No. 16-16016

UNITED STATES COURT OF APPEALS
for THE NINTH CIRCUIT

Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians,
Plaintiff/Appellant

v.

United States Bureau of Land Management and Jill Silvey, in official capacity as Bureau of Land Management Elko District Manager,
Defendants/Appellees

and

Carlin Resources, LLC,
Defendant-Intervenor/Appellee

On Appeal from the United States District Court
For the District of Nevada (Hicks, J.)
Civil Action No. 03:16-cv-00268-LRH-WGC

CARLIN RESOURCES, LLC'S ANSWERING BRIEF

ORAL ARGUMENT REQUESTED

August 26, 2016

CORPORATE DISCLOSURE STATEMENT

Waterton Global Resource Management, Inc. is an affiliate of Appellee Carlin Resources, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other Authorities

ISSUES PRESENTED FOR REVIEW

In denying the Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians' ("Band") motion for preliminary injunction, did the district court act within its discretion when it ruled that the Band failed to present evidence that:

(i) triggered new obligations for the Bureau of Land Management ("BLM") under the National Historic Preservation Act ("NHPA"); and

(ii) showed that the balance of the remaining factors weighed enough in the Band's favor to overcome the low likelihood of success on the merits?

COUNTERSTATEMENT OF THE CASE

A. The Band's "emergency" lawsuit is an untimely challenge to a final agency decision in 2014.

Carlin Resources, LLC ("Carlin") operates the Hollister Mine ("Project") in Elko County, Nevada. The BLM approved expanded exploration and operation of underground development operations in a Record of Decision ("ROD") signed on March 31, 2014. (ER 95).[1] Prior to signing the ROD, the BLM engaged in a six-

[1] Citations to "ER" refer to the Band's "Excerpts of Record". DktEntry 28-1 to 28-3. Citations to "SER" refer to the Supplemental Excerpts of Record submitted by the BLM. Citations to Op. Br. refer to "Appellant's Opening Brief", DktEntry 27.

year NEPA process, which included detailed analysis and approval of construction of the power line challenged by the Band in this lawsuit ("Power Line"). (ER 136). The Band chose not submit comments on the Draft Environmental Impact Statement ("DEIS"), appeal the ROD, or seek judicial review of the BLM's approval of the Power Line or any other portion of the Project.

Despite the Band's choice not to avail itself of the proper remedies to challenge the BLM's analysis and decisions in the DEIS and ROD, on the eve of the commencement of construction of the Power Line, the Band filed this lawsuit to enjoin construction. (ER 316-317). This lawsuit was filed after two years of pre-construction planning and work completed by Carlin and the BLM that included continuous use of the Band's tribal monitors. In its untimely Complaint against the BLM, the Band asserted a claim under § 706 of the Administrative Procedure Act ("APA") and the National Historic Preservation Act ("NHPA"), asking the court to compel the BLM to reevaluate the impacts of the Power Line on previously identified properties or, in the alternative, set aside the BLM's decision under the ROD. (ER 318, ¶ 43). The Band also asserted claims for violation of religious freedom, (ER 318-320, ¶¶ 45-53), and violation of trust responsibility, (ER 320 ¶¶ 54-60), but has not pursued these claims to support its appeal.

The Band's NHPA claim is "strategic gamesmanship" to hinder development and impose costs unnecessarily, which Courts recognize improperly

undermines fundamental principles of finality. *See, e.g., FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004); *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1252 (D.C. Cir. 1988). The Band could have advanced every allegation in the Complaint concerning the lands at issue for at least the 15 years prior to the BLM's issuance of the ROD in 2014 or in a timely appeal of the ROD in the two years leading up to the commencement of construction of the powerline; instead, the Band waited until just days before construction was to start. Such "sandbagging of agency decision makers clearly was not contemplated by Congress." *Apache Survival Coalition v. United States*, 21 F.3d 895, 911 (9th Cir. 1994) ("*Apache*").

B. The district court denied the Band's requests for injunctions.

The district court denied the Band's request for a preliminary injunction to enjoin Carlin's construction of the Power Line in its order dated June 3, 2016. (ER 2). The district court concluded that the Band failed to establish that it was likely to succeed on the merits and found that the remaining factors relevant to a request for a preliminary injunction "do not weigh so far in the Band's favor to overcome the lack of success on the merits." (ER 2). The district court concluded that one of the reasons the Band will not likely prevail on its claims is because there was no discovery of a previously unidentified historic property triggering obligations under Section 106 of the NHPA. (*Id.*).

After the district court denied the Band's request for preliminary injunctive relief, the Band filed this appeal and also filed a motion to enjoin construction of the Power Line pending appeal. The district court denied this motion, too, concluding that nothing in the motion "change[d] the court's finding that preliminary injunctive relief is not warranted in this action." (SER 425). The district court noted that it had considered and rejected all of the Band's arguments. *Id.*

COUNTERSTATEMENT OF THE FACTS

A. The BLM complied with the NHPA prior to signing the ROD.

Following a six-year review process under NEPA, the BLM issued the ROD on March 31, 2014, which included an Approval of Issuance of Right-of-Way Grant ("ROW") for the Power Line. (ER 95). The ROD vested Carlin with rights to complete the Project subject only to compliance and mitigation requirements set forth in the ROD. (*E.g.* ER 136 ("The issuance of these grants constitutes a final decision by the Bureau of Land Management in this matter. The grants will be subject to the terms and conditions contained herein.")).

The BLM discharged its obligations under the NHPA during the NEPA review. The NHPA required the BLM to take into account the effect of the Project on any site that is included or eligible for inclusion in the National Register of Historic Places. To satisfy the NHPA for the Project, the BLM (i) completed

consultation with ten tribes/bands and three tribal organizations and required mitigation for impacts identified (ER 64-68); and (ii) spent three years negotiating a programmatic agreement ("PA") with the Advisory Council on Historic Preservation ("ACHP"), the State Historic Preservation Office ("SHPO") and Carlin's predecessor. (ER 337-338). The Band was consulted throughout the NEPA process and invited to sign the PA as a concurring party but rejected the offer. (ER 349). The Band submitted comments on the Final Environmental Impact Statement ("FEIS") which did not raise the issues in its untimely "emergency" appeal to halt construction of the Power Line.

In compliance with the NHPA, the BLM initiated consultation for the Project on July 30, 2009, by sending notification to thirteen tribes, bands and tribal organizations to inform them of the proposed Project and to solicit their concerns regarding the cultural and religious importance or Traditional Cultural Properties ("TCPs"). (ER 337-338). From its numerous consultations, the BLM noted concerns of impacts to chert deposits due to underground mining, possible looting, and inaccessibility to Velvet Canyon due to the road being washed out by previous rains. (ER 67). Band members attended multiple meetings including a field tour on June 15, 2010, to discuss protection of the Tosawihi Quarries. (*Id.*) Yet, the Band never, during these numerous consultations, raised the concerns asserted in

its Complaint, nor did it demand at any point that the Power Line be placed underground as it did in this "emergency" appeal.

As part of the tribal consultation efforts, an ethnographic report was prepared to summarize Native American concerns with the Project and update existing ethnographic documentation available. (ER 387). Previous consultation that had been conducted over the course of 20 years in and near the proposed Project was also examined. (*Id.*; ER 67-68). In order to update ethnographic documentation and solicit concerns relative to the proposed Project, the report author met with tribe members, attended tribal meetings and participated in two field visits to the Project area. (*Id*.). The results of these data gathering efforts were summarized in the report which was shared with the tribal governments and interested groups. (*Id*.). Once again, the Band did not raise then any of the concerns outlined in the Complaint today.

The PA requires "Class III surveys" and consultation with SHPO and tribal governments, including the Band, to identify historic properties. A Class III survey is an "[i]ntensive" survey that involves "a professionally conducted, thorough pedestrian survey of an entire target area . . . intended to locate and record all historic properties" and that "provides managers and cultural resource specialists with a complete record of cultural properties." BLM Manual, 8110-

Identifying and Evaluating Cultural Resources 8110.21C.1, 8110.21C.3 (Rel.8-73, 12/03/04).[2]

Class III surveys for the Power Line corridor were completed in 2011 and 2013, (SER 455, ¶ 6), and included intensive field inventories to locate and record cultural resources. The Band did not raise the concerns recently asserted in its Complaint during consultation for those Class III inventories. Instead, the single reference to the Power Line was that it should not be constructed because "other power users will come in the area." (SER 460). Although the tribes expressed concerns that the Power Line would encourage additional development in the area, they made no reference to the alleged impacts now identified to this Court (despite the Band's contention that these areas within the alleged new TCPs have been used and important, since time immemorial).

In fact, the approved plan for the Power Line addresses a primary concern the tribes did raise during the NHPA and NEPA process, being that of noise and air emissions. The Power Line replaces the need for diesel generators, which reduces noise and air pollution, mitigating impacts at an existing TCP nearby. (ER 71).

In addition, the BLM identified avoidance and mitigation measures for the Project in the ROD, including a 250-foot buffer zone around then-identified TCPs

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[2] *available at* http://www.blm/gov/pgdata/etc/medial-ib/blm/wo/Planning_and_Renewable_Resources/coop_agencies/cr_publications.Par.44865.File.dat/Binder2-2.pdf.

based on consultation with the tribes. (ER 120). As the ACHP explained to the Band in its December 22, 2015 letter, the BLM is not required to conduct "additional surveys or consultation to identify and evaluate historic properties in areas of proposed surface disturbance where a previous Class III survey" was conducted. (ER 355). The time for consultation was during NEPA and when the Class III surveys were being completed.

B. The Band's untimely challenge of the Power Line.

The very essence of a TCP designation belies the Band's (incorrect) argument that the BLM has not included the "alleged new TCP" in a Section 106 Process. Section 106 requires analysis of the lands potentially affected by an undertaking. These lands can receive various designations, including designation as a traditional cultural property, or "TCP". Although the term TCP is a designation of a set of physical objects, the term "TCP" is sometimes used as short hand to mean the physical site that receives a designation of traditional cultural property. But, contrary to the Band's casual usage throughout its Complaint and brief, a TCP is not something physical that is "discovered" or "found". For clarity, this brief refers to the underlying physical components of the "TCP" alleged in the Complaint as the "Site." The Section 106 process conducted under the PA encompassed the Site.

Although the BLM examined the Site in its Section 106 process, the Band argues in this lawsuit that the Site should now be treated as a TCP based on information about the Site that has always been in the Band's possession but that the Band did not raise until last year. (ER 307-308, ¶ 1). The Band had the full opportunity to assert the significance of any site affected by the Project through consultation during the six-year long NEPA process and the Class III surveys completed in 2011 and 2013. The Band chose not to assert the significance of this Site through consultation nor did the Band submit comments on the DEIS about the Site.[3] As the BLM has acknowledged, "[t]he Band had opportunities to provide new information concerning TCPs prior to the signing of the ROD/PA and over the course of the past two decades, as well as to timely appeal BLM's final determinations in the Hollister EIS." (ER 388). Instead, the Band waited more than eight years after the NEPA process began and two business days before construction of the Power Line commenced, to raise its untimely challenge.

During the NEPA process Native American representatives did raise concerns with increased development in the area resulting from the Power Line. However, the representatives did not mention that the Site was critical to religious

[3] The Band's primary counsel, Rollie Wilson, admitted to then assistant regional solicitor representing BLM that the Band had failed to file comments on the DEIS and was looking for political solutions or a way to get another DEIS published to solve what would otherwise be a problem for the Band to challenge the FEIS/ROD. (SER 464).

and spiritual practices or otherwise request that the Power Line be installed underground. The BLM considered an alternative that would have placed the Power Line underground, but rejected the alternative because of the significant disturbance to "the environment, cultural resources, long-term environmental effects and prohibitive costs as compared to the overhead line. (SER 478, emphasis supplied). The appropriate time to raise concerns or challenge the BLM's decision regarding the Power Line was through comments on the DEIS, which the Band never did.

Instead of raising concerns about the Site either during the six-year long NEPA process or through consultation during the Class III surveys (or within a timely appeal period) the Band delayed initiating this action until just two business days before construction activities on the Power Line were scheduled to commence. The Band's Complaint raises no new information unavailable to the Band prior to the ROD or during the last two years. (ER 310-311, ¶¶ 9-13). Thus, the Band sat on the sidelines with regard to the Site while the BLM and consulting parties completed the Section 106 and NEPA processes and now seeks to halt the Project based on information available to the Band since "time immemorial." (ER 310).

C. Carlin has invested substantial resources and millions of dollars in the Project.

In reliance on the finality of the ROD, Carlin has invested substantial time and resources in the Project—at all times complying with the ROD. (ER 228-231). A preliminary injunction to halt the construction of the Power Line would have substantially harmed Carlin by causing it to lose valuable resources including an exorbitant amount of time and money. Carlin has spent several million dollars on the Power Line. (ER 230; SER 454). Carlin and its predecessor spent two years completing pre-construction activities for the Power Line -- investing in an agreement with NV Energy, negotiating contracts for construction of the Power Line, paying the Band's Tribal Monitors to observe contractors and archeologists, re-routing the Power Line to avoid cultural resources timely and properly identified, and obtaining all necessary ancillary permits after completion of the six-year long NEPA process. (SER 488-489).

The Power Line is a critical component of Carlin's broader investment in the Project, reasonably made in reliance on the finality of the ROD. The delay in the construction start date would have postponed the ultimate power connection date and cost Carlin millions.[4] (SER 455, ¶ 5). Other harms included a significant impact on Carlin's stakeholders by its loss of contractors and other professionals

[4] Since this appeal was filed, Carlin has completed construction of the Power Line in conformance with the Orders of this Court and the district court, as well as the ROD.

that depended on the construction of the Power Line and that had already been scheduled to work (including the builders, engineers, archaeologists, etc.). (ER 230, 241-242). Carlin's loss of its contractors and professionals could have rendered Carlin unable to build the Power Line before the winter months, which would then have further delayed construction until spring 2017. (*Id.*)

The Band's actions affect not only Carlin and the Project but, if allowed to continue, will devastate the mining industry and send the message to the world there is a lack of reliability, certainty and trust in federal permitting in the United States. (ER 232-233). If Carlin cannot rely on its valid existing rights under the ROD and ROW for the Project, a strong sense of uncertainty will be injected into all approved mining plans and other federal authorizations for developers that rely on the federal permitting process. (*Id.*).

SUMMARY OF ARGUMENT

The district court's denial of a preliminary injunction should be affirmed for three reasons.

First, the Band's lawsuit is an untimely end-run around the Band's decision to not appeal the ROD. The crux of the Band's claim is that it disagrees with the BLM's designation of the Site in the ROD, which the BLM issued in March 2014. The Band did not appeal the ROD and this lawsuit is an improper attempt to mount

untimely challenges to the ROD years after the NEPA and NHPA processes concluded.

Second, the BLM fully discharged its obligations under Section 106 by including the Site within its work under the PA and requiring Class III surveys for the Site (which were completed in consultation with the Band). Upon completion of the ROD, the only event that could create additional obligations under the PA or Section 106 would be the discovery of cultural properties during the Project, and the Band agrees with the district court that the Site does not constitute a discovery.

Third, the district court's ruling that the balance of factors in the preliminary injunction analysis do not overcome the Band's low likelihood of success on the merits is supported by evidence in the record. The Band's Opening Brief does not show the court's ruling was an abuse of discretion.

ARGUMENT

Standard of Review. Preliminary injunctions are an extraordinary remedy "never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quotation omitted). To obtain preliminary injunctive relief from the district court, the Band had to satisfy a four-part test, demonstrating that (1) the Band was likely to succeed on the merits of a claim; (2) the Band was likely to suffer irreparable harm absent preliminary relief; (3) equity tips in the Band's favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*,

555 U.S. 7, 20 (2008). Each of these four elements turns on the district court's weighing of the evidence.

This Court reviews the district court's denial of injunctive relief for an abuse of discretion. *Garcia*, 786 F.3d at 740. This review is "limited and deferential" and will result in reversal "only if the district court committed an abuse of discretion, or an error of law, or made a clearly erroneous factual finding." *Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234, 1240 (9th Cir. 2015).

The Band's Opening Brief shows no abuse of discretion in any part of the district court's order denying the Band's motion for preliminary injunction.

I. THE BAND FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

Success on the merits is the most important factor for a preliminary injunction. *Garcia*, 786 F.3d at 740. On appeal, the Band relies exclusively on its claim that the ROD violates the NHPA because the BLM did not assess the effects of the Power Line on the Site and failed to complete eligibility determinations for the Site. Op. Br. at 32; *see also id.* at 20-32. This claim cannot succeed on the merits because (i) the Band failed to timely appeal the ROD; and (ii) the BLM fully discharged its obligations under the NHPA when it completed eligibility determinations and assessed the effects of the Power Line on the Site in full consultation with the Band and after a lengthy NEPA process. The district court was correct that the Band is unlikely to prevail on the merits. The District Court's

decision should be affirmed because (i) the Band's failure to timely appeal the ROD is fatal to its claim; (ii) the BLM discharged its obligations under the NHPA; and (iii) none of the Band's other arguments demonstrate an abuse of discretion.

A. The Band cannot obtain judicial review of the ROD because it failed to timely appeal the ROD.

The Band must rely on the APA to seek relief for alleged violations of the NHPA because the NHPA provides no private right of action. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (NHPA Section "106 does not give rise to a 'private' right of action against the federal government."). The Band never demonstrated to the district court that it satisfied the jurisdictional prerequisites under the APA and does not try to do so in its Opening Brief.

The Band's omission of the APA is not harmless because the APA required the Band to appeal the ROD long before seeking judicial review of the ROD. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) ("The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court. 5 U.S.C. § 704. This requirement applies to claims under NEPA."); *Marathon Oil Co. v. United States*, 807 F.2d 759, 767 (9th Cir. 1986) ("As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time."). The Band had the ability to appeal the ROD under 43 C.F.R. § 4.410(a) (permitting appellate rights to parties adversely affected by a decision of the BLM), but never did so.

The Band has no excuse for its failure to appeal the ROD. The ROD contains the BLM's standard "Appeal Statement" that explained the Band's appellate rights and obligations. (ER 135, 137). The statement explained the 30-day deadline for appeals and the Band's ability to seek a stay of the ROD. (*Id.*) The ROD also provided an outline of the appellate process, including guidance on whether a party may appeal and the logistics to do so. (ER 151-152.) The Band also had all relevant information regarding the Site and construction of the Power Line within its possession at the time these rules required the Band to appeal the ROD. (ER 310, ¶¶ 9-11). The Band has never explained why it waited two years to seek judicial review of the ROD after bypassing a timely appeal to the IBLA.

The Band's failure to timely appeal the ROD followed its silence during the Draft EIS commenting stage. The BLM had been consulting with tribes, including the Band, for "nearly 25 years in order to gather information on potential TCP values in and around" the Site. (ER 387). The "Band had opportunities to provide new information concerning TCPs prior to the signing of the ROD/PA and over the course of the past two decades, as well as to appeal the BLM's final determinations in the Hollister EIS." (ER 388). Throughout this process the Band never presented the BLM with information that would support a TCP designation for the Site.

The Band did, in fact, submit comments during the NEPA process, but never commented on the designation of the Site. (SER 466). Native American representatives also raised concerns with the Power Line but did not suggest that the Site could be designated as a TCP. The BLM rejected an alternative to place the Power Line underground because of the disturbance to, among other things, cultural resources. (SER 478). Yet prior to this lawsuit the Band did not challenge the overhead construction of the Power Line as approved by the BLM.

The Band had complete notice and opportunity to appeal the ROD under 43 C.F.R. § 4.410(a) and failed to exhaust its administrative remedies. The Band can establish no exception to the exhaustion requirement. *See Marathon Oil*, 807 F.2d at 767. Based on this failure alone, the Band has no likelihood of success on the merits, and this Court can affirm the district court's order without considering any other factors. *Garcia*, 786 F.3d at 740.

B. The district court correctly ruled that the BLM had no new Section 106 obligations.

The Band argues that a letter from the BLM dated April 25, 2016 (the "April 2016 Letter"), created new obligations under the NHPA. (ER 318, ¶ 43). The district court correctly rejected this claim, concluding that the April 2016 Letter constituted no discovery that was unanticipated at the time of the ROD. (ER 2). The Band agrees that the Site does not constitute an unanticipated discovery. Thus, the Band's claim fails because only unanticipated discoveries trigger

additional Section 106 obligations following completion of Class III surveys under the PA.

1. The BLM discharged its Section 106 obligations.

Section 106 is a "stop, look, and listen" provision of the NHPA that requires the BLM to consider the effect that an undertaking has on sites eligible for inclusion in the National Register of Historic Places ("NRHP"). *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior* ("*Te-Moak Tribe*"), 608 F.3d 592, 607 (9th Cir. 2010). Only an undertaking defined by 36 C.F.R. § 800.16(y) triggers the Section 106 process. *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1066 (D. Ariz. 2015).

Where an undertaking triggers the Section 106 process, the NHPA implementing regulations require (1) identification of historic properties potentially impacted by the undertaking, 36 C.F.R. § 800.4; (2) assessment of adverse effects of the undertaking, 36 C.F.R. § 800.5; and (3) resolution of adverse effects, including avoidance or mitigation measures for the undertaking, 36 C.F.R. § 800.6. Compliance with these regulations discharges the BLM's obligations under Section 106.

For complex undertakings like the Project, the regulations permit the BLM to enter into a programmatic agreement that will ensure compliance with the Section 106 process. 36 C.F.R. § 800.14(b). The BLM entered into the PA after

extensive negotiations and consultation with the Band. (SER 496-497). "By definition, the project-specific PA is an agreed-upon alternative to the 'standard' Section 106 process developed in Nevada's Protocol. As such, it takes precedence for determining how the Section 106 process will be handled at the Hollister Mine." (ER 390). Accordingly, the Band must point to some provision of the PA to establish an obligation to determine eligibility of the Site or assess the impacts of the Project.

There is none. The PA's identification requirements called for "Class III" inventories and consultation with tribal governments, including the Band, to determine whether any site impacted by the Project is eligible for inclusion on the NRHP. (ER 340-342, Stipulations D.2 (Identification) & D.3 (Evaluation)). Next, the PA required the BLM to craft avoidance or mitigation measures to ensure protection of sites deemed eligible for inclusion on the NRHP. (ER 342-343, Stipulation D.4 (Effects and Treatment). Like the NHPA's implementing regulations, the process prescribed by the PA requires that all sites impacted by the Project be examined once. The Band has identified no support for its contention that the PA requires continuous revisits to previously and recently surveyed sites.

The PA contemplates just one trigger for additional identification and assessment measures. These "Discovery Situations" involve cultural resources discovered while conducting Project activities that were not "previously

identified." (ER 344, Stipulation D.8). Appendix C to the PA contains the protocol to handle the unanticipated discovery of cultural resources. (ER 356).

The framework of the Section 106 process prescribed by the PA can be summarized as follows:

PA Stipulation	Obligation	Frequency
D.2 – Identification	Class III Inventory	Once – before project approval, subject to review under 43 C.F.R. § 4.410(a)
D.3 – Evaluation	Evaluate cultural resources identified in Class III Inventory for eligibility to the NRHP	Once – before project approval, subject to review under 43 C.F.R. § 4.410(a)
D.4 – Effects and Treatment	Assess effects of Project on TCPs and treatment of effects	Once – before project approval, subject to review under 43 C.F.R. § 4.410(a)
D.8 – Discovery Situations	Complete unanticipated discovery protocol in Appendix C to PA	Only where cultural resources are discovered while conducting Project activities

The BLM has complied with each requirement. The Class III inventories and evaluation required by the PA were completed in 2011 and 2013. (SER 455, ¶ 6). The Band had ample opportunity to consult with the BLM during the inventories. The Band did not assert or demonstrate that the Site should be designated as TCPs during this consultation process.

The BLM also satisfied the effects and treatment requirements of the PA in consultation with Carlin, SHPO, and tribal governments. The BLM imposed several avoidance and mitigation measures in the final plan approved by the ROD,

including an avoidance provision that incorporated a 250-foot buffer around the exterior boundary of then identified TCPs to which Carlin and the Project continue to adhere. (ER 386-387). During the two years of pre-construction activities, at the BLM's request to avoid identified cultural resources, Carlin re-routed the Power Line numerous times.

Finally, the Band does not argue that the BLM violated the discoveries provision of the PA and has conceded that the Site is not an unanticipated discovery that triggered Stipulation D.8 of the PA. Op. Br. at 44 ("No one claimed or asserted that the BLM's April 25, 2016 determination was a "discovery"); *id.* at 45 ("The TCP is not a "discovery of previously unidentified property.").

The BLM's April 2016 Letter triggers no new obligations under the PA because it is neither an undertaking nor a discovery. *See Williams*, 98 F. Supp. 3d at 1066 ("With the 'undertaking' of mining having been approved in 1986 after compliance with § 106, the Court cannot conclude that resumed mining under the same Plan constitutes a new undertaking."). The district court's order is simple. The April 2016 Letter could trigger Section 106 obligations only if it constituted (1) an undertaking; or (2) an unanticipated discovery. It was neither. It was not an undertaking because it concerned no new project or plan that required approval—the Power Line was already approved in the ROD. And the Band concedes that the April 2016 Letter was not an unanticipated discovery. The Band is not likely to

succeed on the merits of its claim because the district court was correct that this letter triggered no new obligations.

2. The district court correctly applied Apache and 36 C.F.R. § 800.13

The Band argues that the district court erred by citing *Apache* and 36 C.F.R. § 800.13 to support its ruling that the April 2016 Letter did not trigger new Section 106 obligations. Op. Br. 40. In *Apache*, the Ninth Circuit addressed the same argument the Band raises in this case. The Forest Service in *Apache* had discharged its duties under Section 106 of the NHPA years before the tribe in *Apache* challenged a permit authorizing a project. 21 F.3d at 910-911. The tribe claimed that its challenge was not untimely because it asserted a violation of purported *ongoing* obligations under the NHPA. *Id.* at 911 ("[t]he tribe appeared to argue … that NHPA imposes 'ongoing obligation[s on the part of] the agency to evaluate ongoing project[s.]'"). The court concluded that only certain events trigger additional Section 106 process obligations, including the discovery of previously unidentified properties. *Id.*

Thus, the district court's citation to *Apache* supported its conclusion that the April 2016 Letter did not trigger NHPA obligations because the letter did not constitute discovery of previously unidentified properties. The district court's finding that there was no discovery of previously unidentified properties (which

the Band concedes) also necessarily rejected the Band's argument that the Section 106 process was not completed on the Site.

The Band's attempt to distinguish *Apache* on the ground that the Forest Service completed the Section 106 process in *Apache* fails because the BLM also completed the Section 106 process here in consultation with the Band, SHPO, and Carlin. Op. Br. at 41. The Band's repeated arguments that the BLM did not conduct the Section 106 process are conclusory and incorrect because the Band stubbornly refuses to confront the undisputed fact that the BLM's work under the PA included the Site and completion of Class III surveys prior to the ROD.

Not only does *Apache* support the district court's order, but the holding in *Apache* on the laches defense also undermines any likelihood of success on the merits of the Band's claim here. Although Carlin's laches defense was not addressed in the Order, and is unnecessary to defeat the Band's claims, the conduct supporting the laches defense in *Apache* is materially indistinguishable from the Band's failure to avail itself of regulatory and judicial remedies to challenge the BLM's assessment of the Power Line in the ROD. *See, e.g.*, 43 C.F.R. § 4.410(a) (appellate rights to the IBLA). Laches does not permit the Band to sit on the sidelines while the BLM discharged its duties under the NHPA and NEPA. (*See* ER 388, "[t]he Band had opportunities to provide new information concerning

TCPs prior to the signing of the ROD/PA and over the course of the past two decades, as well as to appeal BLM's final determinations in the Hollister EIS.").

The Band's attack on the district court's citation to 36 C.F.R. § 800.13 also fails because it assumes incorrectly that the BLM never completed the Section 106 process on the Site. The Band cites no authority that a Section 106 process that covers a particular site can be rendered incomplete because a third party withheld information about the site during examination of the site. The logic in the Band's argument would upend the concepts of finality and efficiency embedded in the administrative process that encourages timely participation from interested parties and permits aggrieved parties to timely appeal the BLM's decisions to the IBLA.

Next, the Band's argument that existing regulations require no trigger for Section 106 obligations is flat wrong. Op. Br. 46-47. After a site is included in a Section 106 process (as the Site at issue here was during Class III surveys in 2011 and 2013), additional Section 106 obligations are only triggered by unanticipated discoveries and the circumstances discussed in *Apache* that are not present here. *Williams*, 98 F. Supp. 3d at 1066.

Further, the Band's reliance on revisions to 36 C.F.R. § 800.13 is misplaced because even if the revisions were intended to expand the Section 106 process into an ongoing obligation (they were not), the PA still governs here. Op. Br. 46-47. Section 800.13(a)(1) allows the BLM to use a programmatic agreement to "govern

the actions to be taken when historic properties are discovered during the implementation of an undertaking." The unanticipated discoveries protocol contained in Appendix C to the PA governs actions to be taken when discoveries are made during the implementation of the Project. (ER 344, Stipulation D.8 & 356, "Discovery Plan"). Because the PA governs discoveries here, revisions to the provisions in § 800.13 concerning discoveries "without prior planning" cannot support the Band's argument that the April 2016 Letter imposes Section 106 obligations. In addition, as the Band concedes, there are no "discoveries" at issue.

Lastly, the Band's claim that the phrase "previously unidentified properties" is "outdated" in the current regulations, Op. Br. at 46-47, is unpersuasive here because the PA uses very similar language to describe discoveries: "Cultural Resources, *not previously identified*, which are discovered while conducting Project activities…." (ER 344, emphasis added), "If a *previously unidentified* Cultural Resource is discovered …." (ER 356, emphasis added). The fundamental purpose of the "previous identification" process through a Class III survey is to exhaustively identify all cultural resources and provide finality and regulatory certainty of obligations to avoid the very kind of sandbagging the Band is attempting in this case. There is nothing "outdated" about this precept of administrative law which is critical to all federal permitting and those who rely on it.

Because the BLM included the Site in its Section 106 process and because the PA controls, the Band's objections to the district court's reliance on *Apache* and § 800.13 fail to show an abuse of discretion or error of law.

C. The remaining arguments advanced by the Band in its Opening Brief do not establish new Section 106 obligations.

The six additional arguments the Band raises in its Opening Brief do not show that the district court abused its discretion.

First, the Band argues that the NHPA applies to the Power Line because the NHPA applies to "undertakings." Op. Br. at 21. This is correct, but courts have rejected the Band's implication that the Power Line remains an "undertaking" for the NHPA after the BLM completes the Section 106 process, approves the Project and work has begun. *Williams*, 98 F. Supp. 3d at 1066 ("With the 'undertaking' of mining having been approved in 1986 after compliance with § 106, the Court cannot conclude that resumed mining under the same Plan constitutes a new undertaking."). This is because the Power Line was no longer a "project" that required a "Federal permit, license or approval" after the BLM approved the Project. 36 C.F.R. § 800.16(y). This result comports with common sense notions of fairness and finality in administrative decisions. The Band cites no authority that the Power Line became a new undertaking because of the BLM's April 2016 Letter, and there is none.

Second, the Band is incorrect that the BLM validly designated the Site as a new TCP. Op. Br. at 21. The BLM assessed the Site prior to issuing the ROD, through Class III surveys including consultation with the Band, and did not designate the Site a TCP. The BLM had no authority in its April 2016 Letter to revisit this decision because neither the Band nor any other aggrieved party appealed the ROD. The Band waived its rights to challenge the ROD in 2014—the Band's pursuit of the April 2016 Letter and this lawsuit are untimely and improper attempts to reverse the ROD.

Third, the Band's argument that the NHPA imposes ongoing obligations misstates the cases cited by the Band and the BLM's power to modify the Project. Op. Br. at 22-25. The cases cited are inapposite here because each case involved projects that had not received final approval and had never been subjected to a Section 106 process or received approval from the Advisory Council. In *WATCH v. Harris*, the court held that Section 106 applied because HUD retained authority to make funding approvals for future stages of a project and HUD had not complied with Section 106 for any part of the project. 603 F.2d 310, 326 (2nd Cir. 1979). The court in *Morris County Trust for Historic Preservation v. Pierce* followed *WATCH* and held that HUD had to comply with Section 106 "at least once" because it retained the ability to demand alteration of the project at intervals where the town requested funding. 714 F.2d 271, 282 (3d Cir. 1983). In *Vieux*

Carre Prop. Owners, Residents & Associates, Inc. v. Brown, the court held that the Army Corp of Engineers had to comply with Section 106 because it retained the ability to require changes to a project that had not undergone the Section 106 review. 948 F.2d 1436, 1445 (5th Cir. 1991).

In contrast here, the BLM complied with Section 106 for the entire Project, issued final approval for the Project, and retains no discretion to modify the Project. After approval of the ROD and absent unanticipated discoveries, the PA limits the BLM's role to the ministerial act to issue "Authorizations to Proceed" or "ATPs". (ER 343, Stipulation D.6). An ATP is not an undertaking because it is not a project, activity or program that requires a federal permit, license or approval. 36 C.F.R. § 800.16(y) (defining "Undertaking"). The ATP merely ensures that Carlin has complied with the evaluation process (through Class III surveys), any treatment or avoidance measures required based on those Class III inventories, and has guaranteed funding to complete mitigation. (*Id.* Stipulation D.6(a)(2)).

The IBLA recently confirmed that the BLM has no authority to revise the Project at this stage when it rejected the Band's challenge to an ATP in September 2015. The Band petitioned the IBLA for an "emergency" stay of an ATP issued by the BLM under the PA, arguing that two approved drill sites affected the entire Tosawihi Quarries as a "landscape" TCP not identified during the Section 106 process under the PA. The IBLA dismissed the petition, concluding that there was

no new agency action or decision to appeal because the ATP did not alter the preexisting rights conferred years earlier by the ROD. (SER 493).

The ATP here is more like the action at issue in *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, which distinguished the cases cited by the Band on similar grounds. 968 F.2d 1283, 1289 (D.C. Cir. 1992). The court in *McMillan* held that an action could not be an undertaking that triggers new Section 106 obligations because it did not, and could not, modify a project that had already complied with the Section 106 process. *Id.* (The agency's action "adds no new element previously unconsidered under the § 106 process, and we therefore find that it did not constitute an 'undertaking' and could not obligate the [agency] to comply with the § 106 process.").

The court in *Williams* reached a similar result under similar facts, concluding that

> With the "undertaking" of mining having been approved in 1986 after compliance with § 106, the Court cannot conclude that resumed mining under the same Plan constitutes a new undertaking. The Court agrees with the conclusion in the Mine Review: "Since [Energy Fuels] has not proposed any new activities which would require modification of the existing [Plan] or a new [Plan], there will be no new federal undertakings subject to NHPA Section 106 compliance."

Williams, 98 F. Supp. 3d at 1066. *Cf. Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1128 (10th Cir. 2009) ("That BLM reviews the MOU yearly and has

the discretion to renegotiate does not by itself establish a continuing federal action.").

Fourth, the Band's argument that the BLM failed to follow the steps prescribed by the NHPA's regulations is based on the incorrect premise that the BLM's April 2016 Letter triggered a new obligation under the NHPA. Op. Br. at 25-29. That the BLM did not follow these requirements a second time after the April 2016 Letter does not establish that the requirements were ever triggered by the letter. This argument does nothing to refute or undermine the district court's conclusion that the April 2016 Letter did not trigger NHPA obligations. (ER 2).

Fifth, the Band's argument that this Court must construe the NHPA consistent with the Religious Freedom Restoration Act does not help because the Band points to no provision of the NHPA misinterpreted by the district court. Op. Br. 29-31. Instead, albeit never articulated with precision, the Band's real dispute is with the district court's premise that only an unanticipated discovery could trigger new Section 106 obligations. (ER 2). This premise is based on the straightforward and common sense application of the PA. As explained above in Section I.A.2, the PA plainly does not require additional Section 106 work following completion of a Class III survey which includes consultation.

Sixth, the Band's argument that the BLM failed to consult with the Band also fails because, again, it is premised on the flawed argument the April 2016

Letter triggered new Section 106 obligations. Op. Br. 31-32. It did not, so the BLM did not have to consult with the Band after the April 2016 Letter given the prior completion of the consultation process during the NEPA process and the 2011 and 2013 Class III surveys completed for the Site. The BLM fully discharged its consultation requirements under the PA and Section 106 prior to issuing the ROD, and the Band does not challenge the adequacy of consultation prior to the ROD.

* * * *

The Band cannot succeed on the merits because the April 2016 Letter triggered no new obligations under the PA or the NHPA for the Site. The BLM completed the Section 106 process that included analysis of the Site and consultation with the Bands in the course of that analysis. There is no likelihood of success, and the district court's order should be affirmed under the traditional approach in *Winter* or the supplemental rule advanced by the Band that requires a serious question going to the merits. Op. Br. at 39; *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). The result is the same under either approach.

II. THE BALANCE OF EQUITIES DISFAVORS AN INJUNCTION.

The record contains ample evidence to support the district court's order that the balance of equities could not overcome the low likelihood of success on the merits. (ER 2). The balance of equities weighs heavily against the Band's request

for injunction because (i) the harm of the injunction to Carlin substantially outweighed any harm to the Band if Carlin was not allowed to proceed with the Project; and (ii) the Band's latest and delinquently proposed alternative that the Power Line be constructed underground would cause ground disturbance and increased potential harm to the environment and cultural resources.

The requested preliminary injunction threatened to impair Carlin's vested property rights under its Federal permits and its valid existing rights under the 1872 Mining Law. As explained in detail above in Section C of the Counterstatement of Facts, Carlin invested substantial funds and resources in reliance on its valid existing rights and ROW. The delay in construction of the Power Line would have delayed the re-start of the Hollister Mine costing Carlin millions. Carlin and its predecessor worked diligently with the BLM for six years to arrive at the Final EIS and ROD, incurring substantial costs in doing so. Carlin also paid for tribal monitors provided by the Band at each stage of the Project to monitor surface disturbing activities. The Band never advanced the new alleged additional TCPs during this process or any of the other arguments it asserts for the first time in this lawsuit. Equity and fairness do not permit the Band to sit on the sideline – or participate in the process and withhold information such as that recently raised here – while the BLM, Carlin, and other consulting parties work for years to comply with the NHPA and the PA, and then halt the Project and

undermine the finality and integrity of the entire federal permitting process based on information available to the Band since "time immemorial." *Apache Survival Coal.*, 21 F.3d at 908, 914.

The ROD authorizing the Project, providing for identification and evaluation of any effect on historic properties (completed years ago) and requiring substantial mitigation to resolve effects on historic properties already protects the interests of the Band. The process completed under the NHPA and NEPA ensured that the BLM weighed the significance of cultural resources against the goal of development taking into serious consideration and requiring mitigation for impacts the Band and other Tribes timely raised. *Morris County*, 714 F.2d at 280 ("Congress designed the [NHPA] to draw a meaningful balance between the goals of historic preservation and community development."). The BLM also considered undergrounding the Power Line and rejected that approach because of the increased ground disturbance (and potential harm to the environment and cultural resources) of doing so as compared to placement of poles to install an overhead line. The BLM's compliance with NEPA, the NHPA and the PA for the Project—complete and valid in all respects— already achieved the goal of balanced equities contemplated by Congress under the NHPA. Because the ROD already balanced the interests of historic preservation and development, following thorough consultation with the Band and other Tribes, allowing Carlin to proceed with the

Project as approved by the ROD did not tip the balance of equities in the Band's favor.

Further, the magnitude of the Band's alleged harm raised on the eve of construction must be considered relative to the Band's prior silence throughout the six year NEPA process and during the exhaustive Class III surveys with respect to the importance of the Site since "time immemorial." Any purported "emergency" in the timing of the Band's lawsuit relief is a consequence of the Band's own decision to keep information available to it since "time immemorial" confidential until the eve of construction and weighs heavily against a preliminary injunction.

On appeal, it is not enough for the Band to point to evidence suggesting that some equities weigh in its favor. The Band has failed to show the record is devoid of evidence supporting the district court's determination after balancing the equities, and the decision should therefore not be disturbed on appeal.

III. THE BAND DID NOT PRESENT PERSUASIVE EVIDENCE THAT IT WILL SUFFER IRREPARABLE HARM.

As explained above, the Band's interests in the Power Line and the Project already have been weighed by the BLM over the six-year NEPA process, consultation with the Band during that process, and the exhaustive Class III surveys covering the Site. The Band's indifference (or strategic decision to withhold the information it now presents at the eleventh hour) during the consultation process under the ROD and PA with respect to this Site and time to

appeal the ROD to the IBLA is the best evidence that the Band is not likely to suffer irreparable harm absent the requested relief. Through its continuous attempts to interfere with Carlin's rights under the ROD during the last two years, the Band never has challenged the Power Line location. The Band has not met its burden to show that the entire landscape asserted by the Band even constitutes a TCP. Again, the Band has not shown that the district court's order on any likely harm absent preliminary relief is sufficient to outweigh the other *Winter* factors.

IV. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

Congress mandated how to balance the public interest in historic properties against other interests through the NHPA. The public's interests in protecting historic properties and community development were balanced here during the Section 106 process during completion of the EIS and in accordance with the PA. *Morris County*, 714 F.2d at 280. The public has no interest in permitting the Band's end-run around the ROD, the NHPA process, the PA, and the administrative remedies designed for the careful and timely correction of any alleged flaws. If the Band may revisit the BLM's determinations under the ROD based on information the Band chose to withhold for years, no federal undertaking can or will be pursued with confidence in the finality of agency decisions.

The Band's request for preliminary relief here would transform the NHPA's requirement to "stop, look, and listen" before a federal undertaking into a

requirement to "stop, look, and listen" at any time requested by third parties, even after full completion of a NEPA review, exhaustive Class III inventories including consultation with the Band, and final approval of a project. The increased costs to the federal government and the public due to the inability to plan and act in reliance on final agency decisions will be substantial and are entirely unwarranted given the carefully drawn statutes and regulations that already exist and have been followed here. The public interest does not favor the open-ended second guessing of agency decisions advanced by the Band.

CONCLUSION

The district court's judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Although this appeal can be resolved by reference to straightforward legal principles, Carlin believes that the Court may benefit from oral argument given the numerous and involved arguments that the Band asserts. Carlin thus respectfully requests oral argument.

STATEMENT OF RELATED CASES

Carlin is not aware of any related cases pending in this Court.

Respectfully submitted this 26th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the word limit set forth in F.R.A.P. 32(a)(7)(B)(i) because, according to the word count feature of Microsoft Word, the brief contains a total of 8,466 words, excluding the sections listed in subsection (iii) of this rule.

/s/ Laura K. Granier

CERTIFICATE OF SERVICE

I hereby 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 August 26, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Brigid Bungum