No. 16-16016

In the 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 C. Silvey**, in her official capacity as Bureau of Land Management Elko District Manager,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Nevada (No. 3:16-cv-268) (Judge Hicks)

Federal Defendants-Appellees' Brief

JOHN C. CRUDEN
Assistant Attorney General
JAMES A. MAYSONETT
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Statement of Jurisdiction

The claims in this case are brought under the National Historic Preservation Act ("NHPA"), originally codified at 16 U.S.C. § 470, now codified at 54 U.S.C. § 300101, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, and the United States' general trust obligations to Indian tribes. ER 316–20. The district court had subject matter jurisdiction to hear these claims under 28 U.S.C. § 1331. The district court denied the Plaintiff-Appellant's motion for preliminary injunction on June 3, 2016. ER 1–2. The Plaintiff-Appellant filed a timely notice of appeal of that order on June 3, 2016. ER 3–5. This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).

Statement of the Issues Presented for Review

1. The Plaintiff-Appellant Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians (the "Band") moved for a preliminary injunction to stop the construction of a power line. The district court denied that motion. This is an appeal of the order denying the Band's motion for preliminary injunction. Is this appeal moot now that the power line has been built?

2. The United States Bureau of Land Management ("BLM") spent six years studying the potential effects of this project, including the challenged power line, on historic sites. The Band did not participate in that process and never told BLM that this power line would affect its sacred sites. Is the Band

now barred by laches from asserting these claims, consistent with this Court's decision in *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994)?

3. Is the Band likely to succeed on the merits of its claims under the National Historic Preservation Act ("NHPA") where BLM made extensive efforts to identify historic sites and analyze the potential effects of the power line on those sites, and where BLM has complied with the lawful programmatic agreement that now governs this project and which does not require any further analysis of the power line at this time?

4. Has the Band made the showing of irreparable harm necessary to obtain a preliminary injunction where significant protections are already in place to ensure that this power line does not harm the features of the Band's sacred sites and the evidence before the Court—including the Band's own declarations—shows that sacred sites will not be destroyed?

5. BLM is required by law to manage these lands for multiple uses in combination and must take into account not only their historic value, but also their value as a domestic source of minerals. Through a long administrative process, BLM developed a plan that does that, and the Band failed to raise its concerns about the power line during that process. Would an injunction serve the public interest here when it would undo the careful balance that BLM has struck and would discourage the Band and other tribes from presenting their concerns to the agency in a timely manner in the future?

Statement of the Case

I. The law

A. National Historic Preservation Act ("NHPA")

Section 106 of the NHPA requires federal agencies to consider the potential effects of federal agency actions on historic properties. 16 U.S.C. § 470f (2013).[1] Section 106 requires the BLM to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f). This is "a stop, look, and listen provision that requires each federal agency to consider the effects of its programs." *Muckelshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). The Advisory Council on Historic Preservation ("ACHP") administers the NHPA. *See* 16 U.S.C. §§ 470i, 470s. Its regulations require the agency to "make a reasonable and good faith effort" to identify historic properties within the undertaking's area of potential effects. 36 C.F.R. § 800.4(b)(1).

The ACHP's regulations permit an agency to "use a phased process to conduct identification and evaluation efforts" or to "defer final identification and evaluation of historic properties" where the alternatives under consideration involve "large land areas" or "corridors." 36 C.F.R. § 800.4(b)(2). The regulations also allow an agency to use what is known as a "programmatic

[1] The NHPA has recently been repealed and recodified. Pub. L. No. 113-287, § 7, 128 Stat. 3272, 3272–73 (2014). This brief and the administrative record refer to the earlier codification because this project began before December 19, 2014.

agreement" when addressing effects from complex projects or multiple undertakings. 36 C.F.R. § 800.14(b). Programmatic agreements are particularly useful "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii). "Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities." *Id.* § 800.14(b)(2)(iii); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1216 (9th Cir. 2008).

II. The Facts

A. Mining in the Carlin Trend

This case involves a power line that will support mining operations in the "Carlin Trend" in north central Nevada, where mining has been carried on over the past 100 years. ER 51.[2] BLM is involved here because much of this mine (and the power line) is located on federal land. ER 87. BLM developed an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") to inform its decision on whether to authorize the conversion of this site from mineral exploration to active mining. ER 86. The power line at issue in this case is a 4.5-mile long 24.9-kV electrical distribution line along Little Antelope Creek road. ER 47–9.

[2] The draft and final environmental impact statements are available on BLM's website at http://www.blm.gov/nv/st/en/fo/elko_field_office/blm_information/nepa/hollister_deis__6.html.

This case involves the potential effects of that power line on a "traditional cultural property" in this area. A "traditional cultural property" is a historic site "'associate[ed] with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.'" *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007). The traditional cultural property at issue in this case includes "a ritual spring, ritual rock features, ritual resource . . . gathering areas, prayer points . . . , spiritual passages, a ritual/spirit trail, and curing areas." ER 327. It was found to be eligible for listing on the National Register of Historic Places on April 25, 2016. ER 327. Because BLM keeps the name, location, and other identifying details of this traditional cultural property confidential, we do not name or otherwise identify it in this brief, except to describe it as the "traditional cultural property at issue in this case." A description of the property may be found in the excerpts of record, filed under seal, at ER 327.

B. BLM's NEPA/NHPA review process

BLM began to involve the public in this decision six years ago and it repeatedly encouraged and welcomed public participation. ER 75. In fact, BLM began the process of government-to-government consultation required by Section 106 of the NHPA even earlier, contacting all area tribes, including the Band, in July 2009. *See* ER 64–8.

As explained by Ryan Brown, the staff archaeologist at BLM's Tuscarora Field Office, BLM conducted a Class III cultural resource inventory[3] during the fall of 2010 to determine the feasibility of constructing a mine shaft and electrical lines at Hollister Mine, including the power line at issue in this case. ER 55; SER 407 ¶ 4. BLM surveyed the corridor for the power line as part of this inventory, and the agency identified a total of twenty sites that were deemed eligible for listing on the National Register of Historic Places ("NRHP"). ER 55

BLM distributed the draft environmental impact statement for public comment on June 1, 2012. ER 88. The maps included in the draft environmental impact statement plainly showed that the power line would pass through the area of the "traditional cultural property" ("TCP") at issue in this case. *Compare* ER 46 *with* SER 410.

[3] A Class III survey is an "[i]ntensive" survey that involves "a professionally conducted, thorough pedestrian survey of an entire target area." BLM Manual 8110.2.21.C.1, C.3.

BLM took public comment for 45 days. ER 89. The Band did not comment on the draft environmental impact statement. ER 89–90. BLM then held three public meetings, including a meeting in Battle Mountain, Nevada. ER 89. BLM entered into a programmatic agreement on May 6, 2013. ER 337–63. The mining company, the ACHP, and the Nevada State Historic Preservation Office joined that agreement. ER 349.

BLM released its final environmental impact statement ("FEIS") on May 21, 2013. ER 85. BLM gave notice of "a 30-day Final EIS availability and review period," after which "a Record of Decision (ROD) will be issued." *Id.* BLM also explained in that notice that "[t]he decision reached in the ROD [will be] subject to appeal to the Interior Board of Land Appeals." *Id.* BLM signed its record of decision on March 31, 2014. ER 93–152. BLM then issued the approved right-of-way ("ROW") grant for the construction of the power line. ER 33–42.

During the fall of 2015, the mining company (Carlin Resources L.L.C.) contracted with Western Cultural Resources Management, Inc. ("WCRM") to monitor the surveying and staking of the power line. SER 408 ¶ 6. WCRM identified additional cultural materials near several previously-identified archaeological sites, and so the parties expanded or updated the boundaries of those sites. *Id.* The parties then redesigned the power line to ensure that all of its utility poles and access routes would be outside of the site boundaries for all known historic properties. SER 408 ¶ 7.

C. BLM's consultation with the Band

BLM consulted with the Band on both the proposed mining operations and the power line. But the Band was silent regarding the claims that it makes now, and it was only years later, after the power line had already been approved, that the Band proposed that the traditional cultural property at issue in this case was eligible for listing under the NHPA. The Band did not raise this issue during the repeated consultations regarding the Class III inventory of the power line route in 2010 and 2011, in response to the "Dear Interested Party" letters that BLM mailed to it in April 2010, or during any of the public meetings (which the Band did not attend). The Band did not submit these concerns during the public comment period for the draft environmental impact statement. *See* ER 89–91.

The Band also did not raise these specific claims during its many meetings with BLM and its staff. In fact, the Band never suggested that the traditional cultural property at issue in this case was eligible for listing in the National Register of Historic Places until late 2015, long after BLM had approved the power line, as this timeline of events shows:

- On August 31, 2014, a historian hired by BLM, Dr. Adkins, met with Chairman Joseph Holley of the Band for a tour of the Tosawihi Area. Chairman Holley commented on the significance of Little Antelope Creek (where the power line will run), but did not identify specific religious activities that occurred at or near the creek. SER 413 ¶ 8; SER 419–20 ¶ 8.

- In early September 2014, the Band asked BLM to define additional traditional cultural properties, but that request was general and did not identify any specific locations. SER 420 ¶ 9.
- On September 17, 2014, the BLM's Elko District Manager, Ms. Silvey, met with the Band. The Band asked for help in developing nominations for new or expanded traditional cultural properties, but did not raise specific concerns about the power line or the traditional cultural property at issue in this case. SER 420 ¶ 10.
- On October 18, 2014, Dr. Adkins met with tribal members on a possible traditional cultural property near Eagle Spring and Canyon. SER 413 ¶ 10.
- In June 2014, Dr. Adkins drove along Little Antelope Creek and met Chairman Joseph Holley. Chairman Holley spoke in more detail about the importance of Little Antelope Creek, but he did not provide specifics on types of use or timing of use. SER 414 ¶ 12.
- On January 16, 2015, Ms. Silvey met with Chairman Holly. They discussed the power line at length. SER 420 ¶ 12. Chairman Holly mentioned that there were cultural sites in Little Antelope Canyon (where the power line will run) and that the canyon was important to the Band's religious practices. Chairman Holly asked BLM to require the power line to be buried underground. *Id.*
- During the spring and summer of 2015, Band representatives often referred to the importance of the Tosawihi area. On one occasion, they

mentioned that they wanted to see the power line buried, but gave no specific reason why. SER 420–1 ¶ 15.

- On September 19, 2015, BLM toured proposed drill holes with Band members. Band members again reiterated the importance of the area. For the first time, the Band revealed the existence of a potential traditional cultural property in this area. SER 414 ¶ 15.
- On December 28, 2015, Dr. Adkins conducted a tour of the Rossi Mine with elders and members of the Band. Band members related the importance of Little Antelope Creek. SER 414 ¶ 17.
- On January 6, 2016, a follow-up Rossi Mine tour was held. This tour was the first time that this area was specifically identified as a potential traditional cultural property. SER 415 ¶ 18.
- On March 13, 2016, Dr. Adkins and Band members reviewed a large map of the Tosawihi Quarries area with potential traditional cultural properties overlaid on it. Dr. Adkins and the tribal representatives discussed the areas depicted and their use. It was at this meeting that the specific activities practiced at the traditional cultural property at issue in this case were revealed for the first time. SER 415 ¶ 20.
- On March 15, 2016, a field meeting at Tosawihi was held with tribal members, and the same map used at the March 13th meeting was used again. Joseph Holley and Emerson Winap identified a traditional cultural property for the first time, clarified the location of another traditional cultural property, proposed timing restrictions and construction

configurations for proposed drill holes, and gave specific details on the ceremonies held in the traditional cultural property at issue in this case. SER 415 ¶ 21.

- On March 30, 2016, Dr. Adkins confirmed his understanding of the ceremonies that occur at this traditional cultural property with Councilman Joseph Holley. SER 416 ¶ 23. It was only at this point that Dr. Adkins felt that he had the specific information necessary to justify a determination of eligibility for the National Register of Historic Places for the traditional cultural property at issue in this case. *See*, *generally*, SER 417 ¶¶ 25–28; SER 422 ¶¶ 22–23. BLM determined that this traditional cultural property is eligible on April 25, 2016. ER 327.

III. The history of the case

The Band filed its complaint and motion for temporary restraining order on May 19, 2016. The district court denied the Band's motion without prejudice on May 20, 2016, and later converted that motion to a motion for preliminary injunction. *Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians v. United States Bureau of Land Management*, No. 3:16-cv-268 (D. Nev.), Docket Nos. 10 (May 20, 2016), 35 (May 26, 2016). The mining company moved to intervene on May 23, 2016, Docket No. 20 (May 23, 2016), and the district court granted that motion, Docket No. 55 (June 1, 2016). The district court heard oral argument and testimony from witnesses on June 2, 2016. Docket No. 58 (June 2, 2016).

The district court denied the Band's motion for preliminary injunction on June 3, 2016, concluding that the Band had not "made a showing that it is likely to succeed on its claims under the NHPA and RFRA sufficient to warrant a preliminary injunction in this matter." ER 2. The district court also held that "the remaining preliminary injunction factors" do not "weigh so far in the Band's favor to overcome the lack of a success on the merits." ER 2.

The Band moved the district court for an injunction pending appeal on June 6, 2016; the district court denied that motion on June 7, 2016. Docket Nos. 63 (June 6, 2016), 68 (June 7, 2016). The Band moved this Court for an injunction pending appeal on June 6, 2016; this Court denied that motion on June 8, 2016.

Standard of Review

To obtain a preliminary injunction, the Band must establish four elements: that they are "likely to succeed on the merits," that they are "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [their] favor," and that "an injunction is in the public interest." *See Winter v. NRDC*, 555 U.S. 7, 20, 22 (2008) (describing factors in the context of preliminary injunction); *Humane Soc. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008). This Court reviews the district court's denial of a preliminary injunction for abuse of discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010).

Summary of the Argument

More than two years ago, BLM approved the construction of a power line to support an existing mine in Elko County, Nevada. BLM granted that approval after six years of careful review and thorough public discussion. During the six years that BLM worked on this issue, the Band never told BLM that this power line would harm the traditional cultural property at issue in this case. When BLM held a series of public meetings before it approved this power line, the Band chose not to attend. When BLM asked the Band to comment on its environmental impact statement, the Band did not mention its objection to the power line or identify the traditional cultural property at issue here. Instead, less than two business days before work on this power line was scheduled to begin, and years after BLM had signed its record of decision, the Band filed an emergency motion to block the power line's construction.

The district court denied that motion because the Band had "not made a showing that it is likely to succeed on its claims" under the NHPA. ER 2. The Band has appealed that order, but its appeal is now moot because it sought to enjoin the construction of the power line, and the power line has now been built and is complete.

Even if this appeal was not moot, the district court did not abuse its discretion. The NHPA required BLM to "stop, look, and listen" for historic properties in this area before it approved this power line. BLM did that—it listened, and the Band was silent.

This Court has dealt with facts like these before. In *Apache Survival Coalition v. United States*, the Court held that, because the tribe was silent, its NHPA claims were barred by the doctrine of laches. 21 F.3d 895 (9th Cir. 1994). The district court cited *Apache* in its order and plainly did not abuse its discretion by following this Court's binding precedent. Its order denying the Band's motion for an injunction pending appeal should be affirmed.

And even if these claims were not barred by laches, the Band would still not be likely to succeed on their merits. BLM complied with the law here because it followed the process set out in a lawful programmatic agreement, which, under the applicable regulations, satisfies the requirements of the NHPA and its regulations. That programmatic agreement does not require BLM to reopen this process now to assess the effects of the previously-approved power line on the traditional cultural property at issue in this case. BLM thoroughly assessed the effects of the power line on cultural and religious sites—the agency stopped, looked, and listened, and considered all of the information that it had at the time. The Band simply never told BLM that this power line would affect its interests. By complying with the programmatic agreement, which requires no further process for the power line at this time, BLM has complied with the NHPA and its regulations, and the law.

The Band has also not shown that the construction of this power line is likely to cause "irreparable harm" because it will affect only a small part of this traditional cultural property and will avoid all of its known features. Nor would an injunction here serve the public interest because it would discourage

timely and meaningful participation in the administrative process by the Band and other tribes. For these reasons, the district court's order denying the Band's motion for preliminary injunction should be affirmed.

Argument

I. This appeal is moot.

The Band has appealed the district court's order denying their motion for a preliminary injunction. That appeal is now moot because the power line that they sought to enjoin has already been built.

BLM and the mining company spent years working on this project and analyzing its potential effects on historic sites. The Band did not participate in that process. BLM approved the power line and issued its right-of-way in April 2014. ER 33–4.

The Band waited more than two years, until May 19, 2016, to file this case and to seek a preliminary injunction. That was just two weeks before construction of the power line was scheduled to begin. In its motion, the Band asked the district court to enjoin the defendants:

- [f]rom issuing any authorizations or notices to proceed for any work related to the Power Line pending resolution of this matter; and,
- [f]rom allowing or permitting any ground-disturbing activities related to the Power Line as currently planned, including enjoining all earth work or work in preparation of

> or construction of foundations for power poles or other structures related to the Power Line pending resolution of this matter.

SER 423–4.

While the mining company delayed construction of the power line to give the district court time to rule on the motion for preliminary injunction, and then again to allow this Court to rule on the motion for injunction pending appeal, that construction began once this Court had denied the Band's motion on June 8, 2016.

The construction of the power line has now been completed, however, and the power line has been energized. As a result, the Band's appeal of the order denying their motion for preliminary injunction is moot because there is no relief left to grant on that motion. The power line is done. The events that the Band sought to enjoin have already happened. All "ground-disturbing activities related to the Power Line" have been completed. The "earth work" and "work in preparation of or construction of foundations for power poles" is done. There is nothing left to enjoin.

As such, this appeal is moot. *In Def. of Animals v. U.S. Dept. of Int.*, 648 F.3d 1012, 1013 (9th Cir. 2011) (holding that an appeal of an order denying a motion for a preliminary injunction is moot "where the action that the plaintiff sought to preliminarily enjoin had already occurred."). The Court does not need to decide whether this case as a whole is moot, or whether the underlying

dispute remains alive; that question and any remaining issues should be remanded back to the district court now that the Band's appeal of the order denying their preliminary injunction is moot.

II. The Band is not likely to prevail on the merits of its claims.

A. The Band's claims are barred by laches.

The Band's claims are barred by the affirmative defense of laches because the Band has not been diligent and its lack of diligence has prejudiced BLM, the mining company, and the public. *Lathan v. Brinegar,* 506 F.2d 677, 692 (9th Cir. 1974) (quoting *Costello v. U.S.,* 365 U.S. 265, 282 (1961)); *Coalition for Canyon Pres. v. Bowers,* 632 F.2d 774, 779 (9th Cir. 1980). For six years, BLM, the mining company, other tribes, the public, local governments, and other federal agencies worked their way through the complex administrative process for the approval of this power line (and the rest of the mining project), including a process to identify and protect historic properties. During all that time, the Band never told BLM that it believed that this power line would harm the traditional cultural property at issue in this case. The Band did not raise these concerns when BLM conducted an exhaustive Class III inventory of the area, or when BLM held public meetings, or during the public comment period for the environmental impact statement, or during the many meetings that the Band had with BLM and its historical advisor, Dr. Adkins. SER 415 ¶ 21; SER 420–21 ¶ 15–16. In fact, the Band did not identify this area with sufficient specificity to support its designation as a traditional cultural property until

2015, more than a year after BLM had already approved the power line. This Tribe has expressed its concerns about other mining projects in a timely way in the past, but it did not do so here. *See, e.g., Te-Moak Tribe of Western Shoshone of Nevada v. United States Dep't of the Interior*, 608 F.3d 592, 598 (9th Cir. 2010) (noting that the Te-Moak Tribe met with BLM during the NEPA process and convinced BLM to impose additional mitigation measures on the mine at issue).

The facts in this case are most similar to the facts that were before this Court in *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994). In that case, the tribe chose not participate in the long administrative NEPA and NHPA process, even after it had been invited by the government to do so, and then sued alleging that the construction of the Mount Graham observatory would harm the tribe's sacred sites. *Id*. at 898. This Court found that the tribe "ignored the very process that its members now contend was inadequate" and that, as a result, it had asserted its rights "with inexcusable tardiness" and its claims were barred by laches. *Id.* at 907.

Here, the Band chose—like the tribe in *Apache*—to remain silent about the power line during the long administrative process that led to its approval and then, less than two weeks before construction was scheduled to begin, to file a lawsuit to stop construction. The Band's six-year delay undermines all of the work done here by BLM, the State of Nevada, the mining company, and the other interested parties that spent years studying and working on this project while the Band sat on the sidelines and let this power line be approved

without comment. That delay is more than sufficient to support a finding that the Band's claims are now barred by laches. *See Apache Survival Coalition*, 21 F.3d at 909 n.16 (stating that laches bars environmental suit brought 2 years after relevant agency action); *Save the Peaks Coalition v. U.S. Forest Serv.,* 669 F.3d 1025, 1031-32 (9th Cir. 2012) (plaintiffs' four-year silence constitutes lack of diligence).

The Band asserts that it would be "ironic" to apply laches against it because "the record shows that any delay in bringing this matter forward falls squarely on BLM." Plaintiff-Appellant's Opening Brief ("Br.") at 10 n.3. But that is not what the record shows. The record shows that the Band did not voice its concerns over the power line until January 16, 2015, nearly a year after it had already been approved by BLM. SER 420 ¶ 12. And the record shows that it was not until March 2016—nearly two years after the power line had been approved—that the Band finally provided all of the information necessary to determine that this area was eligible for listing as a traditional cultural property. Moreover, during the six years that BLM was studying this project, the Band never once told BLM that the power line would affect its religious sites. The Band chose not to participate in the administrative process and now it must accept the consequences of that decision.

The Band argues that this case is not like *Apache Survival Coalition* because the agency completed the Section 106 process "four times" in *Apache* and BLM "has never completed the Section 106 process for the Power Line's effects on the TCP" in this case. Br. at 41. The Band claims that the tribe in

Apache was barred by laches because it "sought an additional Section 106 review process of TCPs that the Forest Service already identified, found eligible, determined effects and resolved adverse effects." Br. at 44.

The Band is wrong about the facts here and the facts in *Apache*.[4] In *Apache*, the agency completed its Section 106 analysis and considered the effects of the project on all of the historic sites that it was aware of. BLM did the same thing here—it completed its analysis of the effects of the power line using all of the information that it had at that time (and entered into a programmatic agreement to analyze future mining and exploration that could not be fully defined).

In *Apache*, after the agency had made its decision and long after the administrative process was over, the plaintiff tribe—who had not participated in the administrative process—then announced that the project would harm sacred sites that the tribe had not identified before and that had not been evaluated by the agency. The tribe in *Apache* was not, as the Band contends, asking the agency to conduct additional analysis of sites that had already been considered. As the Court explained, no tribe had previously claimed that there were any sacred sites on Mount Graham. *Apache*, 21 F.3d at 908 (noting that

[4] The Band also claims that, in *Apache*, the agency sought and obtained the concurrence of the state historic preservation office ("SHPO") and the Advisory Council on Historic Preservation ("ACHP"), and it alleges that BLM did not do so here. Br. at 43. This is not true. BLM consulted with the SHPO and the ACHP on all of the effects of the power line that it knew about, just as the agency did in *Apache*. ER 76.

the tribe's complaint was that the agency had "failed completely to consider the religious significance of Mount Graham as a whole to the Tribe."). The Band did the same thing here—it failed to participate in the administrative process, waited until BLM had approved the power line, and then sued arguing that the power line would harm sacred sites that the Band did not identify until after BLM had approved the project.

This Court, in *Apache*, ruled against the plaintiff tribe, not because it was asking for additional, duplicative Section 106 review, but because of its "inexcusable tardiness" and its failure to provide "comment or input" despite repeated requests by the agency. *Id*. at 907. As this Court explained, the tribe's claims were barred by laches because the tribe "ignored the **very process** that its members now contend was inadequate." *Id*. at 907 (emphasis in original). "Had the [t]ribe participated in the process, [it] could not now claim that the information that it subsequently brought to the Forest Service's attention was 'new.'" *Id.* at 912. The Band's claims here are barred by laches for the same reason—because the Band, instead of simply telling BLM about its concerns, chose instead to "ignore[] the very process" that it now contends was inadequate.

The NHPA required BLM to make a reasonable and good-faith effort to identify cultural sites that might be affected by this power line and then to mitigate its impacts on those sites. As explained in detail below, BLM worked hard to satisfy those requirements. The Band simply did not explain its concerns or provide the information necessary to identify this traditional

cultural site during the administrative process. Because the Band was not diligent and did not participate meaningfully in the administrative process, its claims are now barred by laches, and it is not likely to succeed on the merits of those claims.

B. BLM complied with the NHPA by following a lawful programmatic agreement.

The NHPA required BLM to make reasonable, good-faith efforts to identify historic properties that might be affected by this power line (and the rest of the mine), to assess whether the power line would have adverse effects on those properties, and, if so, to try to avoid, minimize, or mitigate those adverse effects. 36 C.F.R. § 800.4(b)(1); *see, e.g., Muckleshoot Indian Tribe*, 177 F.3d at 805. BLM spent six years working with tribes and the public in meetings, workshops, and site visits to identify historic properties and to assess and then avoid, minimize, or mitigate adverse effects. ER 85–91. In particular, it commissioned an ethnographic study early in the process and sought and considered the tribes' input on that study. ER 67–8. It conducted extensive surveys for historic sites (including both a Class I and a comprehensive Class III survey). *See* SER 407–8 ¶¶ 4–6; ER 55–61 (describing Class III inventory); ER 79–84 (showing results of Class I inventory). And it hired professional historians to help it to identify historic and cultural properties within the project's area of potential effects. *See, generally*, SER 411–7; SER 418–22; ER 64–68.

When BLM finally approved this power line, it included significant restrictions in the right-of-way to protect historic and cultural sites. ER 33–42. Most importantly, the right-of-way avoids all traditional cultural properties that were known to BLM when the power line was approved in March 2014. ER 23. The right-of-way also requires the mining company to suspend construction if any cultural or paleontological resources are discovered (or any "Native American human remains, funerary items, sacred objects, or objects of cultural patrimony."). ER 39 ¶¶ 29, 30. It requires tribal monitors to be present during construction near historic and cultural sites. ER 358–9. And after the right-of-way expires, it requires the mining company to reclaim and revegetate the disturbed areas. ER 35–6.

The Band does not claim that BLM was in violation of the law at the time that it approved the power line. Instead, the Band asserts that BLM is now in violation of the law because it has not reopened this process to consider the potential effects of the power line on a newly-eligible traditional cultural property, which was not designated until April 25, 2016, more than two years after the power line was approved. As discussed above, the Band abandoned that argument by failing to participate in the long administrative process that led up to BLM's approval of the power line.

But even if these claims were not barred by laches, they would still fail because BLM has satisfied the requirements of the NHPA and its regulations by complying with a lawful programmatic agreement, and that programmatic agreement does not require any further analysis of the effects of the power line

at this time. The NHPA and its regulations authorize Federal agencies to enter into programmatic agreements "to govern . . . the resolution of adverse effects from certain complex project situations," including "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b), (b)(1)(ii). BLM determined that a programmatic agreement was appropriate for this project because there was no way to know ahead of time exactly where minerals would be found and thus where the mining company would undertake mining operations. BLM repeatedly solicited and considered the tribes' comments on this programmatic agreement. ER 337–8.

The programmatic agreement went into effect in May 2013. It was signed by BLM, the Nevada state historic preservation office, the ACHP (an independent agency which promotes the preservation of historic places), and the mining company. ER 349. It defines how BLM and the mining company will assess the effects of "surface exploration" and "mining activities" on historic sites as exploration and mining go forward on the mountain. ER 339 (defining "mining" and "exploration" areas of potential effects), 355 (same). It requires BLM to continue to consult with the tribes on those activities. ER 346–7. It requires monitoring of these operations by tribal monitors, ER 358–9, and defines a detailed protocol to ensure that exploration and mining will avoid historic sites, ER 360–2.

This programmatic agreement now defines—as a matter of law—how BLM will comply with the NHPA for this project. The NHPA's regulations specifically provide that "[c]ompliance with the procedures established by an

approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement." 36 C.F.R. § 800.14(b)(2)(iii). This project, therefore, is no longer governed by the requirements set out in the NHPA and its regulations—instead, it is governed by the programmatic agreement.

The programmatic agreement requires BLM to assess the effects of future "surface exploration" and "mining activities" on the newly-eligible traditional cultural property at issue in this case as exploration and mining move forward. *See, e.g.,* ER 23–4. But by its terms, it does not require BLM to analyze the effects of the power line on this traditional cultural property at this time. Unlike exploration and mining, the power line was fully defined when BLM signed its record of decision in March 2014. BLM complied with all of the steps required by the programmatic agreement before it signed the record of decision and approved the power line. The programmatic agreement does not require BLM to "identify and evaluate" new historic properties "where a previous Class III survey . . . was conducted within the past 10 years." ER 335.

In short, the programmatic agreement draws a line between those operations whose effects could not be fully determined at the time that the record-of-decision was signed—including exploration and mining—and those operations whose effects could be determined—including the power line. For exploration and mining, it requires further analysis once the scope and location of those actions are known. For the power line, it does not—at least, not at this

time because a Class III survey was conducted within the past 10 years. The power line, therefore, "is not affected by the newly designated TCPs."[5] ER 23.

This was a reasonable and practical place to draw the line. The NHPA does not require BLM to identify every historical site. It does not require the Section 106 process to go on forever. It requires BLM to make reasonable, good-faith efforts to identify historic properties, assess effects, and avoid, minimize, and mitigate adverse effects. BLM did that here. Because BLM entered into and complied with a lawful programmatic agreement, and because that compliance satisfies the requirements of the NHPA and its regulations, the Band is not likely to succeed on the merits of their claims.

The Band contends that BLM is not complying with the programmatic agreement because the agreement provides for "ongoing Section 106 consultation" and BLM has not consulted on the effects of the power line on the newly-eligible traditional cultural property. Br. at 24. But the Band has misunderstood the terms of the agreement—while it does provide for further analysis of the effects of "surface exploration" and "mining activities," it does not provide for any further analysis of the power line at this time. In fact, the ACHP reviewed BLM's compliance with the programmatic agreement at the

[5] The Band repeatedly claims that "[e]ven BLM agrees" that is was required "to assess the effects of the Power Line on the [newly-eligible] TCP [at issue in this case]." Br. at 26–27. This is not true; as explained in this section, BLM does not agree that it is required to assess the effects of the power line on this traditional cultural property at this time.

Band's request and concluded that "BLM has fulfilled all of [the] steps" set out in the "core requirements" of that agreement. ER 335. The Advisory Council rejected the Band's argument that construction should be suspended at the mine "due to non-compliance with the terms of the [agreement]." *Id*.

The Band cites a series of cases holding that the requirements of the NHPA continue to apply to a project, even after it has been approved, "as long as the . . . project is under federal license and [the agency] has the ability to require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals." *Vieux Carre Prop. Owners, Residents and Associates, Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991); *see also Morris Cty. Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3rd Cir. 1983) (concluding that an agency is required to apply the NHPA "as long as [it] has opportunity to exercise authority at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals."); *Waterbury Action to Conserve Our Heritage Inc.) ("WATCH") v. Harris*, 603 F.2d 310, 319 (2nd Cir. 1979) (holding that NHPA applies "until the agency has finally approved the expenditure of funds at each stage of the undertaking.").

None of these cases is binding law here, and their reasoning does not apply for two reasons. Significantly, all of these cases were interpreting and applying the procedural requirements of Section 106 of the NHPA and its regulations. But the procedural requirements of Section 106 and its regulations

do not apply to the power line anymore because they have been superseded by the programmatic agreement, as expressly authorized by the law. Notably, none of these cases involved a programmatic agreement.

These cases are also different because they all involved projects that had never been subject to any analysis under the NHPA and that had not received approval by the ACHP.[6] *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1289 (D.C. Cir. 1992) (concluding that this line of cases was "inapposite" because "they all involved on-going projects, funded or approved by a single federal agency, that had never been subjected to the § 106 process or received Advisory Council approval."). Here, in contrast, BLM undertook an extensive analysis of the effects of this power line on historic sites and did receive the approval of the ACHP (which is also a party to the programmatic agreement, ER 385).

The Band also cites a series of Ninth Circuit decisions on NHPA claims. But again none of those cases involved a programmatic agreement, and their holdings generally do not have anything to do with the issues before the Court here—although the Court did hold in *Muckleshoot Indian Tribe* that it was not a

---

[6] *WATCH*, 603 F.2d at 326 (finding that the agency "did not consider the effect of the project on the [historic property] and did not solicit the Advisory Council's advice."); *Morris County*, 714 F.2d at 279 ("It is undisputed that HUD did not at any time take into account the effect of the Dover Renewal Plan on the [historic property]."); *Vieux Carre*, 948 F.2d at 1439 (noting that the agency had not undertaken NHPA review).

violation of the NHPA for an agency to fail to identify a historic site, where it made reasonable and good faith efforts and the tribe kept silent. *Muckleshoot Indian Tribe*, 177 F.3d at 807 (holding that agency had made reasonable and good faith effort to identify historic properties where the tribe failed to reveal more information to agency); *see also Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1009 (9th Cir. 2013) (holding that BLM had failed to make a reasonable effort to identify historic and cultural resources because, unlike the present case, it had not conducted a Class III survey); *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006) (holding that the agency violated the NHPA where "no consultation or consideration of historic sites occurred."); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 582 (9th Cir. 1998) (holding that the FAA complied with NHPA, even though it did not obtain tribe's consent, because it had made finding of no effect).

The Band has cited a single district court decision that dealt with a programmatic agreement. In *Quechan Tribe v. United States Department of the Interior*, the district court held that merely entering into a programmatic agreement does not, by itself, show compliance with the NHPA. 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010). Rather, the agency must also "carry[] out" that agreement. *Id*. The district court then concluded that the agency had not consulted sufficiently on its programmatic agreement. *Id*. at 1118–9. But as discussed above, BLM is complying with the programmatic agreement here

(and did consult with the Band and other tribes on that agreement), and so the holding in *Quechan Tribe* does not apply.

The NHPA required BLM to "stop, look, and listen," and to make a reasonable, good-faith effort to identify historic sites. BLM did that here. Because BLM has entered into—and complied with—a lawful programmatic agreement, and because that compliance satisfies the requirements of the NHPA and its regulations, the Band is not likely to succeed on the merits of their claims.

C. The district court's order was not based on an error of law.

The district court ruled promptly on the Band's motion for preliminary injunction because it was "acutely cognizant of the time sensitive nature of this action." ER 2. But because there was so little time, the district court was not able to address the parties' arguments at length—instead, it promised that a "supplemental order addressing the entirety of the parties' arguments, including additional defenses and the full merits of the Band's motion," would be forthcoming. *Id*. (The district court has not published that supplemental order yet.) Nonetheless, the court explained in its brief order that it had denied the Band's motion because the Band had "not made a showing that it is likely to succeed on its claims" and because the other factors did "not weigh so far in the Band's favor to overcome the lack of a success on the merits." *Id*.

The Band argues that the district court should be reversed because it made two errors of law in its brief two-page order. Br. at 40–7. First, the Band

objects to the district court's citation of *Apache Survival Coalition*. Br. at 41. But this is no error of law—as we discuss above, the Court faces the same facts here that it faced in *Apache*, and it should reach the same conclusion: that the Band's claims are barred by the laches.

Second, the Band argues that the district court mistakenly cited an inapplicable regulation regarding "post-review discoveries." Br. at 44 (citing 36 C.F.R. § 800.13). The Federal Defendants-Appellees agree that the regulation does not apply, but the Band has read a great deal into a single citation in the district court's order. And we know that the Band is wrong about the district court's reasoning because the Band made these arguments to the district court when it moved for an injunction pending appeal, and the district court explained that the basis for its order was much broader—"[c]ontrary to the Band's assertions . . . , the court . . . carefully considered all of the parties' arguments," including the Band's "arguments concerning the Programmatic Agreement," and it "disagreed with the Band's interpretation of that agreement." SER 425. Finally, even if the Band was right—and the district court's reasoning was somehow flawed—its order should still be affirmed because the Band is not likely to succeed on the merits of its claims and has not shown that it is likely to suffer irreparable harm.

D. The Band is not likely to succeed on the merits of its RFRA claims.

In addition to its claims under the NHPA, the Band has also brought claims under the Religious Freedom Restoration Act ("RFRA"). It touches on these claims only in passing in its brief, but it does argue that "[t]he construction of the Power Line as currently configured would dramatically and significantly burden the Band's exercise of its religion." Br. at 30. The Band cannot succeed on the merits of these claims. To establish a *prima facie* claim under RFRA, the Band must present evidence showing that this power line would impose a "substantial burden" on its exercise of religion. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008).

But as we discuss below in our section addressing "irreparable harm," this power line affects only a small part of the traditional cultural property at issue in this case, runs along an existing bladed road in an area of the property that is already disturbed, and will not result in the destruction of any of the features of the property. The Band's declarations claim only that the "noise, energy, vibration, and sight" of the power line will disrupt and disturb their religious practices. ER 296 ¶¶ 4, 5. But under binding Supreme Court precedent, those effects—effects on the Band's "subjective, emotional religious experience"—are not a "substantial burden" on the free exercise of religion and do not violate RFRA, even if they result in "the diminishment of spiritual fulfillment" ("serious though it may be"). *See Navajo Nation*, 535 F.3d at 1070

(discussing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); *see also La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee v. United States Dep't of the Interior*, 603 Fed. Appx. 651 (9th Cir. 2015). The Band has not alleged that the construction of the power line violates RFRA by (1) forcing it "to choose between following the precepts of [its] religion and receiving a governmental benefit"; or (2) coercing the Band "to act contrary to [its] religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at 1070. Even taken as true, the Band's allegations do not establish a *prima facie* case under RFRA, and, as such, it is not likely to succeed on the merits of its RFRA claims.[7]

III. The Band has not shown that it will suffer irreparable harm.

The Band also failed to show that it is likely to suffer irreparable harm without a preliminary injunction. The district court did not address this factor in detail, but did not hold that the Band had made the required showing of irreparable harm. ER 1–2. Instead, the district court held that "the remaining preliminary injunction factors" (including "irreparable harm") "do not weigh so far in the Band's favor to overcome the lack of a success on the merits." ER 2.

---

[7] The Band also briefly suggests that BLM has violated the general duty that the United States owes to "all Indian tribes" to "comply with general regulations and statutes." Br. at 32. But as discussed above, BLM has complied with the NHPA and its regulations (by following a lawful programmatic agreement), and, in any event, this argument adds nothing to the Band's NHPA claims.

The traditional cultural property at issue in this case includes "a ritual spring, ritual rock features, ritual resource . . . gathering areas, prayer points . . . , spiritual passages, a ritual/spirit trail, and curing areas." ER 327. Throughout its brief, the Band claims over and over again that it will suffer irreparable harm because this traditional cultural property will be "destroyed" "once the bulldozers go through." Br. at 33; *see, generally*, Br. at 32–36. If those allegations were true, they would likely constitute irreparable harm.

But the Band's allegations are not true. None of the features of this traditional cultural property—the ritual spring, the ritual rock features, or any of the rest—have been or will be destroyed by bulldozers during the construction of this power line. ER 306 ¶ 17; *see, generally*, Declaration of Dr. Bryan Hockett, BLM Deputy Preservation Officer, ER 301–6. In fact, none of those features will be affected by the power line at all. *Id*.

This traditional cultural property covers more than 3,000 acres and the power line runs through only a very small part of it. ER 304 ¶ 13, 306 ¶ 18. The power line also runs along an existing bladed road, through an area of the traditional cultural property that is already disturbed. ER 305 ¶ 17. The terms of the right-of-way require the power line to avoid "all eligible physical sites located on the ground," ER 305–6 ¶ 17, and monitors were present during its construction to ensure that no historic properties are "bulldozed," ER 35 ¶¶ 4–5, ER 340, ER 358–59. The claim that the Band's sacred sites are going to be destroyed (by bulldozers or in any other way) is untrue and is not supported by any evidence before the Court.

In fact, the claim that these sacred sites are going to be "bulldozed" is not even supported by the declarations that the Band itself submitted. The Band bases its claims of irreparable harm entirely on two declarations submitted by Mr. Joseph Holley, a councilman for the Band. ER 295–297, 330. In his declarations, Mr. Holley explains his belief that the "noise, energy, vibration, and sight" of this power line will disrupt and disturb the religious practices that take place in this traditional cultural property. ER 296 ¶¶ 4, 5. And he expresses his deep concern that the Band will "lose the ability to exercise its religious and cultural traditions." ER 297 ¶ 12. But he does not allege that any of the elements of this traditional cultural property—such as the ritual spring or ritual rock features—will be destroyed during construction. ER 295–97; 330–1.

As such, the claim that the Band makes in its brief—that this traditional cultural property is about to be destroyed by bulldozers—is not supported by the Band's own declarations or any other evidence before the Court. To the contrary, the evidence before the Court shows that these elements are protected by the detailed and thorough process that BLM engaged in before it approved the right-of-way.

And while Mr. Holley believes that the power line will disturb the Band's religious practices, it is important to note that this area was not pristine when it was designated as a traditional cultural property, and it was not designated to protect the visuals of the area. ER 305 ¶ 17. Instead, the area that the power line runs through is already highly disturbed because mining has been

conducted here for years, and the power line will not prevent the Band from using this road to access the other religious sites within this traditional cultural property. ER 305–6 ¶¶ 17–19. In short, the Band has not shown that the construction of the power line is likely to cause irreparable harm.

Finally, the Band's long delay in raising these concerns also cuts against a finding of irreparable harm. *See, e.g., Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). BLM signed the record of decision and issued the right-of-way for this power line more than two years ago. The Band did not raise its concerns about the power line during the administrative process. And the Band did not bring suit to challenge BLM's decision until just days before construction began—it could have brought this suit at any time over the last two years, and, if it had, these issues could have been litigated and resolved long before the construction was scheduled to begin. If there is an emergency here, it is an emergency entirely of the Band's making and one that could have been avoided. Because the Band delayed bringing these claims, and because it has not shown that it is likely to suffer irreparable harm, the district court's order denying the Band's motion for preliminary injunction should be affirmed.

IV. The balance of equities and the public interest do not support the issuance of a preliminary injunction here.

The Federal Land Policy and Management Act ("FLPMA") requires BLM to manage these lands for multiple uses in combination. 43 U.S.C. § 1702(c); *see, generally*, *id*. § 1701. That means that BLM must not only consider

the historic value of these lands, but also their long-term value as a domestic source of minerals. *Id*. § 1702(c). BLM did that by developing a plan, through a long administrative process, that allows these lands to be a productive source of minerals while also avoiding impacts to all of the historic sites that BLM knew about at the time. The Band failed to raise its concerns about the power line during that process.

Granting a preliminary injunction here would not serve the public interest because it would undo the careful balance struck by BLM and because it would necessarily discourage the Band and other tribes from working constructively with Federal agencies before they make their decisions.[8] This is not to suggest that the Band deliberately withheld information here. But if this injunction had been granted, it would allow the Band and other tribes to sit "on the sidelines while the federal agencies undertook their administrative duties" and might even encourage them to "hold back some evidence of the existence of cultural resources until after the project had been approved." *Apache*, 21 F.3d at 912, 914. If they did that, it would be much more difficult for Federal agencies to evaluate the effects of their actions on tribal interests during the administrative processes required by NEPA and the NHPA.

The Band has participated in these kinds of administrative processes in a timely way in the past, and the district court's denial of the Band's motion puts

[8] Where the federal government is a party, the third and fourth injunction factors—the balance of equities and the public interest—"merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

the Band on notice that it must do so again in the future. For these reasons, neither the balance of equities nor the public interest support the issuance of a preliminary injunction here.

Conclusion

The district court's order should be affirmed.

/s/ James A. Maysonett

James A. Maysonett
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov

August 26, 2016
90-2-4-14700

Certificate of Compliance with Type Volume Limitation

This brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 9,710 words.

/s/ James A. Maysonett

JAMES A. MAYSONETT
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov

Statement of Related Cases

Counsel for the Federal Defendants-Appellees is not aware of any cases pending in the Ninth Circuit that are related to this case within the meaning of Circuit Rule 28-2.6.

Certificate of Service

I hereby certify that on this 26th day of August, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. The parties in this case will be served electronically by that system.

/s/ James A. Maysonett

James A. Maysonett
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov