a right-of-
3 way was arbitrary and capricious and should be overturned. *See San Luis & Delta-*
4 *Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (“[I]f the
5 reviewing court simply cannot evaluate the challenged agency action on the basis
6 of the record before it, the proper course, except in rare circumstance, is to remand
7 to the agency for additional investigation or explanation.”) (quoting *Fla. Power &*
8 *Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

9 **II. The Court Should Vacate BLM’s Decision Granting Rights-of-Way to** 10 **Cadiz**

11 BLM’s decision to grant rights-of-way to Cadiz should be vacated.
12 “Whether agency action should be vacated depends on how serious the agency’s
13 errors are ‘and the disruptive consequences of an interim change that may itself be
14 changed.’” *Cal. Cmty. Against Toxics*, 688 F.3d at 992 (citation omitted).
15 Further, in considering whether to leave a decision in place, a court should
16 consider “the extent to which either vacating or leaving the decision in place would
17 risk environmental harm.” *Nat’l Family Farm Coal. v. U.S. Env’tl. Prot. Agency*,
18 960 F.3d 1120, 1144-45 (9th Cir. 2020). Here, these factors weigh in favor of a
19 remand with vacatur.

20 First, the legal errors are serious. In looking at the seriousness of the error,
22 the court considers the likelihood that the agency will come to the same decision
23 upon remand and whether the errors were “mere technical or procedural
24 formalities.” *Klamath–Siskiyou Wildlands Ctr. v. Nat’l Oceanic and Atmospheric*
25 *Admin.*, 109 F. Supp. 3d 1238, 1244-45 (N.D. Cal. 2015). Here, BLM granted a
26 new right-of-way for a water pipeline to Cadiz without evaluating the potential
27 impacts of water drawdowns on the environment—indeed, without asking where
28 the water would come from at all. In doing so, BLM acted contrary to NEPA and

1 section 106 of the NHPA. This is not a case where BLM conducted an appropriate
2 level of analysis, in which the court might find some technical legal errors.
3 Instead, BLM failed to prepare the required analyses altogether. Further, given
4 that BLM never analyzed the potential impacts of drawing down water on the
5 Mojave Trails National Monument or other federal lands, there is a serious
6 question as to whether BLM would reach the same decision to grant the right-of-
7 way on remand. In such cases, a remand with vacatur is appropriate. *See Nat'l*
8 *Family Farm Coal.*, 960 F.3d at 1145 (vacating rule where the agency's analysis
9 contained fundamental flaws).

10 Second, although vacatur of the right-of-way decision may be disruptive
11 from Cadiz's perspective, this factor does not favor remand without vacatur.
12 In evaluating this factor, the Court should consider whether vacatur would "cause
13 serious and irremediable harms that significantly outweigh the magnitude of the
14 agency's error." *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1246
15 (citation omitted). Cadiz has not indicated any imminent plans to transport water
16 through the pipeline, and, in fact, has indicated that it has no immediate plans to do
17 so. Cadiz2020-02396. Thus, there are no immediate plans for the transportation of
18 water that would be disrupted by the vacatur of the right-of-way. As far as
19 potential monetary harms to Cadiz, BLM would return all rental fees paid by
20 Cadiz. To the extent that Cadiz may claim monetary harm based on its contract
22 with EPNG, in purchasing that contract, Cadiz undertook the risk that its right-of-
23 way might subsequently be deemed legally invalid. Having pressed BLM to make
24 a decision within an artificial time frame governed by its contractual relationship
25 with EPNG, Cadiz is in no position now to argue that it was harmed by a decision
26 making process that took shortcuts in order to comply with the company's wishes.

27 Finally, the Court should consider the potential harm to the environment of
28 leaving the right-of-way in place pending the remand. *See Nat'l Family Farm*

1 *Coal.*, 960 F.3d at 1144-45. Although BLM must approve any further ground
2 disturbing activity within the right-of-way, if no ground disturbance is necessary,
3 then Cadiz may transport water through the pipeline without approval from BLM.
4 Cadiz2020-00005. Such transport will involve the drawdown of water from
5 wherever it is sourced and cause potential impacts to the environment and historic
6 properties that have not been analyzed under NEPA and the NHPA. Given that the
7 extent of such impacts are currently unknown and may be significant, this weighs
8 in favor of vacating BLM’s right-of-way grants. *See Pollinator Stewardship*
9 *Council v. U.S. Env’tl. Prot. Agency*, 806 F.3d 520, 532-33 (9th Cir. 2015)
10 (vacating rule where leaving the rule in place would have risked environmental
11 harm).

12 **CONCLUSION**

13 For the foregoing reasons, the Court should grant Defendants’ motion for
14 voluntary remand and vacate BLM’s decision granting rights-of-way to Cadiz.

15 DATED: December 3, 2021 Respectfully submitted,

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