Nos. 22-15092 and 22-15093

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FALLON PAIUTE-SHOSHONE TRIBE and the CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs-Appellees,
v.
U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, and JAKE VIALPANDO in his official capacity as Field Manager of the Bureau of Land Management Stillwater Field Office, Defendants-Appellees/Appellants
and
ORMAT NEVADA INC., Intervenor-Defendant–Appellant.

Appeal from the United States District Court for the
District of Nevada
No. 3:21-cv-00512-RCJ-WGC
The Honorable Robert C. Jones
United States District Court Judge

APPELLEES FALLON PAIUTE-SHOSHONE TRIBE AND THE CENTER FOR BIOLOGICAL DIVERSITY'S REPLY BRIEF

(Oral Argument Scheduled June 15, 2022)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Dixie Meadows Geothermal Utilization Project ("Project")—authorized by Federal Appellee the Bureau of Land Management ("BLM") and currently under construction on federal public lands—threatens to destroy the only known habitat of an endangered species and would permanently ruin a Tribal sacred site. These foreseeable and devastating impacts prompted Appellees, the Center for Biological Diversity (the "Center") and the Fallon Paiute-Shoshone Tribe (the "Tribe") to provide detailed and substantive comments on the Project before it was approved. Numerous federal and state agencies, including the U.S. Fish and Wildlife Service ("FWS") raised similar objections to the proposal, which remain unresolved.

As late as October 26, 2021, BLM informed the Tribe's Business Council that it would not approve the Project without further consultation, further evaluation of the Project's likely impacts, and a decision from FWS regarding the endangered status of the Dixie Valley toad. Shortly thereafter, Interior Secretary Debra Haaland issued Secretarial Order 3403 and a memorandum of understanding governing consideration of tribal sacred sites. Through these directives the Department promised to better recognize and safeguard sacred sites on federal public land.

BLM, however, abruptly reversed course in November of 2021. BLM not only approved the Project without further modifications, and without conducting the promised consultation and analysis, but also implausibly concluded that Project would cause *no* significant environmental impacts.

FWS has since confirmed the significant impacts of the Project by taking the extraordinary step of issuing a Final Rule on April 7, 2022 immediately listing the Dixie Valley toad as "endangered" under the Endangered Species Act's ("ESA") "emergency listing" provision. FWS's emergency listing rule cites the Project as the main threat to the species, and concludes that "existing regulatory mechanisms," including Appellant and Project developer Ormat's Nevada Inc.'s ("Ormat") Aquatic Resources Monitoring and Mitigation Plan ("ARMMP") are inadequate to save the toad from potential extinction.

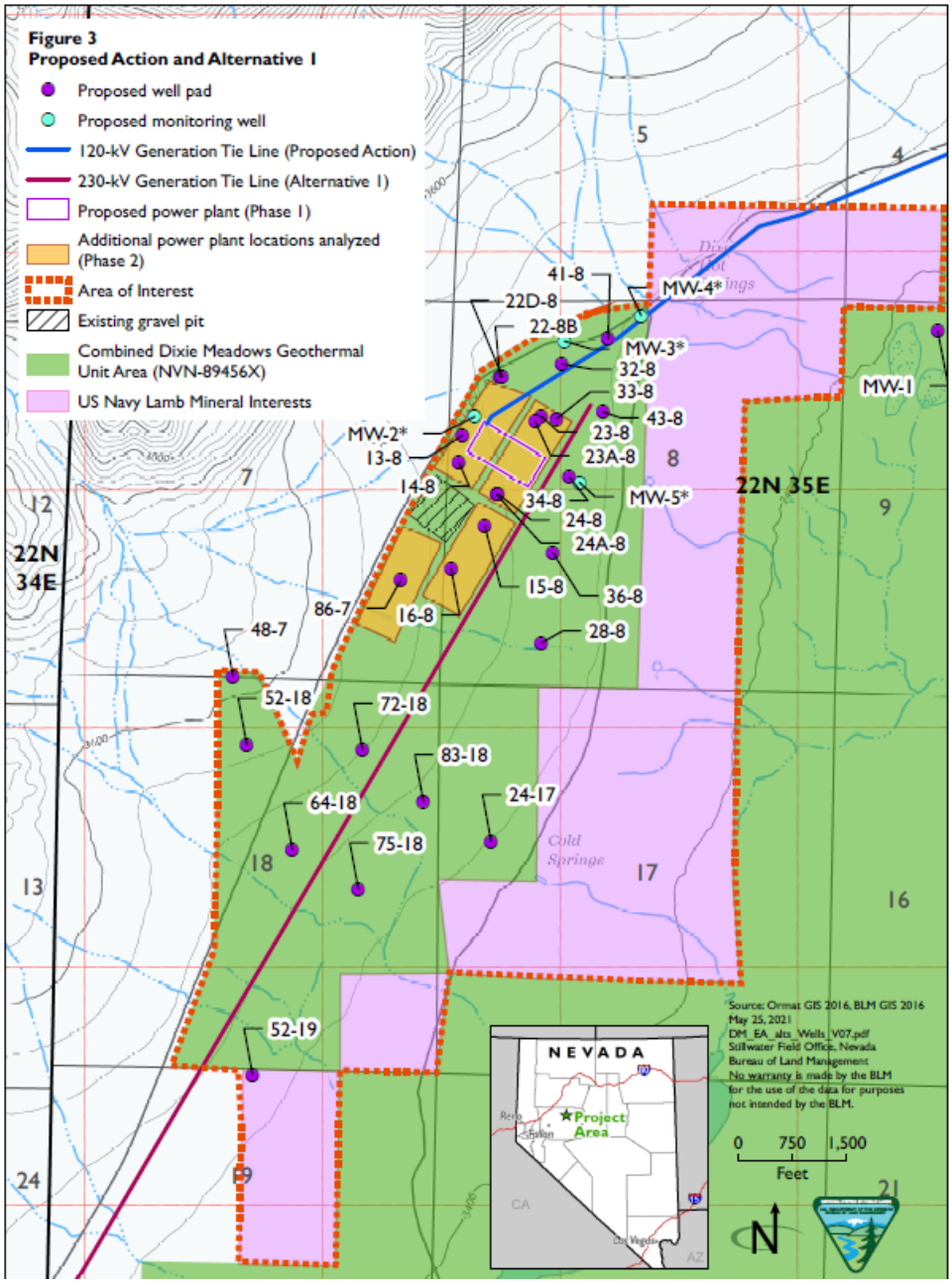
Federal Appellees and Ormat now ask this court to accept a number of facially unreasonable positions—among them, that the reasonably foreseeable extinction of an entire species does not qualify as a "significant impact" on the environment; that the court should defer to an agency "presumption" regarding the project's impacts that flies in the face of FWS's detailed expert analysis, the bulk of scientific literature on the impacts of geothermal development, and real-world experiences in Nevada; and that building a major industrial facility on a tribal sacred site, with the effect of making the Tribe's religious practice impossible to

carry out, does not constitute a significant impact on the human environment or a "substantial burden" on religious exercise. To accept these positions would make empty words of the Administrative Procedure Act's prohibition on "arbitrary and capricious" agency decisionmaking, and the Religious Freedom Restoration Act's ("RFRA") broad protection of religious expression.

REPLY TO FEDERAL APPELLEES' STATEMENT OF THE CASE

The Tribe and the Center incorporate by reference the Statement of the Case from their Principal and Response Brief, ECF No. 27, and include the following in response to Ormat and Federal Appellees' statements of the case and summary of "post-decisional developments."

Ormat and BLM repeatedly minimize the Project footprint and characterize construction as only occurring within one-quarter mile of wetlands. *See, e.g.*, Ormat Br. at 15. This is incorrect. Fig. 3 of the EA demonstrates that the Project consists of both powerplants and a dense tangle of well pads and infrastructure, which collectively cover 126 acres and are within approximately 500 feet of wetlands. 3-ER-0223 (sum of disturbance aside from transmission line).



3-ER-0224. The two powerplants *each* cover 16 acres—four times the size of the U.S. Capitol grounds apiece. *See* 3-SER-601. Moreover, four well pads, each of which covers 3 acres (more than two football fields), 3-ER-0231, are located between the powerplants and the wetlands, with the closest roughly 500 feet away.

See 3-ER-0224; 2-ER-184. Large pipelines connect the well pads to the powerplants. While BLM never provided any visual depiction of the Project, Fig. 3 gives some sense of its enormity and impact.

Ormat and Federal Appellees repeatedly discuss FWS's April 7 emergency listing rule, while asserting that it is not properly before the Court. *See* Fed Resp/Reply. Br., ECF 43, at 59-60. However, Federal Appellees put the Final Rule at issue, *see id.*, and Ormat concedes the information in the rule confirms the FWS' comments in opposition to Project approval. *See* Ormat Resp./Reply Br., ECF 44, at 28 ("[T]he Service relied on findings that largely repackage cooperating agency comments already submitted to BLM on the draft EA and ARMMP."). The Tribe and Center request judicial notice of the Final Rule. *See* 44 U.S.C. § 1507.

The listing is a powerful rebuke to BLM's assertions that the Project will have no significant impacts. Emergency listing is available only where FWS finds that there is an "emergency posing a significant risk to the well-being of any species," and has been used only two other times in the ESA's 49-year history. *See* 66 Fed. Reg. 59734 (Nov. 30, 2001) (Columbia Basin "distinct population segment" of the pygmy rabbit); *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (Mojave Desert population of desert tortoise).

Here, FWS's emergency listing rule is clear: the Project will harm the Dixie Meadows springs and jeopardize the continued existence of the Dixie Valley toad.

FWS determined, "based on the best available scientific and commercial information," and with a "high degree of certainty," that "geothermal production will have severe, negative effects on the geothermal springs the [toad] relies on for habitat." 87 Fed. Reg. 20345. Indeed, all probable scenarios that FWS considered "result in a high level of reproductive failure for the Dixie Valley toad in the near future." *Id.* at 20344.

The Tribe and the Center based their claims in part on FWS' comments and opposition to the project. *See, e.g.*, 1-SER-106 (discussing agency comments on ARMMP). FWS's post-decision actions confirm that BLM failed to meaningfully respond to FWS's direct criticisms, failed to take a "hard look" at the Project's impacts, and attempted to sweep inconvenient facts—such as the lack of support Ormat's hydrogeologic conceptual model—under the rug.

The emergency listing rule also confirms that the ARRMP does not provide adequate "guardrails" against significant impacts but rather assumes without basis that effects to the springs are reversible. *See* 87 Fed. Reg. 20343 (explaining that "[e]xperts had low confidence in the ability of the Monitoring and Mitigation Plan to both detect and mitigate changes to the temperature and flow of surface springs in Dixie Meadows").

ARGUMENT

I. The District Court Applied an Incorrect Legal Standard

This Court has held a party seeking an injunction must only raise "serious questions" regarding success on the merits if the balance of hardships tips sharply in its favor and it meets the remaining two factors. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). Federal Appellees acknowledge the district court's error and the correct standard of review, Fed. Resp. Br., ECF 43, at 25 n. 8, yet argue the error was immaterial because the district court did not find that the balance of hardships tips sharply in favor of the Tribe and Center. However, the balance of hardships is an issue on appeal, and application of an incorrect legal standard in denial of a preliminary injunction is an independent error of law. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d at 1135.

II. Appellees are Likely to Succeed on the Merits of their NEPA, APA, and RFRA Claims

A. BLM Violated NEPA

The core of Federal Appellees' response is the repeated assertion that an agency must only demonstrate that it acknowledged or identified a potential environmental impact to satisfy NEPA. *See, e.g.*, Federal Appellees' Resp. Br., ECF 44, at 40, 42. But NEPA requires more than a perfunctory checklist—it "require[es] that federal agencies carefully weigh environmental considerations and consider potential alternatives . . . before the government launches any major

federal action." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014) (quoting *Barnes v. United States DOT*, 655 F.3d 1124, 1131 (9th Cir. 2011)). NEPA is designed not to generate paperwork, but to force agencies to take a "hard look" at the environmental consequences of any proposed action. *Native Vill. of Point Hope*, 740 F.3d at 493. "The procedures prescribed both in NEPA and the implementing regulations are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act." *Ctr. for Biological Diversity v. United States Forest Serv.*, 349 F.3d 1159, 1166 (9th Cir. 2003) (citing 42 U.S.C. § 4332(1)).

While BLM and Ormat are correct that the agency receives some deference under the Administrative Procedure Act, the "arbitrary and capricious" standard calls for a "thorough, probing, in-depth review." *Native Ecosystems Council v. United States Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citation omitted). "An agency is not entitled to deference simply because it is an agency. It is true that agencies are more specialized than courts are. But for courts to defer to them, agencies must do more than announce the fact of their comparative advantage; they must actually use it." *Meister v. U.S. Dept. of Agriculture*, 623 F.3d 363, 368 (6th Cir. 2010).

Here, BLM failed to take the necessary "hard look" for several reasons. BLM relied on a trial-and-error mitigation approach that lacks both supporting data

and a developed plan for responding to impacts, *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001); failed to establish an environmental baseline before approving the Project, *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016); ignored or failed to meaningfully respond to "substantial questions" raised by FWS and others regarding the Project, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1030-31 (9th Cir. 2007); entirely ignored the foreseeable probability that the Project could cause the Dixie Meadows springs to be permanently altered, 40 C.F.R. § 1502.21, and failed to analyze visual and aesthetic impacts on the Tribe's religious practices.

1. BLM Unlawfully Relied on an Inadequate and Discretionary Mitigation Plan and Failed to Collect Necessary Baseline Data

Ormat and Federal Appellees focus in their Response/Reply briefs once again on the ARMMP, citing *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1106, 1121 (9th Cir. 2000), and *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 476 (9th Cir. 2000). Those cases, however, clearly demonstrate why BLM's reliance on the ARMMP and its "build first, study later" approach violates NEPA. Where the plan at issue in *Okanogan Highlands Alliance* included a detailed, sequential plan for implementation and ranked the feasibility of each proposed mitigation measure, 236 F.3d at 473-76, the ARMMP here simply lists a few mitigation actions that *might* be taken, and does not even purport to analyze their feasibility or effectiveness. *See* 4-ER-0577–79 (general list

of mitigation measures); 4-ER-0531 (comment response declining to evaluate the feasibility of various mitigation measures). Indeed, Federal Appellees' brief concedes that "the ARMMP detailed corrective actions *BLM could require Ormat to take*," *i.e.*, that any future mitigation action is entirely discretionary. Fed. Reply/Resp. Br. at 13 (emphasis added).

And while the agency in *Wetlands Action Network* properly considered the input of cooperating agencies and altered the project in response, such that by the time of approval the cooperating agencies had dropped their objections, 222 F.3d at 1122, BLM here steadfastly dismissed the input of cooperating agencies including FWS, the Nevada Department of Wildlife, the U.S. Navy, and the U.S. Geological Survey, to the point that FWS took the extraordinary step of emergency listing the Dixie Valley toad. *See* 4-ER-0455–0538 (comments and responses); 87 Fed. Reg. 20343.

Likewise, BLM's reliance on "phased" construction and post-approval monitoring does not excuse the agency from performing a full and fair analysis of the Project's impacts. Gradual construction and start-up, long after the NEPA process has concluded and the Project has been approved, does nothing to inform the public about the Project, or help the agency determine if an EIS is necessary. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th

Cir. 2003) (explaining that a post-decision analysis "conducted without any input from the public—cannot cure deficiencies" in a NEPA document).

Finally, in arguing that "monitoring is a form of mitigation," Federal Appellees admit that BLM failed to collect baseline data that—in its own estimation—is "essential" to understanding the Project's impacts. Fed. Resp./Reply Br., ECF 43, at 33-34. Critically, Federal Appellees do not argue that the collecting the necessary data is prohibitively costly or technically infeasible—indeed, collecting and analyzing this data is an integral component of the proposed mitigation scheme. *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) ("If it is reasonably possible to analyze the environmental consequences . . . the agency is required to perform that analysis."); 40 C.F.R. § 1502.22(a). Rather, Federal Appellees simply assert that they should be permitted to obtain this data after the project has been approved, and after any opportunity for public involvement has long since passed. However, this Court has explained that this form of mitigation frustrates NEPA's "stop-and-think" and disclosure purposes because it precludes careful consideration of a proposal's impacts before the agency commits to it, and deprives the public of a role in the decisionmaking process. *N. Plains Res. Council, Inc. v. Surface Transp. Bd*, 668 F.3d 1067 at 1085 (9th Cir. 2011)

2. Controversy and Uncertainty Regarding Ormat's Model Required Preparation of an EIS.

Ormat and Federal Appellees go to great lengths to minimize the objections raised by FWS and others before the Project was approved, with Ormat going so far as to dispute the basis for FWS's emergency listing decision. But as Ormat concedes, the listing decision "largely repackages" the same information FWS presented to BLM before the Project was approved, and thus demonstrates that there was genuine "controversy" and "uncertainty" surrounding the project—*i.e.*, "substantial dispute . . . as to [the] size, nature, or effect" of the proposed action. *Nw. Envt'l Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997).

Ormat and Federal Appellees also rely heavily on Ormat's "hydrogeologic model" and the company's interpretation of a 46-day flow test to defend BLM's decision, but these arguments largely consist of improper post-hoc rationalization because BLM's FONSI relied almost entirely on the ARMMP. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007) (explaining that this Court "may not accept appellate counsel's post hoc rationalizations for agency action"); *see also* 2-ER-0172–76 ("rationale" section of FONSI). Moreover, neither the model nor the flow test support the argument that BLM took the necessary "hard look."

The model was one of the primary sources of controversy surrounding the Project due to its vagueness, notable lack of supporting data, and inconsistency with published research on the Dixie Valley geothermal system. 4-ER-0472, 4-ER-0494–95, 4-ER-0515–16, 4-ER-0518, 4-ER-0521–23, 4-ER-0526–27, 2-SER-0337–50. Shorn of technical detail, critiques of the model made a basic point that there are multiple potential pathways through which geothermal water may travel from the underground reservoir to the surface. *See, e.g.*, 4-ER-0649, 2-SER-0342. These various pathways are critical to any analysis of the Project's impacts because they may connect the underground geothermal reservoir and the springs, and thus could be affected by pumping and reinjection. *See* 4-ER-0527 (FWS comment stating that Ormat's model "would significantly and adversely affect the interpretation of any changes detected at depth in bedrock"). Yet neither BLM nor Ormat investigated these alternative pathways, or how they might be impacted by geothermal power development—they simply assumed, despite being presented with clear evidence to the contrary, that Ormat's working hypothesis was correct. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 192, 194 (4th Cir. 2005) (explaining that "[a]n agency's hard look should include neither researching in a cursory manner nor sweeping negative evidence under the rug.").

Ormat suggests FWS's objections are unfounded based on the results of the flow test, which according to Ormat, show that the geothermal aquifer is not

"directly connected" to the springs. But the data are inconclusive, and if anything, support the conclusion that geothermal operations impact the springs. There were changes in both water temperature and groundwater pressure during the flow test. 5-ER-0732 (noting that "[temperature] increases during the flow test appear to have been associated with the flow testing"); 5-ER-0731 (describing pressure changes); 2-SER-0342 ("[C]hanges at well 22-8B indicates pressure changes propagate to the surface or that flow to the surface is intercepted near the pumping well"). These changes indicate the potential for more severe impacts over a longer period of time, but BLM and Ormat failed to even investigate, let alone analyze, this issue. They simply assumed that because water temperatures stayed within broadly defined historical parameters during the 46-day pumping test, there will be no impacts from decades of pumping.

Again, it is not the case that *any* agency explanation in response to substantive criticism makes the Project non-controversial—the extensive record evidence of fundamental concern from numerous expert agencies demonstrates that there is significant uncertainty and controversy that must be addressed through preparation of an EIS. *Nw. Envtl. Def. Ctr.*, 117 F.3d at 1536.

Ormat's claim that the geothermal aquifer is not connected to the springs also reveals a fundamental omission from BLM's NEPA analysis. As summarized by FWS in comments: "the source of the geothermal spring discharges (which

support habitat for the Dixie Valley toad) and the geothermal system which must (in some manner) be the target of the proposed geothermal energy project *are one in the same*—or at minimum in intimate hydraulic connection." 4-ER-0528. Ormat insists there is no "direct" connection between the geothermal reservoir and the springs, but whether direct or indirect, a connection obviously exists—the springs contain up to 46% geothermal water. 4-ER-0657. By refusing to investigate the evident connection before allowing Ormat to withdraw and reinject 28,000 gallons per of water per minute from the geothermal source, 3-ER-0238, BLM failed to consider an "important aspect of the problem" and violated NEPA. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

3. BLM Failed to Evaluate the Potential Severe Impacts of Spring Dewatering or Permanent Alteration.

Federal Appellees and Ormat downplay the risk of severe and irreversible impacts—such as permanently altering water flows or temperature. But less than 50 miles away in Jersey Valley, a comparable Ormat geothermal facility using the same "non-consumptive, reinjection technology" proposed for this Project, caused nearby hot springs to permanently dry up. Ormat Resp./Reply Br., ECF 44, at 41 n.8.

While Ormat claims "the Jersey Valley Project was subject to unforeseen variables[,]" the impacts caused by that project demonstrate the foreseeable risks of Ormat's exploitation of geothermal resources that lie deep underground. *Id*. at

41. Thus, under the "reasonably foreseeable" NEPA standard touted by BLM and Ormat, BLM was obligated to analyze the risk of dewatering. *See id*. at 40 (citing 40 C.F.R. § 1508.8); Fed. Resp./Reply Br., ECF 43, at 42 (same).

Mere acknowledgement of a potential severe impact, as BLM claims to have done here, is insufficient. *See* Federal Resp./Reply Br. at 41-42. An EA is invalid where it "*acknowledges* that serious environmental consequences might result … but expresses the view that such abuse is 'highly unlikely.'" *Nat. Res. Def. Council, Inc. v. Hodel*, 618 F. Suppl. 848, 852 (E.D. Cal. 1985) (emphasis added). Under NEPA, agencies must "describe the consequences of a remote, but potentially severe impact[.]" *Robertson v. Methow Valley Citizens*, 490 US 332, 355 (1989).

Given the catastrophic consequences of altering or dewatering to an endangered species and *Paumu*, BLM's bare acknowledgement of that reasonably foreseeable impact violated NEPA.[1]

4. BLM Failed to Analyze or Mitigate Visual and Aesthetic Impacts to the Tribe's Use of the Site.

BLM and Ormat respond to the failure EA's failure to address the Project's distinct visual and aesthetic impacts on the Tribe's used of its sacred site by pointing to cursory statements in the EA where the BLM states that it has "redesigned the project to avoid, lessen or minimize audible or visual impacts" and

[1] The Tribe and Center did raise the issue below. *See* 1-SER-106.

those alleged design features "are sufficient to avoid, lessen, or minimize Native American religious concerns in the project area." 3-ER-379-80. This perfunctory, ends-driven conclusion is inadequate.

For at least the past five years, the Tribe has consistently made clear the centrality of an undisturbed aesthetic experience to Tribal members' religious and spiritual use of the sacred *Paumu* site. *See, e.g.*, 1-SER-158, 186-87; 1-SER-178-79 ("The ability to view sacred landmarks from the springs is fundamental to the religious experience."). Nonetheless, BLM failed to include even a single picture or visual depiction of the Project in its analysis. Instead, it simply included a red arrow identifying an area where the Phase I powerplant will be located, 1-SER-28—without showing how the eventual two powerplants or the 126 acres of disturbance from associated infrastructure would impact use and enjoyment of the springs area. *See* ER-0224. BLM's analysis of visual resources from "Key Observation Points" wholly excludes any consideration of the Project's impact on views from the springs. *See* 1-SER-17-34 (EA Appendix E: KOP Locations, Visual Contrast Rating Worksheets and Photo Logs). BLM analyzes the Project's impacts on visual resources from five locations, but not the springs. *See* 1-SER-19-34. BLM sidesteps this gross oversight by deferring to the agency's alleged "standard practice" of analyzing visual impacts only at locations "where the

general public might be present[,]" on the basis that "the general public would not be present at the springs[.]" Fed Resp./Reply Br., ECF 43, at 43 n.12.

Analyzing the visual impacts on only "the general public" is clearly inappropriate, however, where the Tribe—a foremost stakeholder in this NEPA process and to whom the BLM owes a trust responsibility—expressly alerted BLM that impacts on the sacred viewshed are a critical impact of the Project. Despite BLM's knowledge of that major concern, BLM failed to conduct a comparable analysis from the springs. BLM cannot simply ignore impacts to the Tribe because they are a minority. *See* Executive Order 12898 ("each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States"). Indeed, in *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768 (9th Cir. 2006), the agency produced an ethnographic report and EIS for leases for a similarly-sized geothermal project based largely on cultural resources impacts to the Pit River Tribe, and this required further review for lease extensions.

BLM briefly acknowledges the project "would have impacts on Native American concerns and the tribe's religious expression, if it resulted in . . . noise levels from geothermal production that preclude religious expression or ceremonial

use of the site [or o]bstructing the view of [Fox] Peak from the Dixie Meadows Hot Springs site[.]" 3-ER-378. Then BLM abruptly shelves any such concern by claiming to have tweaked the Project in order to "avoid, lessen, or minimize adverse audible or visual impacts[.]" 3-ER-379. The EA provides no description of those impacts, how they would vary based on the alleged design modification, or why the modification renders such impacts non-significant. The map of the Project plainly demonstrates that it obstructs the view from the springs southwest to Fox Peak, 3-ER-0224, and even Ormat now admits that "[t]he power plant would potentially be visible . . . in the westerly view at springs complexes 1 and 2[.]" Ormat Resp./Reply Br., ECF 44, at 48.

BLM's choice to forego meaningful analysis of visual and auditory impacts to Tribal members' religious and spiritual exercise at *Paumu* did not constitute the requisite hard look and violated NEPA.

B. BLM Violated the APA and NEPA by Deviating from Recent Agency Direction on Protection of Sacred Sites

In the weeks leading up to BLM's approval of the Project, Secretary Haaland issued the "Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites," and "Order 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters." The Secretary celebrated these two directives as enacting important changes in how agencies

approach decisions affecting Tribal sacred sites on federal public lands. Federal Appellees' disregard for, and deviation from, Secretary Haaland's applicable directives renders their decision to approve the Project arbitrary and capricious.

In response, Federal Appellees do not contest, and thereby concede, both that the Dixie Valley geothermal project falls squarely within the scope of the directives and that BLM failed to consider them. Federal Appellees' concession that BLM wholly ignored the MOU and Order conclusively demonstrate that Defendants failed to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choices made," and thus violated the APA. *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1067 (9th Cir. 2021) (quoting *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 at 675 (9th Cir. 2016)).

Federal Appellees argue that it was excusable to ignore the Memorandum and Order because the documents merely "reiterate long-standing agency policy." *See* Fed. Resp. at 22, 48-49. Federal Appellees' assertion that directives from the Secretary of the Interior have no actual effect on her staff at BLM—that she simply undertook these measures to no effect whatsoever—is dubious. Their position is further belied by the text of the documents. In each instance, the Secretary stated new requirements and objectives to improve protection of Tribal resources, including sacred sites such as *Paumu*.

Order 3403 "establishes how the Departments will fulfill their obligations to Federally recognized Indian Tribes," including a new emphasis on co-stewardship of Tribal resources on Federal lands. The Order requires that the Department "consider Tribal expertise and/or Indigenous knowledge as part of Federal decision making relating to Federal lands," and commits the Department to "collaborat[ing] with Indian Tribes to ensure that Tribal governments play an integral role in decision making related to the management of Federal lands." 1-SER- 38.

Likewise, the stated purpose of the MOU is for the agencies to "to affirm their commitment to *improve* the protection of, and access to, Indigenous sacred sites through *enhanced and improved* interdepartmental coordination, collaboration, and action." 1-SER-42 (emphasis added). Of particular importance here, the MOU acknowledges that the affected Tribe must have a key role in defining the nature and extent of a sacred site as it connects to the surrounding landscape. 1-SER-43.

Federal Appellees next raise a *post-hoc* argument that their failure to consider the directives was irrelevant because they adequately consulted with the Tribe and fully incorporated the Tribe's input. These arguments are factually incorrect and contradicted by the record. Contrary to the assertion that BLM accommodated every request from the Tribe, *see* Fed. Appellees' Resp./Reply Br.,

ECF 43, at 47, the Tribe expressly did not sign the MOU because of BLM's failures to address its concerns. 1-SER-223–24.

For example, a basic conflict underlying this litigation involves the delineation of the sacred site. Federal Appellees contend that it consists solely of the actual surface waters of *Paumu*. This is akin to arguing that the only sacred part of a church is the altar. For years, the Tribe has repeatedly explained to BLM that the uplands surrounding the spring waters are part of the site and the Tribe's spiritual practices, and that construction on these areas would permanently destroy the sacred site. 1-SER-186-7 (""[F]rom the Tribe's perspective, Ormat's proposal is to build power plants on and around very sacred, spiritual land built by the Creator at the beginning of time"); 1-SER-152–66, 1-SER-176–82. BLM ignored those explanations and requests for associated modifications. Instead, BLM decided to disregard the Tribe's understanding of the extent and use of *the Tribe's own sacred site* in favor of the unsupported view that the site is limited to surface waters. This approach was directly contrary to the Order and MOU, which require enhanced consultation, deference to a Tribe's understanding of its religious and spiritual practices, and integration of Tribal expertise and Indigenous knowledge. Such deviation from agency directives without explanation renders a decision arbitrary and capricious. *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1208 (9th Cir. 2010).

C. BLM Violated RFRA

"The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what [the U.S. Supreme Court] has held is constitutionally required." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). Federal Appellees' approval of the Project violates RFRA's requirement that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 43 U.S.C. § 2000-bb-1(a), because it authorizes construction and operation of a major industrial facility directly on and around the Tribe's sacred site. Uncontroverted Tribal letters and declarations establish that the site is composed of spring waters as well as the directly surrounding uplands and a view of Fox Peak, and that the challenged proposal will forever ruin the site and render impossible the Tribe's religious and spiritual practices. 1-SER-120–33, 1-SER-152–66, 1-SER-176–82, 1-SER-183–221, 1 SER-225–32.

In response, Ormat and Federal Appellees assert that *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) as informed by *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) is dispositive. Those cases are fundamentally distinguishable. The basic premise of both cases was that spiritual sites would not be harmed. In *Navajo Nation*, this Court relied upon the district

court's finding that "there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected … No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified." 535 F.3d at 163. Likewise, in *Lyng* (which predates RFRA), the Court explained that "[n]o sites where specific rituals take place were to be disturbed" by the challenged project. In both cases, the sacred landscape at issue was very large and undifferentiated: 74,000 acres in *Navajo Nation* and 17,000 acres in *Lyng*. The size of the landscape gave the courts pause as to the degree to which religious concerns could dictate public land management writ large. Notably, in both cases the agency prepared an extensive EIS with associated studies designed to consider and avoid impacts to Tribal spiritual and cultural practices.

This case presents a starkly different context and question: whether a federal agency's authorization of permanent destruction of a discrete sacred site constitutes a substantial burden on the Tribe's religious exercise. The core premises underpinning *Navajo Nation* and *Lyng* therefore do not hold true, and neither case controls the outcome here. Rather, the facts presented most closely resemble those of *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), in which construction on a documented sacred site violated RFRA.

Federal Appellees and Ormat take a narrow reading of *Navajo Nation*, under which government action must exactly fit the scenarios set forth in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) or *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981), to constitute a substantial burden under RFRA. This reading undermines the statutory text by rendering legal a wide variety of government actions that can substantially burden religious exercise. *See Hobby Lobby*, 573 U.S. at 706. Federal Appellees' narrow reading also makes no sense. Under their interpretation, the government could bulldoze a sacred site on federal public land and permanently preclude its use, and it would not "substantially burden" religious exercise. However, leaving that same site intact and charging a nominal fine for use would constitute a substantial burden. That illogical result cannot be the intent of Congress.

A line of cases interpreting the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, are applicable here because the statutes feature nearly identical text and RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions." *See Hobby Lobby Stores, Inc.*, 573 U.S. at 695. The cases are particularly instructive because they address churches and temples, discrete locations of worship similar to *Paumu*. "[A] place of worship . . . is at the very core of the free exercise of religion . . . [c]hurches and synagogues cannot function without a physical space adequate to

their needs and consistent with their theological requirements." *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 634 F.3d 1037, 1047 (9th Cir. 2011). While Ormat asserts that *Navajo Nation* precludes application of RLUIPA caselaw, the opposite is true—the case explained the difference between the application of the two statutes, and then assumes that the "substantial burden" standard is the same. *See Navajo Nation*, 535 F.3d at 1077.

In *International Church*, this Court defined "substantial burden" in the same manner as *Navajo Nation*, but provided further detail. Like *Navajo Nation*, the Court pointed to the coercion requirement of *Sherbert* and *Thomas*, but further provided that "a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise. . . . A substantial burden exists where the governmental authority puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Int'l Church*, 634 F.3d at 1045 (quotations omitted) (citing *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) and *Guru Nanak Sikh Society v. City. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006)). Ultimately, this Court determined that "denial of space adequate to house all of the Church's operations" could constitute a substantial burden, even though the Church retained the ability to carry out at least some religious practices. *Int'l Church*, 634 F.3d at 1047. This accords with the Tenth Circuit in *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014), ("It is

enough that the claimant is presented with a choice in which he faces considerable pressure to abandon the religious exercise at issue") and the Sixth Circuit in *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) ("The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).").

The destruction of the Tribe's place of worship forces the Tribe to modify its spiritual practices and violate its beliefs by discontinuing ceremonies and practices. The Federal Appellees have not demonstrated that they have chosen the least restrictive means of fulfilling a compelling government interest, and therefore violated RFRA.

III. The Three Remaining Factors Support Issuance of a Preliminary Injunction for the Remainder of the Case

The district court agreed that the Tribe and the Center will suffer irreparable harm. There is no appeal of that issue, and thus it is not subject to review here. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Nonetheless, Ormat and Federal Appellees attempt to minimize the harm suffered by the Tribe and Center by forecasting a speedy ruling on the merits and arguing that harm from construction is limited before then.

This approach is flawed for three reasons. First, the construction, associated disturbance, and presence of industrial infrastructure across 126 acres of the site and 48 miles of transmission line, 3-ER-0223, threatens the Dixie Valley toad, 3-

ER-0344, and harms Tribal and Center members' ability to "view, experience, and utilize" an area in its undisturbed state, *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Second, while the Center and Tribe support prompt resolution on the merits, when such a ruling may occur is unknown and could easily stretch into Project operations. Third, there is also harm imposed from the "real danger[s]" of "[b]ureaucratic rationalization" and "bureaucratic momentum." *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988). As construction of Ormat's powerplant rapidly proceeds at Dixie Meadows, the harm then-Judge Breyer warned of in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), is coming to pass. Specifically:

> [A]s time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate environmental information, might have come out differently). The relevant agencies and the relevant interest groups . . . may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to undo the earlier action and to embark upon a new and different course of action.

872 F.2d at 503.

Ormat and Federal Appellees' apparent intention to continue constructing the Project—and to invest ever-increasing amounts of time, labor, and resources—even in the face of FWS's emergency listing, illustrates the real environmental harm that results from uninformed decisionmaking and bureaucratic inertia. *See id.*

(noting that "the harm at stake in a NEPA violation is a harm to the environment, not merely to a legalistic 'procedure,' nor, for that matter, merely to psychological well-being"); *see also High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004); *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1241 (D. Idaho 2018) ("[A]n incomplete observance of environmental laws and procedure . . . aided by agency inertia, combine to create irreparable harm.").

With respect to balancing of the equities and the public interest, Ormat's arguments are inconsistent. On the one hand, the company asserts that there is a great public need and interest in production of renewable energy and that the Project is essential. On the other hand, Ormat claims that if faced with a minor delay necessary to comply with applicable law, it may walk away from an alleged $68 million and abandon the Project. This appears to be a pressure tactic. If the energy is truly needed, as Ormat asserts, the only harm to the company is limited delay.

While Ormat makes much of potential decreases in energy prices, future energy prices are speculative and change dramatically based on global factors such as war and inflation. "Because Defendants' complained-of public interest harm is speculative, and Plaintiff's complained-of public interest harm appears concrete and likely, this factor tips in favor of injunctive relief." *DriveWealth, LLC v. Elec.*

Transaction Clearing, Inc., No. CV 19-10550-DMG (Ex), 2019 U.S. Dist. LEXIS 229236, at *16 (C.D. Cal. Dec. 23, 2019).

Finally, the Federal Appellees assert that all harm will be remediated, and thus this case is unlike logging or other environmental injuries. In actuality, the permit term with renewals may be up to 90 years, 3-ER-0208, the prospect of fully recovering the fragile high dessert is doubtful, and remediation would not undo the decades of harm suffered by the toad and the Tribe.

CONCLUSION

An injunction pending resolution on the merits is necessary and warranted.

Respectfully submitted this 13th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief is in compliance with Federal Rule of Appellate Procedure 28.1(e)(2)(C). The total word count is 6,497, excluding those portions excepted by FRAP 32(f). The undersigned relied on the word count of the word processing system used to prepare this document.

Dated May 13, 2022.

/s/ Wyatt Golding
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated May 13, 2022.

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