

NO. S217763

**IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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**CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,**  
*Petitioners and Respondents,*

SUPREME COURT  
**FILED**

v.

OCT - 9 2014

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, Frank A. McGuire Clerk**  
*Defendant and Appellant.*

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Deputy

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**THE NEWHALL LAND AND FARMING COMPANY**  
*Real Party in Interest and Appellant.*

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After a Decision by the Court of Appeal  
Second Appellate District, Division Five, No. B245131

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**NEWHALL'S REQUEST FOR JUDICIAL NOTICE**

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*Attorneys for Real Party in Interest and Appellant,*  
**The Newhall Land and Farming Company**

Pursuant to Evidence Code section 459 and Rules 8.252(a) and 8.520 of the California Rules of Court, Real Party in Interest and Appellant, The Newhall Land and Farming Company (Newhall) requests that the Court take judicial notice of the following document:

“First Amended Complaint for Declaratory and Injunctive Relief” filed on July 22, 2014, in the U.S. District Court, Central District of California by Plaintiffs Center for Biological Diversity, Wishtoyo Foundation, Ventura Coastkeeper, Friends of the Santa Clara River, and Santa Clarita Organization for Planning and the Environment (collectively, CBD) in *Center for Biological Diversity, et al. v. United States Army Corps of Engineers, et al*, Case No. 2:14-cv-01667-PSG-CW (CBD federal action).

The attached amended complaint in the CBD federal action is relevant to this appeal because it establishes that CBD has filed an action in *federal court* challenging the adequacy of the environmental analysis of project impacts to steelhead smolt (juvenile) and cultural resources in the Joint Environmental Impact Statement and Environmental Impact Report (EIS/EIR) for the Newhall Ranch project — the same EIS/EIR at issue on appeal.

In this appeal, Division Five of the Second District Court of Appeal held that CBD forfeited its claims regarding steelhead and cultural impacts, applying the applicable exhaustion of administrative remedies doctrine under the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21177, subd. (a). In CBD’s Opening Brief on the Merits filed in this Court on September 8, 2014, CBD contends that the Court of Appeal erred in preventing CBD from raising its steelhead and cultural resources claims in this case — effectively precluding CBD from raising those claims in any judicial forum. (OBOM:39.)

CBD's amended complaint, Second Claim for Relief, alleges violations arising under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, et seq. Specifically, CBD alleges that the EIS/EIR is inadequate under NEPA because it does not adequately analyze impacts to steelhead or impacts to cultural resources. (Amended Complaint pp. 35-36 ¶¶111 (e)-(g), ¶¶111 (m)-(n), ¶¶112.)

The CBD federal action was filed on March 6, 2014, after the trial and Court of Appeal hearing in this action. Therefore, it could not have been brought to the attention of the trial court or the Court of Appeal. The CBD federal action, however, was filed prior to the Second District Court of Appeal's issuance of its opinion on March 20, 2014. The CBD federal action also was filed before CBD filed its Opening Brief on the Merits.

Newhall requests judicial notice of the CBD federal action pursuant to Evidence Code section 452, subdivision (d), as it is a record of a court of the United States.

October 8, 2014

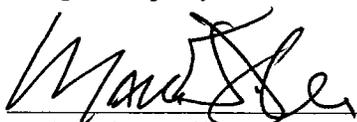
Respectfully submitted,

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20 **UNITED STATES DISTRICT COURT**  
21 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

22 CENTER FOR BIOLOGICAL ) Case No. 2:14-cv-01667-ABC-CW

23 DIVERSITY, WISHTOYO )

24 FOUNDATION, VENTURA )

25 COASTKEEPER, FRIENDS OF THE ) **FIRST AMENDED COMPLAINT**

26 SANTA CLARA RIVER, and SANTA ) **FOR DECLARATORY**

27 CLARITA ORGANIZATION FOR ) **AND INJUNCTIVE RELIEF**

28 PLANNING THE ENVIRONMENT, )

)

29 Plaintiffs, )

30 )

31 v. )

32 )

33 UNITED STATES ARMY CORPS OF )

1 ENGINEERS, COL. KIMBERLY )  
2 COLLOTON, in her official capacity as )  
3 Commander and District Engineer of the )  
4 Los Angeles District of the U.S. Army )  
5 Corps of Engineers, UNITED STATES )  
6 ENVIRONMENTAL PROTECTION )  
7 AGENCY, GINA McCARTHY, in her )  
8 official capacity as Administrator of the )  
9 U.S. Environmental Protection Agency, )  
10 and JARED BLUMENFELD, in his )  
11 official capacity as Region 9 )  
12 Administrator of the U.S. Environmental )  
13 Protection Agency, )  
14 Defendants. )

**INTRODUCTION**

13 1. This action challenges the issuance of a permit under Section 404 of the  
14 Clean Water Act, 33 U.S.C. § 1344 (“Section 404”), by the United States Army Corps  
15 of Engineers (the “Corps”), with the cooperation of the Environmental Protection  
16 Agency (“EPA”), to the Newhall Land and Farming Company for planned urban  
17 development on the current site of Newhall Ranch in northern Los Angeles County.  
18 This action also challenges the Corps’ compliance with the National Historic  
19 Preservation Act (“NHPA”), 16 U.S.C. § 470 *et seq.*, in its issuance of a Section 404  
20 permit, its approval of a Final Environmental Impact Statement (“EIS”) under the  
21 National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332 *et seq.*, and its 2011  
22 Record of Decision (“ROD”) for the Newhall Ranch Resource Management and  
23 Development Plan (“RMDP”) and Spineflower Conservation Plan (together, the  
24 “Project”). This action alleges the Corps’ and EPA’s actions regarding the Project and  
25 related permits were arbitrary and capricious, an abuse of discretion, and otherwise not  
26 in accordance with the law. 5 U.S.C. § 701-706.

27 2. The Project involves a federal Clean Water Act permit for one of the  
28 largest single residential developments ever proposed in California. The Project area

1 covers 2,587 acres, with 2,221.2 acres devoted to residential development. At build-  
2 out, the Project will permit construction of 19,812 residential units and approximately  
3 5.41 million square feet of commercial uses. Construction of this massive development  
4 will result in extensive modification of the Santa Clara River, one of the last free-  
5 flowing rivers in southern California, its floodplain, and tributary streams. The Project  
6 will profoundly alter a key stretch of southern California habitat for the diverse fish,  
7 wildlife, and plants species that rely on the site, including numerous federally protected  
8 threatened and endangered species. Actions permitted under the Section 404 Permit  
9 include filling portions of the floodplain of the Santa Clara River and extensive  
10 modification of many of the river's tributaries. The permitted actions will result in  
11 permanent impacts to 47.9 acres of "waters of the United States" within the Corps'  
12 jurisdiction, and would temporarily disturb an additional 35.3 acres of waters of the  
13 United States. The Project also will result in the permanent destruction of Chumash  
14 and Tataviam Native American Village sites, sacred sites, burial grounds, and ancestral  
15 remains, as well as natural resources significant to Chumash and Tataviam culture,  
16 religion, and history (together, "cultural resources" and or "historic properties"), all of  
17 which the Tribes depend upon to sustain their culture and history.

18 3. Despite these significant environmental and cultural consequences,  
19 Defendants failed to fully disclose, analyze, and evaluate all environmental impacts and  
20 reasonable alternatives when completing its statutorily required environmental review  
21 of the Project and associated Section 404 permit. The Corps also failed to make a  
22 reasonable and good faith effort to identify historic properties and cultural resources  
23 within the Project area. Additionally, the Corps failed entirely to consult with the  
24 federally recognized Santa Ynez Band of Chumash Mission Indians of the Santa Ynez  
25 Reservation ("Santa Ynez Band of Chumash Indians"), which would have ensured that  
26 the Corps adequately identified Chumash and Tataviam cultural resources and historic  
27 properties, and evaluated alternatives to avoid, minimize, or mitigate adverse effects to  
28 those resources and properties. Therefore, Plaintiffs seek declaratory relief that the

1 Corps violated NEPA and the NHPA, and that both the Corps and EPA violated the  
2 Clean Water Act and the Administrative Procedure Act (“APA”). Plaintiffs also seek  
3 injunctive relief to vacate the unlawfully issued permit and to prohibit the filling of  
4 waters of the United States and to protect Chumash and Tataviam Native American  
5 cultural resources unless and until Defendants demonstrate full compliance with the  
6 law.

#### 7 **JURISDICTION AND VENUE**

8 4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 since this action  
9 arises under the laws of the United States. 5 U.S.C. § 701-706 (APA), 42 U.S.C. §  
10 4332 (NEPA), 33 U.S.C. § 1344 (Clean Water Act), 16 U.S.C. § 470 (NHPA).  
11 Additionally, an actual controversy exists between the parties within the meaning of 28  
12 U.S.C. § 2201.

13 5. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e)  
14 because a substantial part of the events or omissions giving rise to the claims occurred  
15 in this judicial district, and the property and resources at issue are located in this  
16 judicial district.

#### 17 **PARTIES**

18 6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a  
19 California nonprofit organization with approximately 50,000 members worldwide,  
20 including approximately 2,450 members who live in Los Angeles, Ventura, and Kern  
21 counties.

22 7. The Center’s mission is to protect endangered species and wild places  
23 through science, policy, education, and environmental law. Center members visit,  
24 recreate in, study, observe, and otherwise enjoy the area proposed for the Project and its  
25 environs, and study, observe, and otherwise enjoy the natural resources at issue in this  
26 complaint. Center members reside and own property in the vicinity of the Project site.  
27 Center members derive professional, scientific, aesthetic, spiritual, recreational,  
28 economic, and educational benefits from the Project site and its resources. The Center

1 and its members have participated and continue to participate in public processes related  
2 to the Project in an effort to reduce the impacts of the Project and to ensure compliance  
3 with applicable laws. The Center and its members will continue to maintain an interest  
4 in Newhall Ranch, its adjoining areas, and resources in the future. The Center and its  
5 members are directly, adversely, and irreparably affected, and will continue to be  
6 prejudiced by the actions permitted under the Section 404 Permit and their direct,  
7 indirect, and cumulative effects, as described herein, until and unless this Court provides  
8 the relief prayed for in this complaint.

9 8. Plaintiff WISHTOYO FOUNDATION is a California nonprofit public  
10 interest organization with over 700 members composed of Chumash Native Americans,  
11 Ventura County residents, and Los Angeles County residents.

12 9. Wishtoyo Foundation's mission is to preserve, protect, and restore  
13 Chumash culture, the culture of indigenous peoples, and the environment. The  
14 Wishtoyo Foundation shares traditional Chumash beliefs, cultural practices, songs,  
15 dances, stories, and values with the public to instill environmental awareness and  
16 responsibility for sustaining the health of our land, air, and water for the benefit of  
17 future generations. The Chumash People, including ancestors of members of the  
18 Wishtoyo Foundation, and the People of the Tataviam Tribe resided in villages,  
19 conducted ceremonies at sacred sites, conducted trade, migrated though, and buried  
20 their dead in and around Newhall Ranch and other areas of Ventura and Los Angeles  
21 counties affected by the Project for thousands of years. The Chumash People and  
22 members of the Wishtoyo Foundation have a strong cultural interest in the protection of  
23 the Santa Clara River's cultural and environmental resources. Wishtoyo Foundation  
24 participated and continues to participate in public processes related to the Project, and  
25 submitted timely comments on the Environmental Impact Statement for the Project.  
26 Members of Wishtoyo use the Project site, surrounding areas, and the downstream reach  
27 of the Santa Clara River for ceremonial purposes, to connect with and celebrate their  
28 ancestors and cultural heritage, to gather natural cultural resources, as sacred sites and

1 grounds, for educational purposes, recreational use, wildlife viewing, scientific study,  
2 and environmental monitoring, and intend to continue this use as permitted. Chumash  
3 members of Wishtoyo perform religious and cultural ceremonies, learn about their  
4 history and culture, and connect with their ancestors at and from burial, sacred,  
5 historical, and cultural sites in, adjacent to, and overlooking the Project area; and have  
6 harvested/collected and desire to continue harvesting/collecting in the Santa Clara  
7 River, and in the riparian habitat within project area (1) white sage for ceremonial,  
8 medicinal, and religious uses, (2) usable willow for Chumash basketry, material culture  
9 practice, and ap (traditional Chumash dwelling unit) construction, (3) river rock for  
10 ceremonial sweats, (4) other usable riparian plant species such as mulefat used to make  
11 Chumash fish traps, additional types of sage used for ceremonial, medicinal, and  
12 religious purposes, and other native riparian plants used for Chumash cultural, religious,  
13 and ceremonial purposes; and (5) condor feathers for Chumash ceremonial and religious  
14 use. Like their ancestors, Chumash members of Wishtoyo desire to maintain their  
15 cultural and religious practices, and spiritual connection with their People, by  
16 experiencing condor flyovers over cultural and sacred sites in the Project area, and by  
17 experiencing and harvesting steelhead downstream of the Project. Wishtoyo Foundation  
18 and its members are directly, adversely, and irreparably affected, and will continue to be  
19 prejudiced by the actions permitted under the Section 404 Permit and their direct,  
20 indirect, and cumulative effects, as described herein, until and unless this Court provides  
21 the relief prayed for in this petition.

22 10. The mission of Plaintiff Wishtoyo Foundation's Ventura Coastkeeper  
23 Program ("Ventura Coastkeeper") is to protect, preserve, and restore the ecological  
24 integrity and water quality of Ventura County's inland waterbodies, coastal waters, and  
25 watersheds. Ventura Coastkeeper strives to maintain clean and ecologically healthy  
26 waters for all living beings in Ventura County's community through advocacy,  
27 education, restoration projects, community mobilizing, and, where necessary, directly  
28 initiating legal and enforcement actions on behalf of itself and its members. Members

1 of Ventura Coastkeeper use the Project site, surrounding areas, and the downstream  
2 reach of the Santa Clara River for recreational use, wildlife viewing, scientific study,  
3 environmental monitoring, and educational purposes, and intend to continue this use as  
4 permitted. Ventura Coastkeeper participated and continues to participate in public  
5 processes related to the Project, and submitted timely comments on the Environmental  
6 Impact Statement for the Project. Ventura Coastkeeper and its members are directly,  
7 adversely, and irreparably affected, and will continue to be prejudiced by the actions  
8 permitted under the Section 404 Permit and their direct, indirect, and cumulative effects,  
9 as described herein, until and unless this Court provides the relief prayed for in this  
10 complaint.

11 11. Plaintiff FRIENDS OF THE SANTA CLARA RIVER (“FSCR”) is an  
12 environmental group organized as a nonprofit corporation in accordance with the laws  
13 of California in 1993, and with its principal place of business in Newbury Park,  
14 California. FSCR brings this action on behalf of its members who have been, and will  
15 continue to be, harmed by actions permitted under the Section 404 Permit, which will  
16 result in loss of wetlands; diminished aesthetic enjoyment; loss of peace and tranquility;  
17 increased traffic; increased flooding; loss of open space and habitat for the River’s  
18 wildlife, including wading birds and federally protected species; degraded water quality;  
19 damage to cultural resources; and diminished quality of life. FSCR has active members  
20 throughout Los Angeles, Ventura, and Santa Barbara Counties who canoe, fish, swim,  
21 hike, travel, recreate, and observe wildlife throughout the Santa Clara River watershed  
22 and intend to continue these activities. The ability of FSCR’s members to engage in  
23 such activities is harmed by approval of the Section 404 Permit because the dredge and  
24 fill activity associated with the Project degrades many of the areas and water bodies  
25 FSCR’s members enjoy. Further, the effects of the Project combined with the effects of  
26 numerous other activities authorized by the Corps along the Santa Clara River are  
27 devastating to the River’s watershed and to FSCR’s members’ ability to use and enjoy  
28 the River. FSCR submitted timely comments on the Environmental Impact Statement

1 for the Project. FSCR and its members are directly, adversely, and irreparably affected,  
2 and will continue to be prejudiced by the Project and its components, as described  
3 herein, until and unless this Court provides the relief prayed for in this complaint.

4 12. Plaintiff SANTA CLARITA ORGANIZATION FOR PLANNING THE  
5 ENVIRONMENT (“SCOPE”) is a California nonprofit membership organization that is  
6 concerned with protection of the environment. Some members of SCOPE reside in  
7 Santa Clarita, in the vicinity of the Project site. SCOPE brings this action on its own  
8 behalf, for its members, and in the public interest. SCOPE was formed in 1987 to  
9 promote, protect, and preserve the environment, ecology, and quality of life in the Santa  
10 Clarita Valley. SCOPE’s mission is to (1) promote, protect and preserve the  
11 environment of the Santa Clarita Valley; (2) work to provide a high quality of life for  
12 residents of the Santa Clarita Valley; (3) monitor, review, and take action on proposals  
13 that would impact or affect the environment, ecology, and/or quality of life in the Santa  
14 Clarita Valley; (4) provide a forum for the people of the Santa Clarita Valley in which  
15 issues involving the environment, ecology, or quality of life can be heard and discussed;  
16 (5) foster the education of the members and the people of the Santa Clarita Valley on  
17 matters involving environment, ecology, and quality of life; and (6) promote community  
18 planning and design that exhibits superior attention to quality, aesthetics, sensitivity to  
19 the environment, and consideration of community goals and needs. SCOPE submitted  
20 timely comments on the Environmental Impact Statement for the Project. SCOPE and  
21 its members are directly, adversely, and irreparably affected, and will continue to be  
22 prejudiced by the Project and its components, as described herein, until and unless this  
23 Court provides the relief prayed for in this complaint.

24 13. Defendant UNITED STATES ARMY CORPS OF ENGINEERS (“Corps”)  
25 is the federal agency charged with evaluating applications for permits under Section  
26 404 of the Clean Water Act for the discharge of dredged or filled materials into the  
27 waters of the United States. In evaluating such permit applications, the Corps must  
28 abide by its own regulations and ensure that the requirements of Clean Water Act

1 Section 404 and EPA's 404(b)(1) Guidelines, as well as the requirements of NEPA and  
2 the NHPA, are fulfilled.

3 14. Defendant Corps also served as the lead federal agency under NEPA for  
4 the Project. Alongside the California Department of Fish and Wildlife ("DFW,"  
5 formerly the California Department of Fish and Game), the Corps oversaw the  
6 preparation of the Joint Environmental Impact Statement/Environmental Impact Report  
7 ("EIS") for the Project. The Corps also issued a provisional Section 404 permit and a  
8 ROD on August 31, 2011. As the lead federal agency for the project, the Corps is  
9 responsible for ensuring compliance with all applicable federal laws with respect to the  
10 Project.

11 15. Defendant COL. KIMBERLY M. COLLOTON is the Commander and  
12 District Engineer of the Los Angeles District of the Corps, which has jurisdiction over  
13 the Project. As Commander and District Engineer, Col. Colloton is responsible for  
14 reviewing and approving all permits for proposed project's resulting in the discharge of  
15 dredged or filled materials into the waters of the United States within the Los Angeles  
16 District. Col. Colloton is sued in her official capacity.

17 16. Defendant UNITED STATES ENVIRONMENTAL PROTECTION  
18 AGENCY ("EPA") is the United States agency with ultimate and final authority over  
19 the Corps' determinations of disposal sites under Section 404 of the Clean Water Act.  
20 Specifically, the EPA has the authority to prohibit and/or withdraw any area defined by  
21 the Corps as a disposal site and the authority to deny, restrict, and/or withdraw the use  
22 of any area defined by the Corps for specification as a disposal site, pursuant to Section  
23 404(c) of the Clean Water Act. As part of this distinct and complementary authority,  
24 the EPA has engaged in analysis and evaluation of environmental review documents  
25 for the Project, including the 2010 Final EIS, the RMDP, and the Section 404 Permit.

26 17. Defendant GINA McCARTHY is the Administrator of the EPA.  
27 Administrator McCarthy is charged with overseeing the EPA's administration of and  
28 compliance with Section 404 of the Clean Water Act, including EPA's regulations

1 implementing Section 404(b)(1) as well as the EPA’s ultimate and final authority over  
2 the Corps’ disposal site determinations. Administrator McCarthy is sued in her official  
3 capacity.

4 18. Defendant JARED BLUMENFELD is the Region 9 Administrator of the  
5 EPA. As Region 9 Administrator, Mr. Blumenfeld is charged with reviewing and  
6 approving the EPA’s administration of Section 404 of the Clean Water Act within  
7 Region 9, which includes the Project. Mr. Blumenfeld issued the final decision not to  
8 prohibit the use of the selected disposal site (the Santa Clara River, its tributaries and/or  
9 its floodplain). Mr. Blumenfeld is sued in his official capacity.

## 10 LEGAL FRAMEWORK

### 11 *THE CLEAN WATER ACT*

12 19. The objective of the Clean Water Act is to restore and maintain the  
13 physical, chemical, and biological integrity of the nation’s waters. 33 U.S.C. §1251(a).  
14 The Clean Water Act and its implementing regulations define “waters of the United  
15 States” to include wetlands and riparian habitats adjacent to waters of the United States.  
16 *Id.* § 1362(7); 33 C.F.R. § 328.3(b).

17 20. Subject to certain exemptions, Section 404 of the Clean Water Act  
18 prohibits the discharge of dredged or fill material from point sources into waters of the  
19 United States without a permit from the Corps. 33 U.S.C. § 1344. The term “fill  
20 material” is defined in the Corps’ regulations as “any material used for the primary  
21 purpose of replacing an aquatic area with dry land or of changing the bottom elevation  
22 of a water body.” 33 C.F.R. § 323.2(m). The regulations define the “discharge of fill  
23 material” as including the “[p]lacement of fill that is necessary to the construction of  
24 any structure in a water of the United States; the building of any structure or  
25 impoundment requiring rock, sand, dirt, or other material for its construction; [and]  
26 site-development fills.” *Id.* § 323.2(n).

27 21. The Corps’ Section 404 regulations prohibit the issuance of a Section 404  
28 permit if “the district engineer determines that it would be contrary to the public

1 interest.” *Id.* § 320.4(a). This “public interest review” requires the Corps to weigh the  
2 benefits of the permitted activity against its reasonably foreseeable detriments,  
3 considering all relevant factors and their cumulative impacts. *Id.* § 320.4(a); *see also id.*  
4 § 320.4(b)(4). These factors include general environmental concerns, wetlands, fish and  
5 wildlife values, water supply and conservation, water quality, and the general needs and  
6 welfare of the people. *Id.* § 320.4(a).

7 22. As part of its public interest analysis, the Corps must also evaluate the  
8 mitigation measures taken to “avoid[], minimiz[e], rectify[], reduc[e], or compensat[e]  
9 for” the negative impacts of the permitted activity on wetlands and the waters of the  
10 United States. *Id.* § 320.4(r).

11 23. In addition, the EPA, in conjunction with the Secretary of the Army, is  
12 responsible for promulgating regulations that provide guidance for the issuance of  
13 permits under Clean Water Act Section 404. 33 U.S.C. § 1344(b)(1). These are known  
14 as the “404(b)(1) Guidelines” and are codified at 40 C.F.R. part 230.

15 24. These regulations, in part, require the Corps to complete a “least  
16 environmentally damaging practicable alternative” or LEDPA analysis to determine if  
17 there is a “practicable alternative” to the proposed discharge that would have a less  
18 adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). An alternative is  
19 considered practicable if “it is available and capable of being done after taking into  
20 consideration cost, existing technology and logistics in light of overall project  
21 purposes.” *Id.* § 230.10(a)(2).

22 25. “In evaluating whether a given alternative site is practicable, the Corps may  
23 legitimately consider such facts as cost to the applicant and logistics. In addition, the  
24 Corps has a duty to consider the applicant’s purpose.” *Sylvester v. U.S. Army Corps of*  
25 *Engineers*, 882 F.2d 407, 409 (9th Cir. 1989). However, an applicant’s purpose must be  
26 “legitimate,” and alternatives considered by the Corps “do[] not have to accommodate  
27 components of a project that are merely incidental to the applicant’s *basic* purpose.” *Id.*  
28

1           26. The 404(b)(1) Guidelines also require that the Corps not issue a permit for  
2 any discharge of fill material “unless appropriate and practicable steps have been taken  
3 which will minimize potential adverse impacts of the discharge on the aquatic  
4 ecosystem.” 40 C.F.R. § 230.10(d).

5           27. Under its distinct and complementary authority under Section 404 of the  
6 Clean Water Act, the Administrator of EPA has the authority to deny, restrict, prohibit,  
7 or withdraw the issuance of any Section 404 permit “whenever [s]he determines . . . that  
8 the [proposed] discharge of such materials into such area will have an unacceptable  
9 adverse effect on municipal water supplies, shellfish beds and fishery areas (including  
10 spawning and breeding areas), wildlife, or recreational areas.” 33 U.S.C. § 1344(c).  
11 Collectively, these actions are sometimes referred to as EPA’s authority to “veto” a  
12 Section 404 permit. *Mingo Logan Coal Company v. U.S. EPA*, 714 F.3d 608, 612-13  
13 (D.C. Cir. 2013).

14           ***THE NATIONAL ENVIRONMENTAL POLICY ACT***

15           28. Congress enacted NEPA to “promote efforts which will prevent or  
16 eliminate damage to the environment.” 42 U.S.C. § 4331. “NEPA was passed by  
17 Congress to protect the environment by requiring that federal agencies carefully weigh  
18 environmental considerations and consider potential alternatives to the proposed action  
19 before the government launches any major federal action.” *Lands Council v. Powell*,  
20 395 F.3d 1019, 1026 (9th Cir. 2005).

21           29. The cornerstone of NEPA is the environmental impact statement that must  
22 be prepared for all “major federal actions significantly affecting the quality of the  
23 human environment.” 42 U.S.C. § 4332. An environmental impact statement must be  
24 prepared prior to initiating any major federal action to ensure that the agency has  
25 available and will carefully consider detailed information regarding the environmental  
26 effects of the proposed action before making a decision, and that relevant information  
27 about the proposed action is made available to the public so that the public may play a  
28 role in the decision-making process. 40 C.F.R. §§ 1501.2, 1502.5.

1           30. An environmental impact statement must consider the environmental  
2 impact of the proposed federal action, any adverse environmental effects which cannot  
3 be avoided should the proposal be implemented, alternatives to the proposed action, the  
4 relationship between local short-term uses of man's environment and the maintenance  
5 and enhancement of long-term productivity, and an irreversible and irretrievable  
6 commitments of resources if the proposed action is implemented. 42 U.S.C. §  
7 4332(2)(C).

8           31. Under NEPA and its implementing regulations, the effects that must be  
9 discussed in the environmental impact statement include the direct, indirect, and  
10 cumulative environmental impacts of the proposed action. 40 C.F.R. § 1508.25(c). The  
11 NEPA regulations define "direct effects" as effects "which are caused by the action and  
12 occur at the same time and place." *Id.* § 1508.5(a). "Indirect effects" are those effects  
13 "which are caused by the action and are later in time or farther removed in distance, but  
14 are still reasonably foreseeable." *Id.* § 1508.8(b).

15           32. NEPA's regulations define "cumulative impact" as the "impact on the  
16 environment which results from the incremental impact of the action when added to  
17 other past, present, and reasonably foreseeable future actions regardless of what agency  
18 (federal or non-federal) or person undertakes such other actions. Cumulative impacts  
19 can result from individually minor but collectively significant actions taking place over  
20 a period of time." *Id.* § 1508.7. The information in a NEPA analysis must be of high  
21 quality, as accurate scientific analysis, expert agency comments, and public scrutiny are  
22 essential to implementing NEPA. *Id.* § 1500.1(b).

23           33. When an agency is evaluating reasonably foreseeable significant adverse  
24 effects on the human environment in an environmental impact statement and there is  
25 incomplete or unavailable information, the agency shall always make clear that such  
26 information is lacking. *Id.* § 1502.22.

27           34. In addition, NEPA requires agencies to rigorously explore and objectively  
28 evaluate all reasonable alternatives to the proposed action, thereby providing a clear

1 basis for choice among options by the decision-maker and the public. 42 U.S.C. §  
2 4332(2)(C)(iii); 23 C.F.R. § 771.105; 40 C.F.R. §§ 1508.9, 1502.14. The alternatives  
3 analysis “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.  
4 The Corps’ NEPA regulations specifically mandate that an environmental impact  
5 statement for a Section 404 permit application “should discuss geographic alternatives,  
6 e.g., changes in location and other site specific variables, and functional alternatives,  
7 e.g., project substitutes and design modifications.” 33 C.F.R. § 325 App. B, 9(b)(5)(c).

8 35. An environmental impact statement must specify the purpose and need to  
9 which the agency is responding in proposing the alternatives including the proposed  
10 action. 40 C.F.R. § 1502.13. The agency’s objectives may not be defined in  
11 unreasonably narrow terms that pre-ordain the proposed action or foreclose reasonable  
12 alternatives, nor may the purpose and need be defined in terms of the applicant’s private  
13 objectives.

14 36. Lastly, the agency’s ROD must state whether all practicable means to avoid  
15 or minimize environmental harm from the alternative selected have been adopted, and if  
16 not, why they were not. 40 C.F.R. § 1505.2(c). A monitoring and enforcement program  
17 shall be adopted and summarized where applicable for any mitigation. *Id.*

18 ***THE NATIONAL HISTORIC PRESERVATION ACT***

19 37. Congress enacted the National Historic Preservation Act (“NHPA”), 16  
20 U.S.C. § 470 *et seq.*, in 1966 with the express intent that “the historical and cultural  
21 foundations of the Nation should be preserved as a living part of our community life and  
22 development in order to give a sense of orientation to the American people.” 16 U.S.C.  
23 § 470(b)(2).

24 38. Section 106 of the NHPA requires federal agencies involved in an  
25 “undertaking,” which includes projects requiring a federal permit, to “take into account  
26 the effect of the undertaking on any district, site, building, structure, or object that is  
27 included in or eligible for inclusion in the National Register [of Historic Places].” 16  
28 U.S.C. § 470f.

1           39. Like NEPA, the NHPA is designed to ensure that federal decision-makers  
2 thoroughly evaluate and address the impacts of their proposed actions on historic  
3 properties prior to taking final action.

4           40. The NHPA Section 106 process requires federal agencies involved in  
5 undertakings to make a reasonable and good faith effort to identify and disclose historic  
6 properties within affected areas, evaluate the potential adverse effects of the federal  
7 undertaking to the historic properties, and seek ways to avoid, minimize, or mitigate any  
8 adverse effects to the historic properties. 36 C.F.R. §§ 800.4-800.6. Throughout all  
9 stages of the Section 106 process, the applicable federal agency must consult with  
10 Indian tribes that attach religious and cultural significance to historic properties within  
11 the affected area that may be affected by an undertaking, even if such an area is outside  
12 of a Tribe's Reservation Boundaries. *Id.* §§ 800.2(c)(2)(ii)(iii), 800.3(f)(2), 800.4(a)(4),  
13 800.5(c)(2)(iii), 800.6(a), 800.6(b)(2).

14           41. The NHPA and its implementing regulations further and specifically  
15 provide that “[c]onsultation [with Indian tribes] should commence early in the planning  
16 process, in order to identify and discuss relevant preservation issues . . .” (36 C.F.R. §  
17 800.2(c)(2)(ii)(A)); federal agencies “shall make a reasonable and good faith effort to  
18 identify any Indian tribes . . . that might attach religious and cultural significance to  
19 historic properties in the area of potential effects and invite them to be consulting  
20 parties” (36 C.F.R. § 800.3(f)(2)); that consultation with a tribe “must recognize the  
21 government-to-government relationship between the federal government and Indian  
22 tribes” (*id.* § 800.2(c)(2)(ii)(C)); and that federal agencies provide the tribe with “a  
23 reasonable opportunity to identify its concerns about historic properties, advise on the  
24 identification and evaluation of historic properties, including those of traditional  
25 religious and cultural importance, articulate its views on the undertaking's effects on  
26 such properties, and participate in the resolution of adverse effects.” *Id.* §  
27 800.5(c)(2)(ii)(A).

28

1 ***ADMINISTRATIVE PROCEDURE ACT***

2 42. The APA, 5 U.S.C. §§ 701-706, provides for judicial review of final  
3 agency action.

4 43. Under the authority of the APA, a reviewing court must hold unlawful and  
5 set aside agency action, findings, and conclusions found to be arbitrary, capricious, an  
6 abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A). A  
7 reviewing court must also set aside agency action, findings, and conclusions found to be  
8 without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

9 **FACTUAL BACKGROUND**

10 44. The proposed Project would permit development of a new urban center of  
11 nearly 20,000 residences and more than 60,000 residents on the approximately 12,000-  
12 acre Newhall Ranch site – one of the largest single residential developments ever  
13 contemplated in California. The Project will require massive alterations to the Santa  
14 Clara River, its floodplain, and tributaries to accommodate planned construction and  
15 flood control protection, and to control erosion that will result from denuding much of  
16 the development site of its natural vegetation. These alterations will have tremendous  
17 adverse impacts on the diverse ecosystems and fragile environment currently found on  
18 Newhall Ranch. While these impacts could have been reduced by reducing the scope or  
19 altering the design of the Project, the current plan for development on Newhall Ranch  
20 will irreparably alter current environmental conditions of the site and surrounding area.

21 ***The Current Environmental Setting***

22 45. Newhall Ranch consists of about 12,000 acres of rugged, undeveloped  
23 terrain and agricultural land along the Santa Clara River in northwestern Los Angeles  
24 County. Specifically, Newhall Ranch lies along an approximately six-mile stretch of  
25 the Santa Clara River between the Ventura County line and Interstate Highway 5. The  
26 site's open space and agricultural uses support an extremely diverse range of plant and  
27 animal types adapted to the variety of landscapes and habitats on the site.

1           46. The Santa Clara River is one of the largest rivers in southern California,  
2 running some 116 miles from its headwaters on the north slope of the San Gabriel  
3 Mountains near Acton to its confluence with the Pacific Ocean between the cities of  
4 Oxnard and Ventura. Like other rivers in southern California, the Santa Clara River  
5 tends to have highly variable, flashy flows. However, in contrast to other major  
6 southern California rivers like the Los Angeles or Santa Ana, the Santa Clara is not  
7 confined by extensive levees, impounded by dams (although a major diversion dam  
8 located near Santa Paula impedes fish passage), or lined with concrete. Throughout  
9 much of its course, the Santa Clara River consists of multiple, braided channels that  
10 wander across a broad floodplain. Upstream of the Project site, the river is bordered by  
11 extensive urban development in Valencia, Santa Clarita, and Canyon Country. The area  
12 downstream of the Project site in Ventura Country is primarily agricultural land.

13           47. Most of the Santa Clara River's flow occurs during the wet season, and  
14 major storms account for most of the wet season flow. A peak discharge of 68,800  
15 cubic feet per second was recorded in 1969 for the Santa Clara—from a watershed of  
16 only about 1,600 square miles. During dry periods, flows can be very low, and in some  
17 stretches, subterranean.

18           48. The Project site contains a wide variety of landscapes and vegetation types,  
19 including the river channel and floodplain of the Santa Clara River, mature riparian  
20 forests, oak woodlands, sagebrush, grasslands, freshwater wetlands, alkaline marshes,  
21 steep hillsides and mountainous terrain covered by chaparral, and agricultural lands. In  
22 addition, Newhall Ranch is crossed by over 40 miles of streams tributary to the Santa  
23 Clara River, including Potrero Canyon, Long Canyon, Middle Canyon, Lion Canyon,  
24 Chiquito Canyon, and San Martinez Grande Canyon.

25           49. Newhall Ranch provides habitat for an exceptionally diverse range of  
26 wildlife, fish, and plants, including several critically endangered species. California  
27 condors flyover, visit, and forage on the Project site, and three other birds protected  
28

1 under federal and/or state law, including the southwestern willow flycatcher, least Bell's  
2 vireo, and yellow-billed cuckoo, nest in riparian vegetation on Newhall Ranch.

3 50. Other rare fish and wildlife found on the Project site or in downstream  
4 reaches of the Santa Clara River include the California red-legged frog, arroyo toad,  
5 golden eagle, white-tailed kite, California gnatcatcher, unarmored threespine  
6 stickleback, and southern California steelhead ("steelhead").

7 51. The Project site contains one of only two known populations of the San  
8 Fernando spineflower ("spineflower"), a small annual plant that was believed extinct  
9 until it was rediscovered in 1999. The spineflower is a candidate species for listing  
10 under the federal Endangered Species Act, meaning that the U.S. Fish and Wildlife  
11 Service has determined that the species warrants legal protection. According to the Fish  
12 and Wildlife Service, "[t]he existence of only two areas of occurrence, and a relatively  
13 small range, makes the variety highly susceptible to extinction or extirpation from  
14 significant portion of its range due to random events such as fire, drought, erosion, or  
15 other occurrences." The spineflower is also protected by the state of California as an  
16 endangered species. In 2001, the Newhall Land and Farming Company cleared and  
17 terraced areas containing spineflower without required permits, resulting in the loss of  
18 numerous individual plants and permanent impacts to spineflower habitat on the Project  
19 site.

20 52. Newhall Ranch, including the Project area, contains the ancestral homes,  
21 trading and migration routes, and trading centers of the Chumash and Tataviam Native  
22 Americans. Accordingly, the Project area is rich with these Tribes' historic properties  
23 and cultural resources, including their burial sites, village sites, sacred sites, trading  
24 routes and grounds, and ceremonial grounds, which have deep religious, spiritual,  
25 historical, and cultural significance to the Tribes. The Tataviam and Chumash thus  
26 retain strong cultural and religious attachment to the lands, historic properties, and  
27 cultural resources within the Project area, which provides invaluable insights into the  
28 temporal and functional mode of the historic Chumash and Tataviam tribal relations,

1 lifeways, socioeconomic structure, cultural practices, history, and community in the  
2 Santa Clara River Valley.

3 53. The Tataviam village center of Tacuyam, home to a mixed population of  
4 Chumash and Tataviam, lies in the center of the Project area, and the village center of  
5 Camulus lies just downstream of the Project area around the Santa Clara River. The  
6 Project area's development envelope (including the area that will be directly affected by  
7 excavation, earthmoving, and other disturbance authorized by the Project plus the  
8 Newhall Ranch Specific Plan area in which the Project will enable development) thus  
9 contains numerous Tataviam and Chumash burial sites, sacred grounds, village sites,  
10 and unearthed cultural artifacts (such as beads, art, tools, musical instruments, and  
11 jewelry). The Project's development envelope also contains Tataviam and Chumash  
12 natural cultural resources, such as the California condor habitat, flyzones, and feathers;  
13 in-stream, floodplain, and riparian gathering sites for willow, white sage, river rock, and  
14 other riparian plants that are essential to maintaining Chumash cultural, religious, and  
15 ceremonial practices; and cultural landscapes which include undeveloped hillsides,  
16 tributaries, canyons, and floodplains that bring sacredness to sacred sites.

17 54. For the region's Native Americans, the condor holds a very special place in  
18 the universe, possessing great cultural and religious significance. It is one of the most  
19 important and irreplaceable historic and cultural resources in the Project area for the  
20 Tataviam and Chumash People. The condor's visible and unseen presence in the  
21 Project area, whether flying overhead, foraging for food, roosting in a tree, or cleaning  
22 itself near the river, are integral components of the sacredness of Chumash sacred  
23 grounds, cultural sites, burial sites, prayers, and ceremonies. The Chumash also have  
24 historically collected, and wish to continue collecting, condor feathers in the Project  
25 area for ceremonial offerings and to use in ceremonial regalia when the feathers fall to  
26 the ground after the condors forage, clean themselves, and roost.

27 55. In 1981, Los Angeles County designated portions of the Santa Clara River  
28 corridor, including the area within Newhall Ranch, as a Significant Ecological Area

1 (“SEA 23”) because these areas provided habitat for a state- and federally-protected fish  
2 species, the unarmored threespine stickleback. According to Los Angeles County’s  
3 1976 SEA study, the stickleback requires a natural stream course, including “clean, free-  
4 flowing perennial streams and ponds surrounded by native vegetation.” Los Angeles  
5 County Dept. of Regional Planning, Los Angeles County Significant Ecological Area  
6 Study, Appendix E, at E-22 (1976). The Section 404 Permit nonetheless allows  
7 development within SEA 23 even though it will destroy a substantial portion of the  
8 stickleback’s essential habitat.

9 56. The Santa Clara River is considered an impaired waterbody due to high  
10 levels of chlorides and other pollutants. Specifically, the Upper Santa Clara River is  
11 impaired for chloride under Section 303(d) of the Clean Water Act. 33 U.S.C.  
12 § 1313(d). The high level of chlorides is the result of wastewater discharges and other  
13 municipal sources, and is caused in part by the importation of water with high chloride  
14 content from outside the watershed. High chloride levels in the Santa Clara River harm  
15 fish and wildlife, downstream agricultural uses, and downstream water supplies. The  
16 Los Angeles Regional Water Quality Control Board has adopted a Total Maximum  
17 Daily Load (“TMDL”) for chlorides in the Santa Clara River, which establishes numeric  
18 targets for chloride concentrations and measures to meet these targets. The Regional  
19 Water Quality Control Board also recently adopted a TMDL for bacteria for parts of the  
20 Santa Clara River.

21 57. Based on development threats, including the Project, the nonprofit  
22 organization American Rivers named the Santa Clara River as one of the nation’s most  
23 endangered rivers in 2005.

#### 24 ***The Proposed Development***

25 58. Newhall Ranch is the site of a proposed new urban center that would  
26 contain more than 60,000 residents at full buildout. Los Angeles County approved the  
27 Newhall Ranch Specific Plan, which provides the overall template for development, in  
28 2003. The Newhall Ranch Specific Plan provides for over 20,000 residential units,

1 extensive commercial development, a water reclamation plant, and attendant roads and  
2 infrastructure. The Project described in the 2010 Final EIS and 2011 Section 404 permit  
3 allows for 2,587 acres of total development area with 19,812 residential units and  
4 approximately 5.41 million square feet of commercial uses.

5 59. The proposed development covered by the Section 404 Permit will result in  
6 permanent impacts to 47.9 acres of waters of the United States, including 5.1 acres of  
7 wetlands, and temporary impacts to 35.3 acres of waters of the United States.  
8 Additionally, the Project will result in the net loss of about 110 acres of the Santa Clara  
9 River's 100-year floodplain, including 5.8 acres of jurisdictional waters of the United  
10 States. Activities required for construction of the development include construction of  
11 bridges and culverts, conversion of tributary streams to buried or channelized storm  
12 drains, removal of native riparian vegetation, stream diversion, and road construction.  
13 Former free-flowing streams would be filled and replaced by concrete-lined channels,  
14 levees, or other bank stabilization structures.

15 60. To accommodate the channel modifications, floodplain fill, levees, bridges,  
16 the Project will require extensive clearing of vegetation, including permanent clearing  
17 of about 25 acres of riparian forest, over 50 acres of other riparian and bottomland  
18 vegetation, 25 acres of chaparral, and 28 acres of scrub, in addition to "temporary"  
19 impacts to over 100 acres of riparian vegetation. These environmental impacts will  
20 adversely affect the diverse wildlife and plants found on Newhall Ranch, including the  
21 least Bell's vireo, unarmored threespine stickleback, arroyo toad, southwestern willow  
22 flycatcher, California red-legged frog, and California gnatcatcher and their habitat.  
23 Upland development facilitated by the Section 404 Permit will reduce the area occupied  
24 by the spineflower and confine the spineflower to a series of isolated reserves with little  
25 connectivity between populations.

26 61. The alteration of the Santa Clara River, its tributary streams, and its  
27 floodplains will require movement and placement of large volumes of fill. The EIS  
28 estimates that about 5.5 million cubic yards of soil will needed to be excavated from

1 Newhall Ranch and used as fill material. However, this projection significantly  
2 underestimates the direct and indirect fill and soil moving requirements of the Project.

3 62. The Project's modifications to the Santa Clara River and its tributaries, in  
4 combination with the replacement of thousands of acres of natural vegetation and soils  
5 with impervious surfaces, will substantially increase stormwater runoff and other water  
6 pollution in comparison to the pre-Project condition. To capture the increased polluted  
7 runoff and sediment from the site, the Project proposes construction of an extensive  
8 series of "water quality treatment" and debris basins.

9 63. The impervious surfaces created by the Project and enabled by the Section  
10 404 Permit will further deprive the flow-impaired Santa Clara River of a source of much  
11 needed sustainable summer base flows from precipitation that would otherwise  
12 percolate into the ground underlying the Project area and steadily make its way to the  
13 River as surface flows. The precipitation that no longer percolates into the soils  
14 underlying Newhall Ranch, but instead falls on impervious surfaces, will not only wash  
15 urban toxins into the Santa Clara River and deprive the river of sustainable base flows,  
16 but its flashy addition to the river in larger volumes over a short time span will have  
17 downstream hydromodification impacts to the Santa Clara River that destroy riparian  
18 habitat, increase flow velocity in a manner harmful to the unarmored threespine  
19 stickleback and other aquatic species, and increase downstream flood damage to urban  
20 and agricultural areas.

21 64. While the Project's stormwater runoff will increase the concentration and  
22 loading of pollutants into the Santa Clara River, into the Santa Clara River estuary, and  
23 into coastal marine waters, discharges of treated effluent from the Newhall Ranch water  
24 reclamation plant also will increase the concentrations and loading of pollutants into  
25 these waters. The human health impacts from the Project's direct, indirect, and  
26 cumulative contribution to bacteria loading and the acute and chronic lethal and sub-  
27 lethal toxicity impacts on the aquatic life residing in and migrating through the Santa  
28 Clara River, its estuary, and coastal marine waters from individual contaminants and the

1 mix of contaminants discharged from the Project site during wet and dry weather  
2 events, and from the water reclamation plant, will impart irreversible impacts to the  
3 steelhead, the unarmored threespine stickleback, the Santa Clara River's  
4 macroinvertebrate communities, and the entire Santa Clara River ecosystem.

5 65. Wastewater from the first 6,000 residential units of the Project is currently  
6 anticipated to be treated though the Los Angeles County's Valencia Wastewater  
7 Treatment Facility. However, the Valencia Wastewater Treatment Facility is currently  
8 not in compliance with Clean Water Act wastewater discharge limits for chloride.  
9 Wastewater flows from the Valencia Wastewater Treatment Facility continue to degrade  
10 the Santa Clara River and will continue to do so if the Valencia Wastewater Treatment  
11 Facility is forced to take on additional wastewater from the proposed Project.

12 66. Despite historical records evidencing the presence of Chumash within the  
13 Project envelope indicating that the Chumash might attach religious, historical, and  
14 cultural significance to historic properties in the Project area, and despite public  
15 comment from a Chumash ceremonial elder that the Chumash attach religious,  
16 historical, and cultural significance to the Project area and its historic properties, the  
17 Corps failed to make a reasonable and good faith effort to identify the federally  
18 recognized Santa Ynez Band of Chumash Indians and invite them to be consulting  
19 parties, the Corps failed to consult with the federally recognized Santa Ynez Band of  
20 Chumash Indians, and the EIS only attempts to adequately identify, analyze, and set  
21 forth mitigation measures for impacts to Tataviam cultural resources.

22 67. The Corps repeatedly failed to provide the Santa Ynez Band of Chumash  
23 Indians with information critical to the NHPA Section 106 consultation process from  
24 the beginning of the archeological surveys in 1993 to Project approval, and failed to  
25 inform or otherwise contact the Santa Ynez Band of Chumash Indians about the Project  
26 as required by Section 106 of the NHPA, precluding the Tribe from engaging in  
27 meaningful consultation regarding identification of historic properties, the Project's  
28 potential adverse effects to such properties, and development and evaluation of

1 alternatives or modifications that could have avoided, minimized, or mitigated those  
2 adverse effects.

3 68. The Corps also failed to consult with the Santa Ynez Band of Chumash  
4 Indians in compliance with Executive Order 13175, Consultation and Coordination with  
5 Indian Tribal Governments (65 Fed. Reg. 67249) (November 6, 2000), President Barack  
6 Obama's November 9, 2009 Memorandum to the heads of all Federal agencies entitled  
7 *Tribal Consultation* (74 Fed. Reg. 57881) reaffirming Executive Order 13175, and the  
8 Corp's Draft Tribal Consultation Policy (December 1, 2011), which, like NHPA Section  
9 106 regulations, requires consultation to commence early and continue throughout the  
10 administrative process, requires sharing of information, and requires consultation with  
11 the actual federal decision-maker, the Corps.

12 69. Among the Project's most devastating and irreversible impacts to Native  
13 American historic, cultural, and religious resources and historic properties are its  
14 impacts to Tataviam and Chumash burials and buried cultural remains such as villages  
15 and artifacts. The earth moving excavation conducted pursuant to the Project will  
16 destroy Tataviam and Chumash burial sites and remains, and along with them, the  
17 ancestors, the spirits, the culture, and the history of their People. These impacts will not  
18 only harm Chumash cultural practices, religious practices, and life ways, but will  
19 permanently impair the ability of the Chumash, Tataviam, and historians to understand  
20 and learn about the temporal and functional mode of the historic Chumash and Tataviam  
21 tribal relations, lifeways, socioeconomic structure, cultural practices, history, and  
22 community in the Santa Clara River Valley.

23 70. In addition, the Project jeopardizes the Tataviam and Chumash cultural  
24 landscape within the Project envelope, which is a critical religious and cultural  
25 component to these Tribes' burial sites, sacred grounds, and ceremonial practices. The  
26 cultural landscape includes scenic vistas, undeveloped mountains, native wildlife,  
27 undeveloped valleys, and meandering waterways in the Project envelope that serve as  
28 the spiritual and religious backdrop for or component of the burial sites , sacred

1 grounds, and ceremonial sites. The Project will line the hills, riverbanks, mountains,  
2 and valleys of the Project envelope with modern buildings, power lines, and pavement,  
3 and decrease the local presence of wildlife such as the overhead flight of the condor,  
4 which is a critical component of the local Tribes' cultural landscape. In effect, the  
5 Project will thus destroy the historic cultural landscape that the current and future  
6 generations of Chumash and Tataviam depend upon to sustain their culture and religious  
7 practices.

8 71. Further, the Project's impacts to instream, floodplain, and riparian natural  
9 cultural resources such as willow, white sage, river rock, other native riparian  
10 vegetation, and steelhead threatens Chumash life ways and the sustainability of  
11 Chumash cultural and religious practices dependent on these resources.

12 72. Additionally, the reduction in presence of the condor from the Chumash  
13 and Tataviam cultural landscape in the Project area and flying over the Project area due  
14 to the Project's impacts will diminish the Chumash Peoples' connection with their  
15 ancestors and their culture, and will detract from their ceremonial and religious practices  
16 in and around the Project area. The Project's negative impacts on condor populations  
17 within the Project area also will deprive Chumash people of a place to find the condor  
18 feathers that are necessary to conduct specific religious and cultural ceremonies.

19 73. Despite the eligibility of historic properties and cultural resources  
20 contained in the Project envelope for inclusion on the National Register of Historic  
21 Places, as noted in a Final EIS comment letter by Chumash Native American  
22 ceremonial elder Mati Waiya, the archeological surveys and other efforts of the Corps to  
23 identify properties of religious, historical, and cultural importance to the Chumash and  
24 Tataviam were not conducted in consultation with either Tribe or the federally  
25 recognized Santa Ynez Band of Chumash Indians, did not utilize best available and  
26 feasible methods, were not conducted in good faith, and otherwise fell short of a  
27 reasonable and good faith effort to identify historic properties within the area of  
28 potential effects within the Project site.

1           74. Furthermore, despite a letter from Chumash Native American ceremonial  
2 elder Mati Waiya alerting the Corps to the Project's impacts to Native American historic  
3 properties, cultural resources, natural cultural resources, and religious practices from the  
4 Project's impacts to the condor, the Final EIS does not adequately identify or analyze  
5 impacts to these properties and resources.

6           75. Because many of the Chumash and Tataviam burial sites and buried  
7 cultural and historic resources are not identified in the limited archeological surveys  
8 cited to in the EIS, because the EIS does not commit to the avoidance or the  
9 preservation of the Chumash and Tataviam cultural and historic resources the EIS does  
10 identify, and because the EIS mitigation measures do not include Chumash Native  
11 American monitors to represent the interests of the Chumash Peoples, the EIS did not  
12 evaluate a reasonable range of alternatives, and specific alternatives, that would  
13 adequately mitigate adverse impacts to these Native American historic and cultural  
14 resources during Project construction. The final EIS does not analyze a Project  
15 alternative that would entirely avoid all Chumash and Tataviam historic properties,  
16 cultural resources, historic resources, and natural cultural resources identified in the  
17 EIS.

18           76. The Project's impacts to historic properties, cultural resources, historic  
19 resources, and natural cultural resources will thus irreparably harm Wishtoyo's  
20 Chumash members' cultural heritage, connections with their ancestors, knowledge  
21 about Chumash history and life ways, and cultural, spiritual, and ceremonial practices.  
22 For example, the Project will impair the ability of Wishtoyo's Chumash members to:  
23 perform religious and cultural ceremonies, learn about their history and culture, and  
24 connect with their ancestors at burial, sacred, historical, and cultural sites in, adjacent to,  
25 and overlooking the Project area; maintain their cultural practices; and to connect  
26 spiritually with their ancestors by experiencing condor flyovers over cultural and sacred  
27 sites in the Project area, and by experiencing and harvesting steelhead downstream of  
28 the Project; and harvest/collect in the Santa Clara River, and in the riparian habitat

1 within project area (1) white sage for ceremonial, medicinal, and religious uses, (2)  
2 willow for Chumash basketry, material culture practice, and ap (traditional Chumash  
3 dwelling unit) construction, (3) river rock for ceremonial sweats, (4) other riparian plant  
4 species such as mulefat used to make Chumash fish traps, additional types of sage used  
5 for ceremonial, medicinal, and religious purposes, and other native riparian plants used  
6 for Chumash cultural, religious, and ceremonial purposes; and (5) condor feathers for  
7 Chumash ceremonial and religious use.

8 ***The Procedural History***

9 77. The Newhall Ranch Specific Plan, which Los Angeles County approved in  
10 2003, contemplates five development phases and describes the general development  
11 guidelines and policies governing this future development. Subsequent subdivision  
12 approvals are required for each of these phases. Los Angeles County approved the first  
13 two phases of Newhall Ranch—Landmark Village and Mission Village—in 2011 and  
14 2012, respectively.

15 78. In December 2003, Newhall applied to the Corps for a Section 404 Permit  
16 to permanently impact 93.3 acres and temporarily impact 33.3 acres of waters of the  
17 United States for construction of extensive development on Newhall Ranch in  
18 conjunction with the Project.

19 79. In 1994, prior to making a reasonable and good faith effort to identify any  
20 Indian tribes that might attach religious and cultural significance to historic properties  
21 and cultural resources in the Project Area, the Phase I and Phase II archeological  
22 surveys relied upon by the EIS were completed. Neither the federally recognized Santa  
23 Ynez Band of Chumash Indians nor the Tataviam were consulted during the Phase I and  
24 Phase II archeological surveys.

25 80. In July 2004, well after the Phase I and Phase II archeological surveys were  
26 completed, the Corps began its outreach to Native American Tribes. The Corps did not  
27 consult, or otherwise make a reasonable and good faith effort to identify, the federally  
28 recognized Santa Ynez Band of Chumash Indians at any time during the Corps' Section

1 404 permitting process prior to issuance of a ROD and provisional Section 404 permit  
2 to the Newhall Land and Farming Company.

3 81. In April 2009, the Corps released the Draft EIS for the Project and for the  
4 Corps' Section 404 Permit. This joint environmental review with California DFW was  
5 intended to evaluate the environmental consequences of the Project pursuant to the  
6 California Environmental Quality Act (Cal. Pub. Resources Code § 21000 *et seq.*) and  
7 the Corps' Section 404 permit pursuant to NEPA. The Draft EIS relied heavily and  
8 primarily upon the Phase I and Phase II archeological surveys for identification of  
9 Chumash and Tataviam historic properties, cultural resources, and natural cultural  
10 resources, and relied upon a consultation process that did not include all mandatory  
11 consulting parties, such as the Santa Ynez Band of Chumash Indians, and that was not  
12 informed by Chumash Native Americans.

13 82. The EIS evaluated several alternatives, including a no action/no project  
14 alternative (Alternative 1), the applicant's proposed project (Alternative 2), and an  
15 "environmentally superior" alternative (Alternative 7). Alternative 7 would remove  
16 bank stabilization structures and other development from the Santa Clara River's 100-  
17 year floodplain, preserve two tributary streams that would be destroyed and converted to  
18 buried storm drains under the Alternative 2, eliminate two major bridge crossings of the  
19 Santa Clara River, and maximize avoidance of areas populated by spineflowers.  
20 Alternative 7 would allow the development of 1,352.4 acres, including 3.76 million  
21 square feet of commercial floor space and 16,471 development units.

22 83. The EIS also detailed the Draft LEDPA as modified Alternative 3, which  
23 includes 2,587 acres of total development area with 19,812 residential units and  
24 approved approximately 5.41 million square feet of commercial uses. Although the  
25 Draft LEDPA would reduce the footprint of the development in comparison to the some  
26 of the alternatives proposed, it would still result in the permanent fill of 66.3 acres of  
27 waters of the United States and temporarily disturb 32.2 acres of waters of the United  
28 States. These impacts are substantially greater than the impacts of Alternative 7, which

1 would result in the permanent fill of 13.1 acres of waters of the United States and  
2 temporarily disturb 20.3 acres of waters of the United States.

3 84. Plaintiffs submitted extensive comments on the Draft EIS. In June 2010,  
4 California DFW and the Corps issued a Final EIS that purported to respond to these  
5 comments and those submitted by other organizations, individuals, and numerous state,  
6 federal, and local agencies. Plaintiffs submitted additional comments on the Final EIS.  
7 EPA provided comments to the Corps on both the Draft and Final EIS detailing  
8 numerous concerns with the proposed Project and the Corps' Draft LEDPA.

9 85. The Draft LEDPA in the Final EIS served as the primary basis for the  
10 Newhall Ranch RMDP. The RMDP is described as "a conservation, mitigation, and  
11 permitting plan for the long-term management of sensitive biological resources" within  
12 the Newhall Ranch Specific Plan that "is intended to direct both resource management  
13 and development in the Specific Plan area." In addition to the Newhall Ranch Specific  
14 Plan area, the RMDP area covers an adjacent 1,517-acre Salt Creek area in Ventura  
15 County.

16 86. During the review period for the Section 404 Permit, EPA stated to the  
17 Corps that it had environmental concerns because the Project may result in "substantial  
18 and unacceptable impacts to an aquatic resource of national importance (ARNI). In a  
19 letter dated September 17, 2009, EPA reaffirmed that it had objections to the Permit  
20 approval "on the basis that the authorization will have substantial and unacceptable  
21 impacts to an ARNI."

22 87. On July 25, 2011, the Corps provided EPA with a Notice of Intent to  
23 Proceed and a draft Section 404 Permit for the RMDP. After reviewing the draft  
24 provisional permit, and despite EPA's prior comments evidencing the agency's  
25 numerous concerns and objections regarding the Permit, EPA Regional Administrator  
26 Jared Blumenfeld informed the Corps on August 9, 2011 of the EPA's decision to not  
27 seek higher level review of the draft Section 404 permit. In a letter titled "Decision Not  
28 to Seek Higher Level Review of Department of Army Permit 2003-01264-AOA," Mr.

1 Blumenfeld informed the Corps of the EPA's decision to not deny, restrict, or prohibit  
2 the Project's Section 404 permit in light of specific changes and conditions added to the  
3 draft permit. Specifically, Mr. Blumenfeld stated that EPA "will not seek a higher level  
4 review of the draft permit at the EPA's Office of Water pursuant to paragraph 3(d)(1) of  
5 our agencies' Memorandum of Agreement (MOA) under Clean Water Act (CWA)  
6 Section 404(q)."

7 88. On August 31, 2011, the Corps made a final conformity determination and  
8 completed its environmental review, issuing a provisional Section 404 permit to  
9 Newhall Land and Farming Company and issuing a ROD permitting the fill of waters of  
10 United States during construction of the Project. The Final LEDPA adopted by the  
11 Corps permits permanent construction-related impacts to 47.9 acres of waters of the  
12 United States and temporary construction-related impacts to 35.3 acres of waters of the  
13 United States. The waters impacted include the Santa Clara River, several tributaries to  
14 the Santa Clara River, and adjacent wetlands.

15 89. On October 22, 2012, the Corps signed and/or issued the final 404 permit.

16 **FIRST CLAIM FOR RELIEF**

17 **(Against the Corps and EPA, for violation of APA Section 706: Failure to Comply**  
18 **with the Clean Water Act and its Accompanying Regulations Prior to Issuing a**  
19 **Section 404 Permit)**

20 90. Plaintiffs incorporate by reference each and every allegation set forth in  
21 this Complaint as if set forth in full herein.

22 91. This claim is brought against the Corps and EPA and is raised by all  
23 Plaintiffs.

24 92. The 404(b)(1) Guidelines associated with the Clean Water Act mandate  
25 that "no discharge of dredged or fill material shall be permitted if there is a practicable  
26 alternative to the proposed discharge which would have less adverse impact on the  
27 aquatic ecosystem, so long as the alternative does not have other significant adverse  
28 environmental consequences." 40 C.F.R. § 230.10(a). Accordingly, the Corps must

1 adopt the alternative to a proposed discharge that best avoids, minimizes, and mitigates  
2 of impacts to the aquatic ecosystem while still achieving the Project's purpose as the  
3 least environmentally damaging practicable alternative (LEDPA).

4 93. The LEDPA chosen by the Corps will result in unnecessary and avoidable  
5 environmental impacts to the Santa Clara River and the surrounding areas.

6 94. The LEDPA adopted by the Corps will permanently fill 47.9 acres of  
7 waters of the United States, including 5.1 acres of jurisdictional wetlands. The LEDPA  
8 will also temporarily disturb 35.3 acres of waters of the United States, including 11.8  
9 acres of jurisdictional wetlands. In particular, the LEDPA would directly impact 5.8  
10 acres of jurisdictional waters of the Santa Clara River and temporarily impact 15.7  
11 acres of the Santa Clara River.

12 95. The LEDPA adopted by the Corps will result in the net loss of 110 acres of  
13 Santa Clara River 100-year floodplain, or about 8 percent of the river's 100-year  
14 floodplain in the Project area.

15 96. The LEDPA adopted by the Corps will result in significant adverse impacts  
16 to air quality and human respiratory health.

17 97. The LEDPA adopted by the Corps is not the LEDPA as defined by the  
18 404(b)(1) Guidelines. Other practicable, less-damaging alternatives are available that  
19 conform to the 404(b)(1) Guidelines.

20 98. The Corps failed to minimize and eliminate all avoidable environmental  
21 impacts associated with the LEDPA, including the filling of waters of the United States  
22 and direct, indirect, and cumulative impacts to habitat for endangered, threatened, and  
23 rare species.

24 99. The Corps' economic analysis in support of the LEDPA is flawed and  
25 inadequate because, among other things, it ignores likely economic returns for the  
26 alternatives and arbitrarily skews the analysis in favor of the LEDPA.

27 100. Alternative 7 would facilitate urban development on the Project site but  
28 would result in reduced placement of fill within waters of the United States and avoid

1 impacts to the 100-year floodplain. The Corps failed to adequately justify its rejection  
2 of the environmentally superior Alternative 7 as not economically practicable or  
3 compatible with the Project's purpose.

4 101. Additionally, the Corps violated its mandatory duty under the 404(b)(1)  
5 Guidelines when it:

- 6 a. failed to ensure that the Project would not cause or contribute to significant  
7 degradation of the waters of the United States, including the Santa Clara  
8 River and its tributaries, through additional wastewater flows;
- 9 b. failed to fully analyze and address all of the Project's cumulative effects on  
10 the water quality and productivity of the aquatic ecosystem;
- 11 c. failed to fully analyze and address the secondary effects of the filling of the  
12 waters of the United States associated with the Project;
- 13 d. failed to ensure that the Project will not jeopardize the continued existence  
14 of any federally listed species as required by 40 C.F.R. 230.10(b)(3); and
- 15 e. failed to provide a comprehensive compensatory mitigation plan that  
16 includes the required elements described in 40 C.F.R. § 230.9(c), such as  
17 baseline information, a mitigation work plan, a maintenance plan,  
18 ecological performance standards, monitoring requirements, and a long-  
19 term management plan for Project's the numerous unavoidable  
20 environmental impacts.

21 102. The Corps also violated its mandatory duty under the Corps' own Clean  
22 Water Act regulations (33 C.F.R. pt. 320) when it failed to adequately analyze and  
23 evaluate each of the public interest factors listed in 33 C.F.R. § 320.4, including but not  
24 limited to:

- 25 a. the Project's adverse environmental impacts to the ecologically important  
26 Santa Clara River floodplain;
- 27 b. the Project's impacts to the Santa Clara River and its watershed;
- 28

- 1 c. impacts from anticipated changes in water flows associated with the Project
- 2 to nearby downstream properties;
- 3 d. the Project's impacts on flood control and downstream erosion resulting
- 4 from changes to river and stream banks and the floodplain; and
- 5 e. the Project's effects on general environmental concerns and human
- 6 welfare, including its impacts on air quality and human health.

7 103. In its public interest analysis, the Corps improperly considered broad  
8 economic factors and purported Project benefits beyond the scope of the Corps'  
9 statutory and regulatory mandates, and beyond the scope of the analysis of impacts and  
10 alternatives.

11 104. The Corps authorized floodplain development and failed to avoid the long-  
12 and short-term significant adverse impacts associated with occupancy and modification  
13 of floodplains despite the existence of practicable alternatives outside the floodplain.

14 105. The Corps has violated the Clean Water Act by failing to adequately  
15 analyze the LEDPA for the Project, failing to adequately comply with the 404(b)(1)  
16 Guidelines, and failing to complete the required public interest analysis under 33  
17 C.F.R. pt. 320. Therefore, the Corps acted arbitrarily and capriciously, abused its  
18 discretion, and was not in accordance with law as required by Clean Water Act, the  
19 Corps' and EPA's implementing regulations, and the APA, and is subject to judicial  
20 review under the APA. 5 U.S.C. §§ 701-706, 706(2).

21 106. EPA determined that it would not prohibit the Project's discharge of fill  
22 material even though such a discharge will "have an unacceptable adverse effect on  
23 municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational  
24 areas." 33 U.S.C. § 1344(c). As a result, EPA's decision not to deny, prohibit, or  
25 restrict the Section 404 Permit under EPA's Clean Water Act Section 404(c) authority  
26 is arbitrary and capricious, an abuse of discretion, and not in accordance with law as  
27 required by Clean Water Act, its implementing regulations, and the APA, and is subject  
28 to judicial review under the APA. 5 U.S.C. §§ 701, 706(2). EPA's decision not to

1 deny, prohibit or restrict the permit, as evidenced by a specific letter in which the  
2 EPA's Regional Administrator declared that the agency's final decision to "not seek a  
3 higher level review of the draft permit at the EPA's Office of Water pursuant to  
4 paragraph 3(d)(1) of our agencies' Memorandum of Agreement (MOA) under Clean  
5 Water Act (CWA) Section 404(q)," conclusively removed the sole remaining barrier to  
6 Corps approval of the permit and issuance of the ROD three weeks later. In making its  
7 decision not to deny, prohibit, or restrict the Section 404 Permit, EPA applied the  
8 standards of Clean Water Act Section 404(c), the 404(b)(1) Guidelines, and 40 C.F.R.  
9 part 231 (Section 404(c) Procedures).

10 **SECOND CLAIM FOR RELIEF**

11 **(Against the Corps, for violation of APA Section 706: Failure to Adequately**  
12 **Evaluate Environmental Impacts and All Reasonable Alternatives in the 2010**  
13 **Environmental Impact Statement in Violation of the National Environmental**  
14 **Policy Act)**

15 107. Plaintiffs incorporate by reference each and every allegation set forth in  
16 this Complaint as if set forth in full herein.

17 108. This claim is brought against the Corps and is raised by all Plaintiffs.

18 109. In preparing an EIS, agencies must take a "hard look" at the potential  
19 environmental consequences of a proposed action, and must consider relevant factors  
20 and important aspects of the proposed action. *See N. Plains Resource Council v.*  
21 *Surface Transp. Bd.*, 668 F.3d 1067, 1074-75 (9th Cir. 2011). An EIS must analyze the  
22 direct, indirect, and cumulative environmental impacts of the proposed action. 40  
23 C.F.R. § 1508.25(c).

24 110. Agencies must also disclose in the EIS whether the alternatives under  
25 consideration will or will not achieve compliance with other environmental laws and  
26 policies. 40 C.F.R. § 1502.2(d). Because the alternatives analysis "is the heart of the  
27 environmental impact statement" an agency must "[r]igorously explore and objectively  
28 evaluate all reasonable alternatives." *Id.* § 1502.14.

1           111. The 2010 Final EIS is inadequate under NEPA, 42 U.S.C. §§ 4331 *et seq.*,  
2 and its implementing regulations, 40 C.F.R. §§ 1500-1508, because it does not  
3 adequately address and analyze all relevant factors, including but not limited to, the  
4 following:

- 5           a. loss of ecological function within the Santa Clara River, its floodplain, and  
6           its tributaries due to the placement fill;
- 7           b. environmental impacts of storm water runoff, including water quality  
8           impacts and hydromodification of the Santa Clara River and its tributaries;
- 9           c. environmental impacts of management of wastewater, including long-term  
10           water quality impacts and hydromodification of the Santa Clara River and  
11           its tributaries;
- 12           d. environmental impacts on water quality due to sedimentation from upland  
13           sources and management or mitigation of those impacts;
- 14           e. significant indirect and cumulative chronic and acute sub-lethal toxicity  
15           impacts of the Project's wet and dry weather urban runoff, either in  
16           combination with the Newhall Ranch water reclamation plant or alone, on  
17           aquatic life, juvenile steelhead, and adult steelhead in the Santa Clara  
18           River, the Santa Clara River Estuary, and in the Pacific Ocean;
- 19           f. cumulative impacts to surface water quality from permanent and temporary  
20           impacts to the waters of the United States impacted by the Project;
- 21           g. significant indirect and cumulative water quality impacts on juvenile  
22           steelhead residing in the Santa Clara River estuary, migrating adult  
23           steelhead in the Santa Clara River, or migrating juvenile steelhead in the  
24           Santa Clara River, and in particular, the significant indirect and cumulative  
25           sub-lethal toxicity impacts on juvenile steelhead from the Project's  
26           stormwater discharges containing dissolved copper, and the sufficiency of  
27           proposed mitigation measures;
- 28

- 1 h. environmental impacts and the efficacy of measures taken to prevent
- 2 erosion at bridge abutment and outfall locations;
- 3 i. environmental impacts to the endangered spineflower and the sufficiency
- 4 of proposed mitigation measures;
- 5 j. air quality impacts arising during construction and daily vehicles miles
- 6 traveled by residents after completion of construction of the Project;
- 7 k. impacts from roadway congestion, projected automobile emissions, and
- 8 other transportation related impacts;
- 9 l. the amount of fill material and soil required for the proposed development,
- 10 thereby making uncertain the direct, indirect, and cumulative air quality
- 11 and traffic impacts associated with moving this material;
- 12 m. potential significant direct, indirect, and cumulative impacts to Chumash
- 13 and Tataviam historic, cultural, and religious resources, practices, and
- 14 knowledge, and the sufficiency of proposed mitigation measures for the
- 15 impacts to these resources; and
- 16 n. potential significant direct, indirect, and cumulative impacts to Chumash
- 17 natural cultural resources, including white sage, willow, river rocks, other
- 18 native riparian vegetation, steelhead, and the California condor, and the
- 19 potential significant direct, indirect, and cumulative impacts to Chumash
- 20 cultural and religious practices, and the Chumash Peoples' connection to
- 21 their ancestors, from the potential significant direct, indirect, and
- 22 cumulative impacts to these Chumash natural cultural resources.

23 112. By not disclosing, failing to analyze, or failing to adequately consider these  
24 important and relevant factors within the EIS, the Corps violated NEPA. 42 U.S.C. §  
25 4332(2)(C); *N. Plains Resource Council*, 668 F.3d at 1074-75.

26 113. Furthermore, the Corps' consideration of alternatives in the Final EIS is  
27 inadequate under NEPA and its implementing regulations. The Corps failed to analyze  
28 all reasonable alternatives that were distinguishable in substance and consequences

1 from those alternatives the EIS actually considered, including an alternative that would  
2 involve no fill in Potrero Canyon, an adequate spineflower conservation plan, a cultural  
3 resources monitoring plan with Chumash monitors to represent the interests of the  
4 Chumash Peoples and to protect Chumash cultural and historic resources, and an  
5 alternative that would entirely avoid all Native American cultural sites and resources,  
6 natural cultural resources, historic resources, and historic properties identified in the  
7 EIS. In addition, the Final EIS alternatives analysis was fundamentally flawed because  
8 Corps' Final EIS erroneously relied on incomplete, insufficient, and flawed Chumash  
9 cultural and historic resources impact analysis, mitigation analysis, and mitigation  
10 measures that were noncommittal, to inform, analyze, and set forth alternatives.

11 114. Additionally, the Corps' analysis of Alternatives 1 through 8 was  
12 incomplete and inadequate. For example, the Corps failed to analyze the alternatives in  
13 light of hydromodification impacts to each of major tributaries to Santa Clara River.  
14 Similarly, the Corps did not fully address why some alternatives, such as the  
15 environmentally superior Alternative 7, are economically or technologically  
16 impractical or infeasible. When evaluating alternatives, the Corps failed to rigorously  
17 and objectively explore all alternatives. Instead, the Corps adopted an alternative that  
18 is more desirable to the applicant but that was never fully disclosed or analyzed within  
19 the Final EIS.

20 115. The Corps adopted a statement of purpose and need that defined the  
21 Project's objectives in terms that are unreasonably and unlawfully narrow.

22 116. In adopting the statement of purpose and need for the Project, the Corps  
23 failed to exercise its independent judgment.

24 117. The Corps improperly adopted the applicant's objectives, including  
25 conformity with the 2003 Specific Plan, as defining characteristics of the Project and as  
26 criteria for evaluating alternatives.

27 118. The Corps' approval of the 2010 Final EIS despite its inadequacy violated  
28 NEPA and its implementing regulations. 42 U.S.C. §§ 4331 *et seq.*; 40 C.F.R. §§

1 1500-1508. The Corps' issuance of the Section 404 permit for the Project on the basis  
2 on an inadequate EIS violates NEPA. Therefore, the Corps' approval and issuance of  
3 the ROD and Section 404 permit are arbitrary and capricious, an abuse of discretion,  
4 and not in accordance with the law as required by NEPA, its implementing regulations,  
5 and the APA, and are subject to judicial review under the APA. 5 U.S.C. §§701-706;  
6 706(2).

7 **THIRD CLAIM FOR RELIEF**

8 **(Against the Corps, for violation of APA Section 706: Failure to Comply with the**  
9 **National Historic Preservation Act)**

10 119. Plaintiffs incorporate by reference each and every allegation set forth in  
11 this Complaint as if set forth in full herein.

12 120. The Santa Ynez Band of Chumash Indians is a federally recognized Indian  
13 Tribe that has used the lands and waters at and around the Project site for generations  
14 since time immemorial. The Santa Ynez Band of Chumash Indians attach religious and  
15 cultural significance to historic properties that may be affected by the Project.

16 121. NHPA Section 106 and its implementing regulations provide that federal  
17 agencies "shall make a reasonable and good faith effort to identify any Indian tribes . . .  
18 that might attach religious and cultural significance to historic properties in the area of  
19 potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2).  
20 The Corps violated NHPA Section 106 and its implementing regulations by failing to  
21 make a reasonable and good faith effort to identify the federally recognized Santa Ynez  
22 Band of Chumash Indians as an Indian tribe that might attach religious and cultural  
23 significance to historic properties in the area of potential effects, and by failing to invite  
24 the Santa Ynez Band of Chumash Indians to be a consulting party. *Id.*

25 122. According to the NHPA Section 106 and its implementing regulations, a  
26 federal agency "shall ensure that consultation in the section 106 process provides the  
27 Indian tribe . . . a reasonable opportunity to identify its concerns about historic  
28 properties, advise on the identification and evaluation of historic properties, . . .

1 articulate its view on the undertaking's effects on such properties, and participate in the  
2 resolution of adverse effects." 36 C.F.R. §§ 800.2(c)(2)(ii)(A)(C). The Corps did not  
3 consult the federally recognized Santa Ynez Band of Chumash Indians with regard to  
4 identifying properties in the Project area that may be affected by the Project, evaluating  
5 and identifying the potential impacts to such historic properties, and resolving adverse  
6 effects to such historic properties. Furthermore, the Corps did not consult with  
7 members of other non-federally recognized Chumash bands or the Tataviam Tribe until  
8 after the Phase I and II cultural resources surveys were completed to identify tribal  
9 historic properties and cultural resources. These failures to adequately consult with the  
10 Santa Ynez Band of Chumash Indians, and to delay consultation with members of other  
11 Chumash bands and the Tataviam Tribe until after surveys for historic properties and  
12 cultural resources were complete, violate the consultation requirements of NHPA  
13 Section 106 and its implementing regulations. 36 C.F.R. §§ 800.2(c)(2)(ii)(A)(C).  
14 These failures also prejudicially impacted all Chumash and Tataviam Peoples and  
15 Bands, and Wishtoyo's members, because they resulted in Corps failure to obtain  
16 adequate information about the impacts of the Project on Chumash and Tataviam  
17 historic properties, cultural resources, and natural cultural resources, and in the Corps  
18 failure to obtain adequate information to sufficiently mitigate these impacts.

19 123. Furthermore, pursuant to the NHPA Section 106 and its implementing  
20 regulations, a federal agency, must consult with an Indian tribe that that attaches  
21 religious and cultural significance to historic properties that may be affected by an  
22 undertaking, and this consultation must recognize the government-to-government  
23 relationship between the federal Government and Indian Tribes be conducted in a  
24 manner sensitive to the concerns and needs of the Indian tribe. 36 C.F.R. §§  
25 800.2(c)(2)(ii); (ii)(C). The Corps violated the NHPA and its implementing regulations  
26 prior to the issuance of the Section 404 permit to Newhall Land and Farming Company  
27 and executing the ROD because it failed to initiate a government-to-government  
28 relationship to conduct a consultation with the Santa Ynez Band of Chumash Indians,

1 and failed to engage in a consultation for impacts to historic properties in a manner  
2 sensitive to the concerns and needs of the Santa Ynez Band of Chumash Indians. *Id.*

3 124. The NHPA and its implementing regulations also request the Corps to  
4 make a reasonable and good faith effort to identify historic properties within the area of  
5 potential effects of a federal undertaking. The Corps failed to make this requisite effort  
6 to identify Chumash historic properties within the Project site as evidenced by its  
7 inadequate investigation and analysis of Chumash historic properties and cultural  
8 resources, failure to adhere to the Secretary of the Interior's investigation guidelines<sup>1</sup>, by  
9 its failure to consult with the Santa Ynez Band of Chumash Indians, and by its failure to  
10 adequately consult with, and consider information from, other Chumash and Tataviam  
11 Native Americans. 36 C.F.R. § 800.4. For example, the Corps failed to identify  
12 Chumash and Tataviam historic properties known to exist, failed to identify the extent  
13 and character of significant historic properties, identified historic properties through  
14 mere chance, employed unreasonably inadequate methods to identify subsurface historic  
15 properties, burials, and artifacts, failed to follow the Secretary of the Interior's  
16 guidelines' techniques and procedures to identify and locate historic properties and  
17 artifacts, and failed to follow the Secretary of the Interior's guidelines'<sup>2</sup> techniques and  
18 procedures to identify subsurface historic properties where portions of historic  
19 properties were uncovered by chance and where findings revealed a historic property to  
20 be more significant than estimated. The Corps failure to make a reasonable and good  
21 faith effort to identify historic properties within the area of potential effects of a federal  
22 undertaking prejudicially impacted all Chumash and Tataviam Peoples and Bands, and  
23 Wishtoyo's members, because it resulted in Corps failure to obtain adequate  
24 information about the impacts of the Project on Chumash and Tataviam historic  
25

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26  
27 <sup>1</sup> See *National Register Bulletin 36: Guidelines For Evaluating and Registering*  
28 *Archeological Properties* and *National Register Bulletin 24: Guidelines For Local*  
*Surveys: A Basis For Preservation Planning.*

<sup>2</sup> *Id.*

1 properties and cultural resources, which precluded the Corps from prescribing  
2 sufficient measures to mitigate these impacts.

3 125. The Corp's unlawful failure to comply with the requirements of the NHPA  
4 prior to issuing the provisional Section 404 permit and executing the ROD violates the  
5 NHPA and its implementing regulations. Therefore, the Corps' approval and issuance  
6 of the ROD and Section 404 permit are arbitrary and capricious, an abuse of discretion,  
7 and not in accordance with the law as required by the NHPA, its implementing  
8 regulations, and the APA, and are subject to judicial review under the APA. 5 U.S.C.  
9 §§ 701-706; 706(2).

10 **PRAYER FOR RELIEF**

11 Wherefore, Plaintiffs respectfully request that the Court enter judgment providing the  
12 following relief:

- 13 1. declaring that the Corps' Section 404 Permit issued to Newhall Land  
14 and Farming Company was unlawfully issued in violation of the Clean  
15 Water Act, NEPA, the NHPA, APA, and the implementing regulations  
16 of these laws;
- 17 2. vacating the Corps' decisions approving the ROD, approving the  
18 Section 404 Permit, and specifying the disposal site identified in the  
19 Section 404 Permit, and remanding these decisions to the Corps for  
20 further action consistent with the Court's rulings;
- 21 3. vacating EPA's decision not to deny, restrict or prohibit issuance of the  
22 Section 404 permit, and remanding this decision to the EPA for further  
23 action consistent with the Court's rulings;
- 24 4. issuing a preliminary injunction, and a permanent injunction,  
25 prohibiting any construction activities resulting in the discharge of  
26 dredged or fill material into any waters of the United States associated  
27 with the Project unless and until the Corps issues a valid Section 404  
28

1 permit and complies with all applicable laws and regulations and all  
2 declarations and orders described above;

3 5. award Plaintiffs' reasonable attorneys' fees and costs; and

4 6. grant Plaintiffs such additional and further relief as the Court may deem  
5 just and appropriate.

6  
7 Respectfully submitted this 22nd day of July, 2014,

8 /s/ Aruna Prabhala

9 Aruna Prabhala

10 John Buse

11 Adam Keats

12 CENTER FOR BIOLOGICAL DIVERSITY

13 Attorneys for Plaintiffs Center for Biological  
14 Diversity, Friends of the Santa Clara River, and  
15 Santa Clarita Organization for Planning the  
16 Environment

17 /s/ Jason Weiner

18 Jason Weiner

19 WISHTOYO FOUNDATION/VENTURA  
20 COASTKEEPER

21 Attorney for Plaintiff Wishtoyo  
22 Foundation/Ventura Coastkeeper  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on 22 July, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

/s/ Aruna Prabhala

Aruna Prabhala, Cal. Bar No. 278865  
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Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I declare that I am employed with the law firm of Gatzke Dillon & Ballance LLP, whose address is 2762 Gateway Road, Carlsbad, California 92009. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on October 8, 2014, I served a copy of the following document(s):

**NEWHALL’S REQUEST FOR JUDICIAL NOTICE**

- BY OVERNIGHT DELIVERY [Code Civ. Proc. sec. 1013(d)]** by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by Golden State Overnight, at 2762 Gateway Road, Carlsbad, California 92009 in accordance with Gatzke Dillon & Ballance LLP’s ordinary business practices.

I am readily familiar with Gatzke Dillon & Ballance LLP’s practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Gatzke Dillon & Ballance LLP’s business practice the document(s) described above will be delivered to an authorized courier or driver authorized by Golden State Overnight to receive documents on the same date that it (they) is are placed at Gatzke Dillon & Ballance LLP for collection.

- BY ELECTRONIC SERVICE [Code Civ. Proc. sec. 1010.6]** by electronically mailing a true and correct copy through Gatzke Dillon & Ballance LLP’s electronic mail system to the e-mail address(s) set forth below, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6.

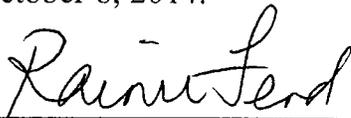
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		Electronic Service

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Carlsbad, California on October 8, 2014.

  
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