Nos. 16-16586, 16-16605

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROTECTING ARIZONA'S RESOURCES AND CHILDREN; FOOTHILLS COMMUNITY ASSOCIATION; FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION; CALABREA HOMEOWNERS ASSOCIATION; SIERRA CLUB; PHOENIX MOUNTAINS PRESERVATION COUNCIL; DON'T WASTE ARIZONA, INC.; GILA RIVER ALLIANCE FOR A CLEAN ENVIRONMENT; GILA RIVER INDIAN COMMUNITY,

Plaintiffs-Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION; KARLA PETTY, in her official capacity as the Arizona Division Administrator of the Federal Highway Administration; ARIZONA DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

On Appeal from the U.S. District Court for Arizona,
Case Number 2:15-cv-1219 (Hon. Diane J. Humetewa)

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

JEFFREY H. WOOD
Acting Assistant Attorney General

ANDREW C. MERGEN
TYLER L. BURGESS
JOHN P. TUSTIN
ROBERT P. STOCKMAN
Attorneys, Env't & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 353-1834
robert.stockman@usdoj.gov

Of Counsel:
COURTNEY LEAS
DIANE MOBLEY
Office of the Chief Counsel
Federal Highway Administration

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GLOSSARY

§ 4(f)	§ 4(f) of the Department of Transportation Act
ADOT	Arizona Department of Transportation
APA	Administrative Procedure Act
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
GRIC	Gila River Indian Community
MAG	Maricopa Association of Governments
MSATs	Mobile Source Air Toxics
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
PARC	Plaintiff coalition including Protecting Arizona's Resources and Children
ROD	Record of Decision
RTP	Regional Transportation Plan
SER	Supplemental Excerpts of Record
SMPP	Phoenix South Mountain Park/Preserve
TCP	Traditional Cultural Property
THPO	Tribal Historic Preservation Officer

JURISDICTIONAL STATEMENT

The district court had jurisdiction to review this agency action under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 702-706. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

In March 2015, the Federal Highway Administration (FHWA) authorized the Arizona Department of Transportation's (ADOT's) proposed Loop 202 South Mountain Freeway (Project) in Maricopa County, Arizona, for federal funding under the Federal-Aid Highway Program. SER689-770.[1] The Project is a twenty-two mile, eight-lane divided freeway beginning at a connection to I-10 near 59th Avenue and ending at the existing interchange connecting SR 202L to I-10. SER699; SER723. The Project completes a "loop" highway around the urban core of Phoenix. SER1189 (map); SER1191.

After fourteen years of analysis and public outreach, FHWA and ADOT (collectively, the Agencies) published a Final Environmental Impact Statement (FEIS) thoroughly analyzing the potential environmental impacts of the Project. The Agencies defined the purpose and need for this Project based on existing congestion and lack of capacity, as well as socioeconomic projections and forecasts of future transportation demand. The Agencies' analysis also carefully considered two major

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[1] We cite to the Supplemental Excerpts of Record (SER) filed by ADOT.

geographical constraints on alternatives: (1) the inability to construct any alternatives on the land of the Gila River Indian Community (GRIC), and (2) the need to avoid or minimize impacts to properties protected by § 4(f) of the Department of Transportation Act (hereinafter, § 4(f)), including the 16,600-acre area of the Phoenix South Mountain Park/Preserve (SMPP). Although the Agencies considered numerous alternatives, the Agencies reasonably eliminated many of these alternatives from detailed study because they would not resolve current traffic congestion, meet projected demand, or satisfy other legal and practical constraints. Consistent with the National Environmental Policy Act (NEPA), the Agencies "briefly discuss[ed] the reasons for [those alternatives] having been eliminated." 40 C.F.R. § 1502.14(a).

Ultimately, the Agencies selected the environmentally preferable alternative that would serve the Project's purpose and need. SER691; SER756-58; SER1174-75; SER1279-87. The Project will reduce congestion and save millions of hours of travel time; the present value of travel time savings for the Project between 2020 and 2035 would be almost $3.4 billion. SER1354.[2] The Project will impact less than **0.2**% of the SMPP—*i.e.*, 31.1 acres of this 16,600-acre area, SER1178—and includes numerous measures to minimize harm to the SMPP, including acquiring an equivalent amount of replacement land. SER744; SER1502-10.

[2] GRIC's Brief claims the Agencies made numerous concessions that they never made. *E.g.*, Br. 3, 17, 25-26, 51. For example, these benefits are not "minimal." GRIC often provides no citation for these alleged "concessions" or mischaracterizes prior statements. This Court should hold the Agencies only to what they actually said.

A coalition of Plaintiffs including Protecting Arizona's Resources and Children (collectively, PARC) and GRIC each sued under the APA, challenging FHWA's decision under NEPA and § 4(f). The district court correctly held that the Agencies complied with NEPA and § 4(f).

ISSUES PRESENTED

We reframe the issues in terms of legal requirements and then correlate our characterization to the Plaintiffs' issues in parenthetical:

1. Did the Agencies reasonably define the purpose and need? (PARC issue: 1(a); GRIC issues: 1, 2, 3)
2. Did the Agencies reasonably analyze alternatives? (PARC issue: 1(b); GRIC issue: 2)
3. Did the Agencies reasonably analyze the "No-Action Alternative"? (PARC issue: 1(c); GRIC issue: 5)
4. Did the Agencies take a "hard look" at the environmental impacts of the Alternatives? (PARC issue: 2; GRIC issue: 4)
5. Did the Agencies comply with § 4(f)? (PARC issue: 3; GRIC issue: 3)
6. Do GRIC's three well sites justify setting aside the Agencies' decision when the Project will not impact those sites? (GRIC issue: 6)

STATEMENT OF THE CASE

A. Statutory Background

1. NEPA

NEPA requires agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under NEPA, federal agencies must take a "hard look" at the environmental consequences of their proposed actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). NEPA is procedural; it does not dictate substantive results. *Id.* at 350.

2. Section 4(f)

Under § 4(f), FHWA may approve a project requiring the use of a significant "public park, recreation area, or wildlife and waterfowl refuge" or a "historic site" only if "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the *** [resource] resulting from the use." 49 U.S.C. § 303; *see also HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1227 (9th Cir. 2014). Section 4(f) does not require formal findings or the use of any particular format for its analysis. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971). Pursuant to statutory authority, FHWA has promulgated regulations for § 4(f) at 23 C.F.R. §§ 774.1-774.17.

B. Factual Background

The Agencies prepared an FEIS thoroughly analyzing the potential environmental impacts of the Project. SER1182-83. ADOT is the project sponsor. SER1186. The Project is essential to the region's transportation system, which lacks a corridor in the southwestern Phoenix metropolitan area. SER1252-55. The Maricopa Association of Governments (MAG) has contemplated the need for such a project for thirty years. SER1187-89. GRIC is an active member of MAG and thus participated in the past decisions leading to MAG's current Regional Transportation Plan. SER1206.

1. Purpose and Need: Phoenix's freeways are already congested, and projections indicate that traffic volumes will continue to increase.

The purpose and need for the Project is detailed in Chapter 1 of the FEIS. SER1184-1205. Among the purposes is "to serve projected growth in population and accompanying transportation demand and to correct existing and projected transportation system deficiencies." SER1194. The need is based on "[t]he proposed action [being] constructed where existing traffic congestion has already decreased travel speeds throughout much of the Regional Freeway and Highway System and the major arterial street network." SER1467; SER1196. MAG's current Regional Transportation Plan also identifies a need for a facility in this area as part of its comprehensive regional plan for transportation. SER1187. The FEIS reexamined the available data when new projections became available in 2013, which confirm the

purpose and need based on existing highway congestion and future socioeconomic projections for Maricopa County. SER1218; SER1184-1205.

In 2012, the region's freeways were already "noticeably congested and operate[d] poorly." SER1199; SER1200 (maps). "Based on the consideration of existing traffic conditions in the MAG region and the Study Area, the need for a major transportation facility in the Study Area exists today." SER1203; SER1205.

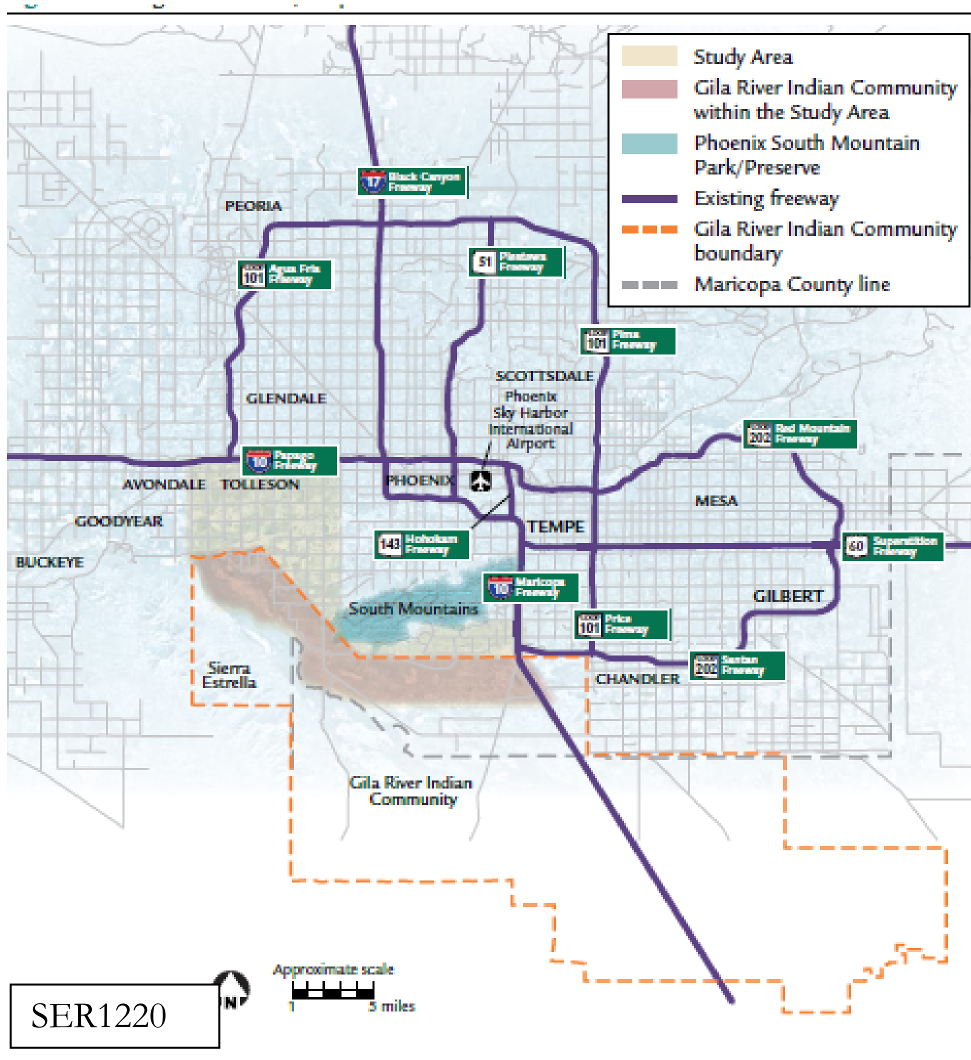
The population of Phoenix and Maricopa County has grown immensely in recent decades. SER1190-95. Projections indicate that "Maricopa County's population will increase from 3.8 million in 2010 to 5.8 million in 2035." SER1194. "Almost 50 percent of the projected regional growth is expected to occur in areas that would be immediately served by the proposed action." SER1194-95. As a result, traffic volumes are projected to increase significantly. SER1196-1204.

Without a new facility, "[t]rips between locations in the Study Area and downtown Phoenix would take much longer in 2035 than they did in 2012; the projected travel time would increase by between 27 and 36 percent." SER1203. "Even with the major transportation improvements planned in the [Regional Transportation Plan] (except for the proposed action), the 2035 system would be able to meet only 69 percent of projected travel demand." SER1203.

2. Alternatives Analysis.

a. Geographical constraints limit the potential alternatives.

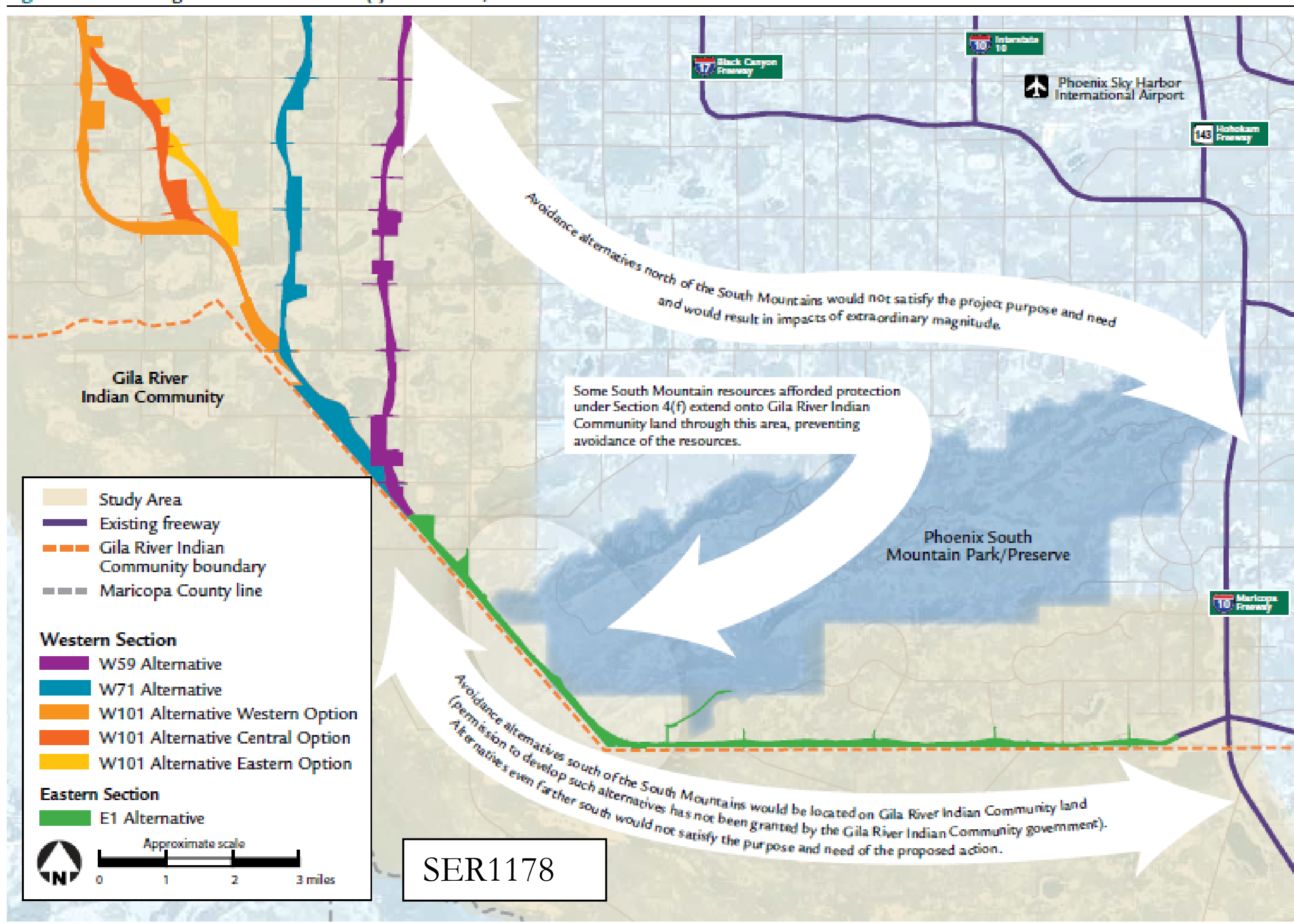
Several maps in the FEIS are particularly helpful for understanding the Project and two of the major constraints on potential alternatives. All cited maps are available in the SER; we incorporate two into the Brief for the Court's convenience. The map at SER1220 (incorporated below) depicts the Study Area in its regional context, including the large gap in the current freeway system.



The maps at SER1146 and SER1225 show how the Agencies divided the Study Area into Eastern and Western Sections because each Section had its unique issues.

Finally, the map at SER1178 (incorporated below) highlights two major geographical constraints limiting the options for freeway alignments. First, to the south of the Study Area is GRIC land. GRIC is a sovereign nation, and "[u]nder federal law, an Act of Congress is required before a state may condemn tribal land." SER1177. Despite years of outreach efforts, GRIC has not granted permission to study in detail any alternative across GRIC lands, let alone construct anything on GRIC lands. SER1177; SER1206-16. As a result, alternatives on GRIC land are not

Figure S-11 Sovereign Nation and Section 4(f) Constraints, Action Alternatives



currently feasible, and GRIC's lands are large enough that an alternative built south of those lands would be too distant from the relevant, developed areas to serve the purpose and need. SER1179; SER1226; SER705 (map). Thus, reasonable alternatives must be north of GRIC's boundaries.

Second, the Eastern Section of the Study Area contains the approximately 16,600-acre SMPP, which is protected under § 4(f) as a significant publicly owned recreation area and a historic property. SER1178. An alternative north of the SMPP would not meet the purpose and need of the proposed action and would create impacts of extraordinary magnitude. SER734; SER1229-32; SER1497. Those alternatives would, *inter alia*, (i) place more traffic on the system, (ii) increase congestion, (iii) cause underuse of the Santan Freeway, (iv) displace thousands of residents and over 100 businesses, and (v) split South Mountain Village, resulting in community disruption. SER1497. Thus, alternatives for the Eastern Section were also limited by the need to minimize harm to the SMPP. SER1232.

b. The Agencies developed and analyzed numerous alternatives.

The Agencies developed a broad range of alternatives and engaged in a five-tiered screening process over the course of 14 years. *E.g.*, SER3537-4026. The screening methodology included the following criteria: (1) the ability to satisfy the purpose and need, namely by improving the operational characteristics of the region's transportation system; (2) the ability to minimize impacts to the human and natural

environment; (3) the degree of public and political acceptability; and (4) consideration of cost estimates. SER1220.

The Agencies analyzed several different transportation modes, looking first to those modes that would create the least impacts while meeting the purpose and need. SER1220. Before considering new freeway segments, the Agencies considered non-freeway alternatives including (1) Transportation System Management/Transportation Demand Management, (2) transit improvements, (3) arterial street improvements, and (4) land use controls. SER703; SER1218; SER1220-23. The Agencies also evaluated all these alternatives in combination. SER1221.

The Agencies ultimately eliminated the non-freeway alternatives because, even relying on the most optimistic scenarios (*i.e.*, more funding, more bus routes, more ridership on transit, etc.), those alternatives combined would only address 13% of the 31% capacity deficiency. SER1221. In other words, less than half of the projected capacity deficiency, and thus those alternatives would have limited effectiveness in reducing congestion. SER1221-22. Standing alone, each of these alternatives addressed 5% of the deficiency or less. SER1221. The Agencies then focused on the freeway alternatives, while incorporating aspects of the non-freeway alternatives to minimize impacts and improve traffic operations. SER1223.

The Agencies screened the freeway alternatives through five tiers, considering numerous alignments. SER1256; SER1223-56. At the first stage of this process, the Agencies identified a myriad of freeway alternatives based on public input and a

review of past studies. *See, e.g.*, SER1224 (map identifying numerous potential alignments); *see also* SER1227-42. The Agencies then steadily reviewed the alternatives and refined them (SER1227), and each time the Agencies eliminated an alternative from detailed study, the Agencies provided the reasons for that elimination. *See, e.g.*, SER1228-29. Some of these reasons are discussed more *infra* at 29-34, 61-66. The Agencies also evaluated several alternatives that lie entirely or partially outside the defined Study Area. SER1226; SER705 (map).

At the end of the screening process, the Agencies identified three action alternatives for the Western Section of the freeway, one action alternative for the Eastern Section of the freeway, and a No-Action Alternative for in-depth study. SER1147 (map); SER1257-86; *see also* SER714-15. The Agencies forthrightly acknowledged that the three end-to-end action alternatives would "not completely solve the regional system-wide capacity deficiency in 2035," SER1248, but would address the deficiencies better than the rejected alternatives and "would make a substantial difference for the area's overall transportation network." SER1255. The Agencies found that the three action alternatives would meet the purpose and need of the Project, but the No-Action Alternative would not. SER1256-57.

3. The FEIS analyzed the environmental impacts of the Project under NEPA and § 4(f).

The FEIS thoroughly analyzed the environmental consequences flowing from the action alternatives and compared them to each other and to the No-Action

Alternative. SER1288-1479. For example, the FEIS analyzed impacts to, *inter alia*, air quality and children's health (SER1355-74), noise (SER1375-87), water resources (SER1388-96; SER1403-07), biological resources including vegetation and wildlife (SER1412-26), cultural resources (SER1427-47), visual resources (SER1454-58), land use and residents (SER1290-1306; SER1333-42), and social conditions and environmental justice populations (SER1307-32).

The FEIS provided a chapter devoted to coordination with GRIC and describing the relationship of the Project to GRIC land. SER1206-16. The Agencies held over 100 meetings between 2001 and 2009 where GRIC representatives were invited to discuss various topics. SER1209-10. In February 2012, GRIC members voted against allowing any freeway on GRIC land and alternatives on GRIC land were then eliminated as not feasible. SER1213; SER1215.

The Agencies nevertheless recognized that alternatives located off GRIC land could affect the Tribe and therefore analyzed the impacts on GRIC and its land. SER1215. As described *infra* at 50-56, for each impact, the Agencies discussed any impacts specific to GRIC and otherwise discussed the impacts generally as they apply to both GRIC and the rest of the community. The Agencies also consulted with GRIC's Tribal Historic Preservation Officer (THPO) over the course of a decade. *E.g.*, SER1432-43. With respect to "places of spiritual importance to certain population segments, such as the South Mountains Traditional Cultural Property (TCP)," the Agencies engaged in "extensive consultation, avoidance alternatives

analyses, and mitigation measures." SER1325; SER1430-47. The Agencies managed to avoid some TCPs entirely (*e.g.*, SER1507) and committed to enhancement plans for others. SER1430-31. Ultimately, the THPO concurred with the Agencies' cultural analysis regarding TCPs, "project effects, and proposed mitigation and measures to minimize harm," including for the South Mountains TCP. SER1332; SER1431. The THPO also approved the TCP Enhancement Plan, which contained mitigation measures for adverse effects to TCPs, including the South Mountains TCP. SER741; SER751. With these mitigation measures, the project would not stop the "access and the cultural and religious practices by Native American tribes." SER1325; SER1506.

The FEIS also evaluated impacts to other § 4(f) resources. SER1480-1510. The Agencies designed the action alternatives to avoid a large number of § 4(f) resources in the Study Area. *See* SER1483-92; SER1483-85 (maps). But the Agencies could not develop a feasible and prudent action alternative that served the Project's purpose and need that completely avoided the SMPP. SER1493-1501. The Agencies explained why the alternatives that would avoid the SMPP were not feasible and prudent, SER1497-1501, and they incorporated numerous measures to minimize the harm to the SMPP as conditions of the federal funding, SER744-45, SER1502-07.

4. The Record of Decision (ROD) selected the environmentally preferred alternative.

In the ROD, FHWA explained that the selected alternative would have the least environmental impacts relative to the other action alternatives analyzed in-depth

in the FEIS (SER691) and would be responsive to the purpose and need by (i) reducing overall traffic on the arterial street system; (ii) optimizing travel on the region's freeway system; (iii) reducing the capacity deficiencies to levels better than experienced today; (iv) reducing the duration of unacceptable Level of Service conditions on the region's freeway system; (v) improving travel times on trips within the Study Area and across the region; and (vi) providing improved regional mobility for areas projected to experience growth. SER715; SER1279-87. FHWA also thoroughly considered and responded to all comments, including those from the Environmental Protection Agency (EPA), GRIC, and PARC. *See, e.g.*, SER778-1027; SER1514.

The Project will improve transportation connectivity and reduce congestion. SER1352-54; SER691; SER764. User benefits would be about $200 million per year, and the Project would "reduce the capacity deficiency [in 2035] to levels better than experienced today." SER715 (citing SER1203; SER1248; SER1354). "The proposed freeway's additional operating capacity would alleviate about 61 percent *** of the projected 18 percent regional system capacity shortfall." SER1248.[3]

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[3] PARC quotes a comment claiming that the Project would not alleviate capacity deficiencies. Br. 5. PARC points to no evidence supporting this assertion and does not develop an argument based on this allegation. As the Agencies responded to this comment: "Capacity deficiencies would be substantially greater in the foreseeable future under No-Action when compared against the action alternatives." SER2147.

C. Proceedings

1. District Court Opinion

The district court rejected all of Plaintiffs' claims under NEPA and § 4(f). Both Plaintiffs misread the district court's decision. This Court should look to the district court's actual, careful analysis.

First, the court ruled that the Agencies complied with NEPA. SER5-26. The court found that the "purpose and need discussion [was] sufficiently broad to permit consideration of a reasonable range of alternatives" and "not impermissibly narrow such that it led to a predetermined outcome." SER8. The court upheld the "Agencies' analysis of alternatives" as "demonstrat[ing] that extensive work was performed to develop reasonable alternatives, thoroughly screen the alternatives, and more fully study those that survived the screening process." SER11. The court found the analysis of the No-Action Alternative was reasonable under *Laguna Greenbelt, Inc. v. DOT*, 42 F.3d 517 (9th Cir. 1994). SER12-13. As the court explained, "the Study Area *** is highly developed," and the "Agencies' use of the projections was reasonable under the circumstances here." SER13. The court found the Agencies had reasonably analyzed: the potential air quality impacts of the Freeway Project on all populations, including children; impacts of Mobile Source Air Toxics (MSATs); impacts associated with the transportation of hazardous materials; and mitigation measures. SER16-26. The court also found that the Agencies had "evaluate[d] the

environmental impacts on GRIC." SER15. And the court found the Agencies' responses to EPA's comments sufficient on all issues. *E.g.* SER12-13, SER17-19.

Second, the court ruled that the Agencies complied with § 4(f). SER26-33. The court upheld the Agencies' determination that the No-Action Alternative "would not meet the project's purpose and need and, as a result, it was not prudent." SER28. The court found that "the Agencies acted reasonably in their determination that no feasible and prudent alternatives exist that would avoid impacts to SMPP." SER30. The court also ruled that the Agencies had met the § 4(f)(2) requirement to include all possible planning to minimize harm, SER30-33, noting that "Plaintiffs themselves fail to propose any specific measures that they believe the Agencies should have addressed but did not." SER33.

Finally, the court found "no violation of NEPA with respect to the GRIC wells." SER34.

2. Appellate Proceedings

PARC and GRIC filed separate appeals. PARC moved for an injunction pending appeal, and this Court denied the motion on November 21, 2016. Less than three weeks later, GRIC filed a motion for an injunction pending appeal, and after another round of briefing, the court denied that motion on January 13, 2017. The court then *sua sponte* consolidated the appeals.

SUMMARY OF ARGUMENT

This Project addresses a real transportation need in Maricopa County. In 2012, the region's freeways were already congested and operating poorly. The Agencies projected that the population in the area will continue to grow, resulting in substantial increases in transportation demand and traffic volume. Without the Project, the transportation network would serve only 69% of demand in 2035. SER1203. Traffic and congestion would increase significantly. The Agencies found that this Project will reduce the capacity deficiency in 2035 to levels better than those experienced today. SER715. In 2035, the Project is expected to save approximately 13 million hours of travel time annually. SER1354. The present value of travel time savings for the Project between 2020 and 2035 is almost $3.4 billion. SER1354.

The Agencies spent 14 years analyzing various alternatives and studying the potential environmental consequences of the proposal, with extensive public proceedings and opportunities for comment. The Agencies published a robust FEIS and § 4(f) evaluation, and after considering another round of public comments, the Agencies selected this Project. Plaintiffs have failed to meet their heavy burden of establishing that the Agencies' decision was arbitrary and capricious under the Administrative Procedure Act (APA). 5 U.S.C. § 706.

Plaintiffs fail to engage with the Agencies' thorough analyses and the administrative record supporting the Agencies' findings. For example, the Agencies based the purpose and need on a comprehensive discussion of socioeconomic trends

(*e.g.*, population, housing, and employment growth) and the increases in transportation demand resulting from those trends. It was not a predetermined, narrow purpose and need statement. The Agencies also reasonably considered alternatives through a screening methodology, and the Agencies provided sound reasons for eliminating various alternatives from detailed study. While Plaintiffs make conclusory assertions that eliminated alternatives would work, Plaintiffs fail to grapple with the Agencies' reasons for finding otherwise. The Agencies also provided sound evidence for analyzing the No-Action Alternative based on available socioeconomic projections, and the Agencies pointed to record evidence indicating that the freeway was unlikely to induce growth in these circumstances. The Agencies thoroughly considered the reasonably foreseeable environmental impacts of the Project and alternatives, as well as potential mitigation measures.

The Agencies complied with § 4(f). The Project avoids all § 4(f) properties other than the SMPP. The Project will use less than 0.2% of the SMPP—*i.e.*, it will use 31.1 acres of this 16,600-acre Preserve. SER1178. The Agencies reasonably concluded that there were no "feasible and prudent" alternatives that avoided the SMPP. SER1480-1510. And the Project includes all possible planning to minimize harm to the SMPP. Plaintiffs fail to propose any specific measures that the Agencies should have addressed but did not.

Finally, GRIC's well sites provide no basis for setting aside the Agencies' decision. GRIC failed to raise this issue adequately in its comments, and thus GRIC forfeited the issue. In any event, the Project will not take these sites.

STANDARD OF REVIEW

This Court exercises *de novo* review of the district court's grant of summary judgment. NEPA and § 4(f) compliance are reviewed under the deferential standard of the APA. 5 U.S.C. § 706. "An agency's action must be upheld unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Lands Council v. McNair (Lands Council II)*, 629 F.3d 1070, 1074 (9th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)). "A decision is arbitrary and capricious 'only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (quoting *Lands Council v. McNair (Lands Council I)*, 537 F.3d 981, 987 (9th Cir. 2008)). Review is most deferential where the agency makes a scientific judgment within its expertise. *Id.*

ARGUMENT

I. FHWA complied with NEPA.

NEPA requires that "agencies take a 'hard look' at environmental consequences" and "provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

None of Plaintiffs' arguments establish that the Agencies failed to take a "hard look" at the environmental impacts of this Project or to share that information.

A. The Agencies reasonably defined the purpose and need based on existing deficiencies, as well as projected growth and transportation demand.

The Agencies reasonably defined the purpose and need. SER1184-1205; *see supra* at 5-7; SER2974-3025. The purpose and need "statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. "Agencies enjoy considerable discretion in defining the purpose and need of a project, but they may not define the project's objectives in terms so unreasonably narrow, that only one alternative would accomplish the goals of the project." *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014) (quotation marks omitted). The statement may include an objective identified in a state or local transportation plan, such as the planning efforts undertaken by MAG. *Id.* (upholding a purpose and need defined consistent with the local regional transportation plan) (citing 23 U.S.C. § 139(f)(3)). Since ADOT is sponsoring the Project, FHWA reasonably took "into account the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

The need for the proposed action is "to serve projected growth in population and accompanying transportation demand and to correct existing and projected transportation system deficiencies." SER1194; SER2192. Seeking to address this

need is consistent with the policies articulated in the Federal-Aid Highway Program under which FHWA is acting here. *See* 23 U.S.C. § 101(b)(3); *see also League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012) (considering statutory context when assessing purpose and need). The Agencies carefully examined the capacity of present facilities and the projected demand, and the Agencies concluded that there was a need for a "Major Transportation Facility" to serve that projected growth and demand. SER1194; SER1145. At the outset of this process, the Agencies prepared a technical memorandum finding that capacity deficiencies existed and explaining the proposed purpose and need. SER2974-3025. The Agencies then reassessed and confirmed the purpose and need with the updated MAG socioeconomic and traffic projections provided in 2013. SER3540; SER2601-02.

The Agencies identified a reasonable Study Area and geographic scope for assessment. Courts afford agencies considerable deference in determining the geographic scope of their analysis. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1125 (9th Cir. 2012) ("An agency has the discretion to determine the physical scope used for measuring environmental impacts so long as the scope of analysis is reasonable.") (quotations omitted). Here, the Agencies identified the geographic area for study as the "southwestern portion of Maricopa County, Arizona," including "the southern and western city limits of Phoenix, Arizona." SER1187. The Agencies delineated the Study Area "as the area defining the transportation problem," relying

on models to identify where the transportation problem existed. *See, e.g.*, *supra* at 5-7; SER3021-22; SER2192. "The proposed action would be constructed where existing traffic congestion has already decreased travel speeds throughout much of any given day on most of the regional freeway system and the major arterial street network." SER2684; SER1467; SER1196.

The description of purpose and need was broad enough for the Agencies to consider all potential alternatives to address the identified transportation needs, as described in more detail *supra* at 9-11 and *infra* at 29-34. SER1218-87. For example, the Agencies considered numerous non-freeway alternatives, such as (i) maximizing the efficiency of existing transportation facilities; (ii) reducing demand on existing transportation facilities; (iii) increasing capacity of the existing transit network; (iv) expanding arterial streets; (v) expanding existing freeways; (vi) reducing demand from existing and planned land use; and (vii) combinations of those alternatives. SER1220-23. As explained *supra* at 9-11, these alternatives were eliminated because they did not address the unmet transportation demand. *E.g.*, SER1221-23.

As described *supra* at 5-7, the Agencies found that the regional transportation system's operating capacity currently only meets 84% of existing travel demand while operating at an acceptable Level of Service of D. SER1199; SER1197 (explaining Levels of Service); SER2602. In 2012, outbound directions from downtown Phoenix were congested for more than 3 hours per day on almost every freeway. SER1199. And conditions in 2035 would be "substantially worse." SER1204. By 2035, the

network would serve only 69% of the total demand at an acceptable level of service. SER1199-1201. Given regional growth, the Agencies project that the average travel time for trips in a sample of locations in the Study Area to downtown Phoenix would increase by between 27% and 36%. SER1203.

Because the Agencies showed how the data supported each aspect of the purpose and need statement, and they adequately explained their reasoning, the statement is reasonable and should be upheld. *See City of Carmel-By-The-Sea v. DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997) (upholding purpose and need statement as reasonable "in light of the cited project goals"); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866-68 (9th Cir. 2004) ("[N]othing about the language of the Statement of Purpose and Need limits consideration of [various] measures."). Indeed, Plaintiffs point to no way that the Agencies could have defined the purpose and need more broadly without rendering it meaningless.

1. The Agencies reasonably considered prior transportation studies and plans.

The Agencies reasonably used MAG's transportation studies and planning documents to inform their analysis while independently evaluating both the purpose and need and the various alternatives. SER1144; SER700-01; SER722; SER766. The Agencies explained that a freeway had been included in the region's transportation planning documents since 1985, SER1187-88, SER1191-93, and the current Regional Transportation Plan (RTP) includes "an alignment for the South Mountain Freeway

that closely followed the W59 Alternative." SER1305; SER1188 (explaining RTP). Nonetheless, the Agencies prepared an independent NEPA analysis for this Project; the Agencies did not rely on the prior regional studies to define the purpose and need, eliminate alternatives, or otherwise dictate the outcomes of this process.

The Agencies reasonably used MAG's RTP as a starting point for the NEPA analysis. "Congress has directed that federally funded highway and transit projects must flow from metropolitan and statewide transportation planning processes" and that those planning processes "should be the foundation for highway and transit project decisions." 23 C.F.R. § Pt. 450, App. A (citing 23 U.S.C. §§ 134-135; 49 U.S.C. §§ 5303-5306). Congress intended for FHWA to consider regional planning studies in the decision-making process. *See HonoluluTraffic.com*, 742 F.3d at 1230; *Sierra Club v. DOT*, 310 F.Supp.2d 1168, 1189 (D. Nev. 2004); *Citizens for Smart Growth v. DOT*, 669 F.3d 1203, 1212 (11th Cir. 2012). ADOT's Brief discusses the regional planning process in greater detail.

Here, the Agencies properly used MAG's transportation plans to inform their NEPA analysis, not as a substitute for it. *E.g.*, SER1143-44; SER1153; SER1174; SER1188. Rather than adopt MAG's decisions outright, the Agencies first reexamined, as part of the NEPA process, whether a major transportation facility was still needed. SER700-02. Finding that one was, the Agencies screened alternatives for the Draft EIS, where they evaluated numerous modes of transportation, corridors for

potential freeway locations, and alignments within those corridors, in addition to the No-Action Alternative. GRIC's ER3-219 to ER4-14.

Subsequently, after MAG issued its 2013 socioeconomic projections for Maricopa County, the Agencies again independently reexamined the purpose and need, the alternatives, and the environmental impacts for the FEIS. SER1134-36. For example, the record contains a later technical report prepared by the Agencies validating the alternatives screening process. SER3537-66 (excerpt). Thus, the studies and data in the record show that the Agencies performed the required analysis as part of their own stand-alone NEPA process.

Here the Agencies did not refuse to analyze any alternatives because they had been rejected in prior studies. *HonoluluTraffic.com*, 742 F.3d at 1231-32. Furthermore, the Agencies analyzed in-depth two action alternatives that followed different alignments than the freeway in the RTP. SER1257-69. That three different action alternatives fulfill the purpose and need disproves PARC's suggestion that "only one alternative" would fulfill its goals. PARC Br. 18. Moreover, during the NEPA process, the Agencies twice shifted the alignment of the alternative that ultimately became the preferred alternative. SER1240-43.[4] It is not in the "same location" (GRIC Br. 13) as the one in the original transportation plan from 1985.

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[4] The Agencies first shifted the alignment from 55th Avenue to 59th Avenue where the freeway would connect with I-10. SER1240-41. The Agencies then shifted

Cont.

2. The purpose and need reflects socioeconomic projections from 2013 and the data from the 2010 census.

PARC (Br. 8) and GRIC (Br. 24) also state that the Agencies relied on outdated census data, though neither Plaintiff develops a clear argument on this issue. To clarify, the Agencies updated the purpose and need in the FEIS based on socioeconomic projections that MAG released in 2013, reflecting the 2010 census data. SER1134-36. PARC quotes its alleged expert's statement (Br. at 8) that the "only difference between the DEIS and FEIS is that the reduced figures have now been 'plugged in' to Figure 1-7 and the text on page 1-11." *See also* GRIC Br. 24 (quoting same language). But this statement is plainly incorrect. As the Final EIS explains, the Agencies updated the analysis for both the purpose and need *and* the alternatives to reflect the "new socioeconomic and traffic projections." SER1134. Comparing the Draft EIS and FEIS reveals that the FEIS reflected the more up-to-date data throughout. *E.g.*, *compare* SER1198, *with* GRIC's ER3-199; *compare* SER1202, *with* GRIC's ER3-203; *compare* SER1247, *with* GRIC's ER3-248. Notably, both Plaintiffs regularly cite to the Draft EIS, but the FEIS is the relevant analysis. *Carmel-By-The-Sea*, 123 F.3d at 1156 (finding nothing inappropriate in changes between Draft and Final EISs).

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the alignment from 59th Avenue to 62nd Avenue around Dobbins Road to avoid historic properties and a planned hospital. SER1242-43.

The administrative record also reflects the more recent data. For example, the *Traffic Overview* Report from May 2014 compares the action alternatives and the No-Action Alternative based on the new population, employment, and housing projections from 2013. SER2628; SER2574-2650. And the Agencies validated the Alternatives screening process and purpose and need based on the new projections as well. SER3537-66.

3. The Agencies did not predetermine their decision.

GRIC repeatedly suggests (*e.g.*, Br. 2, 12, 39, 41) that the Agencies "predetermined" the outcome but develops no clear argument on the issue. No predetermination occurred. An agency may have a preferred alternative in mind when it conducts a NEPA analysis. 40 C.F.R. § 1502.14(e); *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997) (noting that "an agency can formulate a proposal or even identify a preferred course of action before completing an EIS"); *Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1101 (9th Cir. 2012) (noting that NEPA requires agencies to identify preferred alternatives at various points). "NEPA does not prohibit agencies from having or expressing a favored outcome." *City of Mukilteo v. DOT*, 815 F.3d 632, 638 (9th Cir. 2016). "Agencies are required only to conduct the required environmental review 'objectively and in good faith,' rather than as 'subterfuge to rationalize a decision already made.'" *Id.* (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)).

For NEPA purposes, "predetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010); *see also Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893 (9th Cir. 2002); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998). Here the Agencies did nothing to irreversibly or irretrievably commit themselves to a particular outcome before completing the FEIS, and Plaintiffs point to no such commitment. The only two things GRIC identifies that could be a commitment of resources are that (1) ADOT previously constructed a "system traffic interchange between the I-10 highway" and SR 202L and (2) ADOT previously constructed a high-occupancy vehicle (HOV) lane. GRIC Br. 41. But the interchange "was constructed between 2000 and 2002." SER1230-31; SER1265; SER1267. This system interchange has independent utility and has been fully operational for close to 15 years. Similarly, the high-occupancy vehicle (HOV) lane serves traffic to and from the east of the Project, SER1267, and it also has independent utility. There is no evidence that the construction of these functional, independent facilities committed the Agencies to constructing the current Project. *See, e.g.*, *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974) (rejecting predetermination argument when each project had independent utility).

B. FHWA considered a reasonable range of alternatives and gave sound reasons for eliminating alternatives.

The Agencies analyzed all reasonable alternatives. *See Carmel-By-The-Sea*, 123 F.3d at 1155 ("The [EIS] need not consider an infinite range of alternatives, only reasonable or feasible ones."). And as the district court explained, the Agencies provided sound reasons for eliminating various alternatives. SER29. The Agencies reasonably rejected alternatives that would not meet the purpose and need as not feasible and prudent, satisfying their obligations under § 4(f). *HonoluluTraffic.com*, 742 F.3d at 1227. "Alternatives that do not accomplish the purposes of the project may properly be rejected as imprudent." *Ariz. Past & Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983); *Friends of Southeast's Future*, 153 F.3d at 1067 ("[W]hen the purpose [of the project] is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.") (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986)). An agency is also not required to "consider alternatives which are infeasible, ineffective, or inconsistent with [its] basic policy objectives." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990).

As described *supra* at 7-11, the Agencies conducted an extensive analysis of alternatives, including several varying modes of transportation in various combinations and numerous alignments for freeways through a five-tiered selection process. SER1218-87; SER3537-66 (excerpts from Validation of the Alternatives

Screening Process). This Court previously affirmed this type of alternatives screening process in *HonoluluTraffic.com*, 742 F.3d at 1231. The Agencies used this screening process to identify reasonable alternatives for detailed study, and the Agencies provided their reasons for eliminating certain alternatives. *See, e.g.*, SER1228-29 (providing reasons for eliminating various alternatives). This process flows directly from the NEPA regulations, which provide that an agency should "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (emphasis added); *see also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (upholding an EIS where 13 of 14 sites were eliminated with merely a brief discussion because only one site was feasible). Plaintiffs mischaracterize this analysis.

GRIC and PARC mention numerous action alternatives in their Briefs: the Riggs Road, SR 85/I-8, U.S. 60 Extension, I-10 Spur, and non-freeway alternatives. GRIC Br. 18; PARC Br. 21. GRIC and PARC also allege that the Agencies failed to consider certain vague categories of alternatives, such as alternatives north of the SMPP, south of GRIC, or submitted in PARC's comments. But the Agencies provided sound reasons for eliminating these alternatives from in-depth review. Plaintiffs fail to engage with that reasoning.

First, as explained below, many of these alternatives were properly eliminated for several reasons, not just purpose and need. Second, the Agencies reasonably

eliminated these alternatives, in part, because they would not be able to meet the purpose and need—*i.e.*, they would not address the unmet transportation demand. SER1497; SER3538-54. For example, the Agencies reasonably eliminated non-freeway alternatives because none of them would address the transportation capacity deficiencies or reduce congestion—indeed, based on modeling, the Agencies found that any single one of the non-freeway alternatives would address less than 5% of the capacity deficiency. *Supra* at 9-11; SER1220-23; SER3539-40; SER3583-3642. Plaintiffs point to no error in that analysis.

The Agencies reasonably eliminated the Riggs Road Alternative not only because it would not serve the purpose and need, but also because it is mostly on GRIC land and GRIC would not allow construction on its land. SER1226; SER1212-13; SER1497; SER879; SER3545-46. Given GRIC's refusal to allow the Agencies to build this type of alternative, SER1213, GRIC can hardly complain that the Agencies did not analyze it more in the FEIS. The Riggs Road Alternative also "would require substantial out-of-direction travel for accessing the alignment." SER3546. Motorists would need to travel on the already congested I-10 or substantially out of their way to the south, defeating the goal of reducing congestion on I-10. *See* SER705.

The SR 85/I-8 Alternative would connect to I-10 approximately 56 miles south of downtown Phoenix and then loop around GRIC's lands to reconnect 32 miles west of downtown Phoenix. SER3546-47; SER705 (maps). As a result of the great

distances, this alternative would likely have little impact on the current and projected transportation deficiencies being addressed by this Project. SER1497; SER3546-47. It also would be much longer than the proposed Project. Notably, contrary to GRIC's suggestion (Br. 38), the Agencies' consideration of this alternative reveals that the Agencies considered an alternative south of GRIC's lands.

Thus, the record directly contradicts PARC's claim that the Riggs Road and SR 85/I-8 Alternatives were eliminated "simply because they were not the South Mountain/Loop 202 Freeway." PARC Br. 21. Moreover, the Agencies explained that failing to complete the Loop System would cause "substantial out-of-direction travel for motorists." SER1226. The Agencies could reasonably consider that factor as weighing against adopting such an alternative. The Agencies articulated "the reasons" for eliminating these alternatives, 40 C.F.R. § 1502.14(a), and Plaintiffs identify no flaw in the Agencies' analysis.

The Agencies rejected the U.S. 60 Extension and I-10 Spur Alternatives, *inter alia*, because they would have numerous adverse impacts, such as (i) placing more traffic on the system, (ii) increasing congestion, (iii) causing underuse of the Santan Freeway, (iv) displacing thousands of residents and over 100 businesses, and (v) splitting South Mountain Village, resulting in community disruption. SER1497; SER3552-53; SER1229; SER707-09; SER814; SER1909. Once again, contrary to GRIC's suggestion (Br. 38), the Agencies' consideration of these alternatives reveals that the Agencies considered alternatives north of South Mountain (SER1229).

PARC also inaccurately asserts (Br. 6, 20-21) that the Agencies did not discuss their proposed alternatives. In fact, the Agencies discussed all of PARC's proposed alternatives and explained the reasons for their elimination. *See, e.g.*, SER813-16; SER879; SER914; SER2154-59; SER2404. PARC points to no error in these analyses.

PARC also incorrectly implies (Br. 20) that the public did not have a role in developing the alternatives before 2005. The Agencies provided many opportunities for public input, beginning no later than 2002. SER1512-38; *see also* 66 Fed. Reg. 20,345 (Apr. 20, 2001) (initiating NEPA process). For example, in 2001 the Agencies formed the Citizens Advisory Team, and that Team participated in the alternatives screening process. SER1174-77. During the public-scoping process in 2002, "[p]articipants were asked to identify potential alternatives to be considered during the alternatives development phase of the EIS process," and "[f]rom September to October 2003, public input on the alternatives identified to be studied in detail was received." SER1523; *see also* SER1224 (map including public proposals).

Finally and crucially, Plaintiffs have not presented evidence that any of these alternatives are "a feasible option." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1088 (9th Cir. 2013). "We cannot say that failure to consider this alternative is improper without evidence showing the feasibility of the alternative." *Id.* at 1088.

C. The Agencies reasonably evaluated the No-Action alternative.

The Agencies reasonably modeled the No-Action Alternative and considered the issue of potential induced growth. In analyzing all the alternatives, the Agencies relied on the socioeconomic projections provided by MAG for population, employment, and housing. SER1134-35; SER1144-45; SER1194-1205. Federal transportation agencies may rely on socioeconomic forecasts produced by local planning organizations. *See, e.g.*, *Laguna Greenbelt, Inc. v. DOT*, 42 F.3d 517, 526 (9th Cir. 1994); *Sierra Club*, 310 F.Supp.2d at 1189 (upholding "FHWA's reliance on figures produced by a state governmental entity statutorily charged with developing state transportation plans based on projected need"). The Agencies used this data to, among other things, model traffic and evaluate air quality impacts for all of the alternatives, including the action alternatives and No-Action Alternative. SER1188.

To be clear, the No-Action Alternative does <u>not</u> assume that the Project would be built. Rather, the No-Action Alternative assumes that "[e]xisting residential land use patterns and trends would be maintained," and then models the effects <u>if</u> the freeway is <u>not</u> built. SER1297. Thus, the No-Action Alternative is consistent with the Council of Environmental Quality (CEQ) regulations, which solely direct that the EIS should "[i]nclude the alternative of no action." 40 C.F.R. § 1502.14(d). The Agencies also explained that, if the freeway is built, it is not expected to induce growth given historic data, socioeconomic forecasts, land use plans, and population growth. SER1469-70; SER1156; SER1477; SER2684-87. Thus, the Agencies used the same

demographic and socioeconomic projections for both the action alternatives and No-Action Alternative. *See* SER2684-87; SER782-84.

When MAG developed its socioeconomic projections (SER4037-4163), MAG relied on a sophisticated model including numerous data inputs, including *inter alia* the 2010 census data, employment data, and data on residential completions. SER4164-4236. As part of that modeling, MAG also relied on regional transportation plans, and one aspect of those transportation plans is a proposed freeway similar to that in the Project. SER4194. Plaintiffs contend that the area's growth would be lower if the Project is not built, and they assert that therefore the Agencies should have used different (unidentified) socioeconomic projections for the No-Action Alternative. GRIC Br. 54-58; PARC Br. 21-23. But the Agencies provided sound reasons for their assumption that the same level of growth would occur in this area regardless of whether this Project is built. The district court correctly deferred to the agencies' modeling assumptions (SER11-13), for the reasons set forth by this Court in *Laguna Greenbelt*, 42 F.3d 517. This approach "has standard application in the transportation industry." SER784.

The Agencies explained that, if the freeway is built, it is not expected to induce growth in the Study Area given historic data, socioeconomic forecasts, land use plans, and population growth. SER1469-70; SER1156; SER1477; SER782-84. Numerous other factors are driving the growth in this area, such as the "affordable cost of living, employment opportunities, mild climate, reasonable accessibility, and a development-

oriented regulatory environment." SER1473. An "[e]xamination of data comparing population and land use between 1975 and 2000 suggests major transportation infrastructure projects like the proposed action are not major contributors to or inducers of growth in the region." SER1469. The Western Section of the Study Area is quickly urbanizing and it is likely that much of the area in the Western Section will have already transitioned to residential and commercial use before the entire freeway becomes operational. SER1315. With respect to the Eastern Section, growth is already constrained by the presence of existing urbanized areas, the SMPP, and GRIC land. SER1469-70. "Because transportation capacity seriously lags transportation demand in the Study Area, it can be assumed the proposed action would neither induce growth nor facilitate any increase in the rate of growth." SER1469. In response to comments, the Agencies explained that the current zoning and land use also supported this approach. SER783.

In *Laguna Greenbelt*, 42 F.3d at 525, this Court upheld an approach similar to the one taken by the Agencies here. This Court found that the agency, in developing its traffic projections, had relied on socioeconomic projections that, among other things, assumed the presence of the planned tollroad. *Id.* at 526. This Court recognized that the approach was reasonable when, as here, the locality "has already experienced substantial growth[] and *** is expected to continue to grow in the future." *Id.* This Court upheld the agency's analysis, emphasizing that "NEPA does not require us to

decide whether an EIS is based on the best scientific methodology available or to resolve disagreements among various experts." *Id.* at 526.

Here, as in *Laguna*, the "EIS's discussion of growth-inducing impacts was reasonably thorough." *Id.*; *see, e.g.*, SER1469-70. It is undisputed that the region's existing freeway system is already congested and operates poorly. The record shows that the Project is located in a highly developed metropolitan area and is intended to address current traffic congestion issues. *See Laguna Greenbelt*, 42 F.3d at 526; *see also Carmel-By-The-Sea*, 123 F.3d at 1162 (upholding finding of limited or no induced growth for portion of project in "a well-developed area" when "it is the existing development that necessitates the freeway").

GRIC points (Br. 55) to EPA's comment suggesting that the Agencies use different assumptions when modeling growth for the No-Action Alternative, but GRIC ignores the Agencies' thorough responses to those comments. SER782-84; SER934-36. EPA's views are not controlling on other Agencies. "[A] lead agency does not have to follow the EPA's comments slavishly—it just has to take them seriously." *Citizens Against Burlington*, 938 F.2d at 201.

The Agencies explained that EPA's proposed approach would "have application in some instances," such as "if the area was not developed," but Maricopa County's history supported a different approach here. *See* SER782-84. In Maricopa County, the "pre-freeway" land use planning and development has mimicked the post-freeway land use planning—the regional freeway system does not appear to have

induced the growth. *See* SER782-84. Sixty-seven percent of the Study Area is already developed and "already has good connecting transportation infrastructure (although congested) to support continued development without the freeway." SER783. Eighty-eight percent of the land in the Study Area is zoned for commercial, residential, industrial, and other developed uses. SER713.

This case bears no similarity to the precedent cited by Plaintiffs. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (finding "no action" flawed when built around "a plan that was [previously] held invalid"); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 640 (9th Cir. 2010) (finding "no action" flawed when agency assumed same mining operations would occur under both action and no action); *N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 605 (4th Cir. 2012) (finding agency erred when it relied on data "without disclosing the data's underlying assumptions and by falsely responding to public concerns"). ADOT's Response Brief distinguishes these cases.

In sum, the Agencies properly relied upon the socioeconomic projections provided by MAG in their NEPA analysis. The Agencies reached reasonable conclusions about growth based on the historical data and information in the record. "When an agency undertakes technical scientific analyses, as with the development of models to help analyze a problem, the court's deference to the agency's judgment is at its peak." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016).

D. The Agencies took a "hard look" at the environmental impacts of the Project.

1. The Agencies considered the potential impacts associated with the transportation of hazardous materials.

The FEIS discussed the potential for transportation of hazardous materials on the proposed Project in sufficient depth. SER1453; SER1327. The Agencies also reasonably explained that a more in-depth analysis was not required under Council of Environmental Quality (CEQ) or DOT regulations. SER752; SER975; SER1034. A hazardous waste spill, while possible, is not likely to occur or a probable consequence of the Project. SER1017; SER752; SER975.

The FEIS explained that, through federal delegation, ADOT is responsible for designating and restricting routes for transport of hazardous materials. SER1453; SER1181. The FEIS explained the process that state and local jurisdictions may undertake to restrict hazardous materials on the freeway. SER1453; 49 U.S.C. § 5112. The FEIS also notes that the potential for such an accident already exists for many portions of the Phoenix metropolitan area and that emergency service providers must have an effective response plan for such spills. SER1453; SER969-70. ADOT has committed to coordination with such providers, including the GRIC Commission. SER742; SER802. The FEIS also extensively analyzed trucking in the MAG region. *See, e.g.*, SER1281.

The FEIS discussed hazardous materials when particularly relevant to some of the alternatives—such as the tunnel and bridge alternatives for the Eastern Section—

which were eliminated as not feasible and prudent for other reasons. SER1499; SER1230-31. For the other action alternatives, the FEIS disclosed that "[a]ll population segments along the length of the proposed action would be exposed to trucks carrying hazardous cargo, but the probability of a spill of hazardous cargo is low." SER1327; SER1181; SER752. The FEIS explained that the two most frequently shipped hazardous materials in Arizona are gasoline and paint products. SER1453. The FEIS discusses mitigation measures to protect water resources from potential chemical spills resulting from vehicle accidents. SER1394-95; SER738. The FEIS also responded to comments raising this issue. SER1034; SER1181; SER1515; SER1521; SER1920.

As the FEIS discussed the potential impacts of hazardous materials, this case bears no similarity to *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006); *but see New Jersey Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132, 142 (3d Cir. 2009) (declining to adopt *San Luis Obispo*). In *San Luis Obispo*, "the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks." 449 F.3d at 1028. And the NRC apparently "prevent[ed] the public from contributing information to the decisionmaking process," *id.* at 1034, whereas here the Agencies published public comments regarding hazardous transportation and the Agencies responded to them. *E.g.*, SER969-70.

FHWA also reasonably concluded that it did not need to provide any additional analysis of potential impacts from accidents potentially arising from the transport of

hazardous materials. *See* SER752. That ADOT continues to study "hazardous materials transport in the state," SER1453 (emphasis added)—does not mean that an accident is a reasonably foreseeable consequence of this project—a 22 to 24 mile freeway. This Court has recognized that an agency's study of an issue does not mean that it is a "reasonably foreseeable" risk for NEPA purposes. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004). FHWA's decision to fund the freeway also has too limited a causal relationship to the entirely speculative risk of an accidental spill on the freeway to trigger a more detailed NEPA analysis than was done. *See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983).

2. The Agencies thoroughly evaluated the Project's impacts on air quality and children's health.

The Agencies reasonably considered the potential impacts of the Project on air quality (SER1355-74) and children's health. SER1370; SER785-86; SER748-53; SER763-66; SER1028-29; SER1032; SER1034-35. In both the NEPA analysis and the conformity analysis under the Clean Air Act, the Agencies addressed the potential air quality impacts of the Project, including the potential for impacts on children. SER752-53; SER1355-74. The administrative record contains a full Air Quality Technical Report. SER2902-73. And the Agencies cited to numerous studies and reports regarding the potential adverse effects of traffic-related air pollution. SER1368-71; SER752 (citing Health Effects Institute reports totaling over 1,000

pages). After considering all the available information and the models of air emissions, the Agencies "determined that the proposed project would not produce disproportionate impacts on children." SER1370.

EPA establishes National Ambient Air Quality Standards (NAAQS) for certain "criteria" air pollutants. SER1355-59. EPA establishes the NAAQS to protect the health of sensitive populations, specifically including children. SER1370; SER785-86. Here, the Agencies performed conformity analyses for the NAAQS, including a quantitative "hot spot" analysis for particulate matter (PM10) and carbon monoxide (CO). SER1361-65; SER2902-68. "The hot-spot analysis shows that the Preferred Alternative would not cause new violations of the CO and PM10 NAAQS, exacerbate any existing violations of the standard, or delay attainment of the standards or any required interim milestones." SER1362 (citing 40 C.F.R. § 93.116(a)). Those analyses show emissions levels "well below" the NAAQS for CO. SER1362-64. The analysis also shows no violation of the PM10 NAAQS and that the vast majority of those pollutants are "attributable to background concentrations," not a result of the Project. SER764; SER1364. For example, "at the location with the absolute highest concentration for [PM10], 145 micrograms per cubic meter is the background concentration and only 3.8 micrograms per cubic meter will be added by the project." SER764.

Ultimately, "[t]he [EPA] and [FHWA] agree that the project has met all applicable Clean Air Act and regulatory requirements related to compliance with the

[NAAQS]." SER785; SER780. No Plaintiff challenges the conformity findings under the Clean Air Act. If there are no impacts related to the NAAQS, there can be no disproportionate impacts. And "at least two courts have recognized that NEPA's requirements are per se satisfied by demonstrating conformity with NAAQS." *Coal. for Advancement of Reg'l Transp. v. FHWA*, 576 F. App'x 477, 492 n.1 (6th Cir. 2014) (citing *Tinicum Twp. v. DOT*, 685 F.3d 288, 296-98 (3d Cir. 2012); *Sierra Club v. FHWA*, 715 F.Supp.2d 721, 741 (S.D. Tex. 2010)).

The Agencies also provided additional analysis for NEPA purposes, analyzing projected concentrations of CO and PM10 at additional interchange locations and representative locations along the corridor, and finding compliance with the NAAQS at those locations as well. SER1364; SER2911; SER2920; SER2922-23. The FEIS also discussed health effects of traffic-related pollution, including evidence indicating that it may exacerbate asthma. SER1356-61; SER1366-71.

PARC suggests that the Agencies' findings are for the "150 square mile Study Area" (Br. 25), but the conformity analysis considered levels at the "worst-case location" and "the year of peak emissions over the life of the project." SER1362; SER1363; *see also Coalition for a Sustainable 520 v. DOT*, 881 F.Supp.2d 1243, 1260 (W.D. Wa 2012) (upholding "worst case" methodology). PARC also asserts that the Project "will have a direct impact" on a number of nearby schools (Br. 27), but then fails to provide evidence proving this impact, much less responding to the Agencies' analysis of this issue. SER2026-33.

The Agencies reviewed the project maps and found that "while some schools are near the project corridor, the proposed freeway is not located closer to schools than it is to other nearby receptors," SER785, SER4454-74, SER4452, supporting FHWA's conclusion that there are no disproportionate impacts on children related to air quality. Additionally, because particulate matter levels decrease rapidly with distance from the freeway, and the NAAQS are already met at the freeway's boundary, FHWA concluded that the NAAQS would also be met at these schools. SER785; SER765. This Court has upheld agencies' reliance on models that "yield conservative data because the models incorporate the higher of the two [known potential values] in assessing the overall risk." *Nw. Coal. for Alternatives to Pesticides (NCAP) v. EPA*, 544 F.3d 1043, 1050 (9th Cir. 2008).

The record disproves PARC's assertion (Br. 27) that the Agencies did not address impacts to schools. For example, the Agencies thoroughly studied the Project's potential noise impacts on children's health, including noise receptors located at nine schools. *See* SER1370. The Agencies ensured that noise impacts would be mitigated to an acceptable level through the use of noise walls. SER1370.

The Agencies also considered all of EPA's comments. SER778-94; SER1874-1900. The Agencies took many steps to explain and update their analysis to address EPA's concerns. *See, e.g.*, SER5300-17; SER5319-28. These changes resolved many of those concerns. *See, e.g.*, SER5318; SER4428-29; SER4430-45. With respect to children's health, the Agencies reasoned that (1) children are located in the same

areas, and thus have the same exposures as, the population at large; (2) the quantitative hot spot analysis demonstrated that the freeway would not cause a violation of the NAAQS, which are required by law to protect children and other sensitive populations; and (3) therefore the freeway would not create a risk to children's health. SER785-86; SER1370. Additionally, while EPA made general comments about the potential impact of "air pollution" on children, it did not contest the specific analyses the Agencies had performed. SER785-86.

The disagreement between FHWA and EPA does not suggest that the Agencies failed to meet their NEPA obligation to study the environmental consequences of the proposed action; it highlights the rigorous consideration of the Project. Agencies are only required to give EPA's comments adequate consideration, and they did so here. *See Citizens Against Burlington*, 938 F.2d at 201.

Finally, while the Court need not reach this issue, Executive Order 12,606, *Protection of Children From Environmental Health Risks and Safety Risks*, 62 Fed. Reg. 19,885 (April 21, 1997), does not create enforceable rights. Compliance with executive orders may be judicially reviewable if (1) the order does not expressly disclaim the creation of a private right of action, (2) the order is based upon statutory authority, and (3) there is a legal standard or "law to apply" by which the agency's action may be judged. *See Carmel-by-the-Sea*, 123 F.3d at 1166-67. Here, the order specifically states it does not create any right to judicial review for alleged noncompliance. 62 Fed. Reg. at 19,888 § 7-701 ("This order shall not be construed to

create any right to judicial review involving the compliance or noncompliance with this order by the United States, its agencies, its officers, or any other person."). This Court previously held that identical language made a different Executive Order unenforceable. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998). Second, this Order does not cite any specific statutory authority. Third, this Order does not create an enforceable "law to apply," and indeed, PARC develops no argument for how the FEIS or ROD are inconsistent with the Order's text. PARC Br. 27-28.

3. The Agencies reasonably considered the Project's potential health impacts resulting from Mobile Source Air Toxics (MSATs).

The FEIS and ROD reasonably analyzed the proposed Project's impacts on MSATs. SER1359-74; *see also* SER748; SER752-53; SER763-66; SER2906-09; SER2923-30. The Agencies modeled MSAT emissions using EPA's latest model, documented the Project's MSAT impacts in the Study Area and two subareas, and responded to comments from EPA and others. SER1359-74; SER763-66; SER780-81; SER1874-87; SER2906-09; SER2923-30; SER4413-15.

The Project's MSAT analysis conformed to FHWA's guidance for MSAT analysis for roadway projects. SER1365; SER5329-48. This Court should defer to FHWA's guidance and modeling. *San Luis & Delta-Mendota Water Auth. v. Locke (Delta Smelt)*, 776 F.3d 971, 992 (9th Cir. 2014) ("The APA gives an agency substantial discretion 'to rely on the reasonable opinions of its own qualified experts.'") (quoting

Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)); *see also*, *Audubon Naturalist Soc'y of The Cent. Atl. States, Inc. v. DOT*, 524 F.Supp.2d 642, 675 (D. Md. 2007) (upholding FHWA's MSAT analysis in absence of EPA guidance).

Various regulatory initiatives will result in substantial reductions of MSATs in the Study Area in the near term. SER1365 (trend chart). The FEIS found that in 2035, under either the Preferred or No-Action Alternative, MSAT emissions in the Study Area would be about 84% lower than 2012 levels, with similar reductions in the two subareas. SER1367-68; *see also* SER2906-09; SER2923-30.

The FEIS acknowledged that constructing the Preferred Alternative would increase MSATs, as compared to the No-Action Alternative, but the increase would be by less than 0.1% of total annual emissions in the Study Area in 2035. SER764; SER2923-30.[5] Thus, any negligible increase in emissions from the Preferred Alternative is insignificant compared to the sizeable expected decreases.

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[5] PARC inaccurately states that the MSAT analysis suggested that pollutants would be "lower" with the Project. Br. 28. The Draft EIS predicted that the action alternatives would likely reduce total MSAT emissions as compared to the No Action Alternative. GRIC's ER4-123. However, when the Agencies updated the analysis, they found the action alternatives would likely increase total MSAT emissions by a small percentage. SER1367-68. The FEIS and ROD reflect the accurate, slightly higher MSAT emissions for the action alternative, and FHWA factored this into its final decision (SER764). FHWA concedes that some of the summary information inadvertently reflects the original conclusion that the project would reduce emissions compared to No Action (*e.g.*, SER719) despite FHWA's attempts to correct those materials (SER4453). Regardless FHWA based its decision on the correct analysis. SER764.

The Agencies then summarized four studies showing the health risks from exposure to MSAT emissions. SER1366-68; SER2969-73. Those studies conservatively assumed constant near-term emission rates (whereas here the emissions are estimated to decline by ~84% by 2035) and constant exposure over 30 or 70 years. SER1366-67. The studies reported an estimated increased cancer risk ranging from .08 to 2 cases per million people over those decades. SER1366-67. Thus, "the incremental risk of cancer from breathing air near a major roadway is several hundred times lower than the risk of a fatal accident from using a major roadway," and is a very small fraction of the overall U.S. cancer risk. SER1368; SER766.

FHWA considered EPA's suggestion that FHWA do a health-risk analysis based on site-specific exposures along the corridor, and FHWA explained why it did not adopt such an approach. SER1369; SER1366-67; SER780-81; SER790-91; SER1880-85; SER4393-4401; SER4402. First, EPA's risk estimates for MSATs are based on 70-year lifetime exposures, and studying MSAT emissions in the overall Study Area better reflects a person's exposure during a 70-year period, compared to studying emissions at fixed locations along the roadway, where people are unlikely to be present for 70 continuous years. SER1367; SER780-81; SER4446-48.

Second, as the Agencies explained, there are currently no guidelines to help FHWA, EPA, or the public to determine whether a given corridor-specific emission represents a potential health risk. SER781; SER1878; *Sierra Club*, 310 F.Supp.2d at 1188 ("FHWA does not act arbitrarily and capriciously by not evaluating a project-

specific impact for which the then-current scientific modeling and available information could not provide meaningful findings on which to base a decision."); 40 C.F.R. § 1500.1(b) ("NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.").

NEPA regulations also provide that "information must be of high quality" and "[a]ccurate scientific analysis" is "essential." 40 C.F.R. § 1500.1(b). As the FEIS explained, "MSAT health risk assessment uncertainty builds on itself—each step of the analysis involves uncertainties." SER1369. The FEIS details the numerous sources of uncertainty. SER1369. "The total cumulative uncertainty involved in highway project health risk assessment is much larger than the change in emissions attributable to projects (typically a few percentage points)." SER1369.

Third, to address the increases in emissions along the project corridor, the FEIS "include[d] a summary of past health risk studies for similar projects," described above. SER781; SER1366-68; SER2969-73. The Agencies considered such studies more "relevant and meaningful" than "simply reporting an emissions number for the corridor." SER781. Notably, EPA did not suggest that the Agencies' risk analysis was inaccurate or incorrect. SER780-81.

Finally, PARC asserts (Br. 29) that recent FHWA recommendations for project sponsors conducting MSAT analysis undermine the Agencies' approach here. Not so. First, this technical assistance document post-dates the decision and is not part of the administrative record; the Court should strike it and not consider it. *See, e.g.*, *Delta*

Smelt, 776 F.3d at 992. Second, the language cited by PARC does not support the proposition for which it is cited. PARC Addendum D-10. This technical assistance document discusses appropriate roadway segments to include when preparing a project-wide MSAT analysis; it does not state that FHWA needs to estimate "near-roadway" emissions of MSATs. Third, it is a technical assistance document for project sponsors—it does not establish binding requirements on the agency. Fourth, the document clearly states that "[t]hese recommendations are not a substitute for project-specific knowledge and consideration of local circumstances," PARC Addendum D-11, as were used here. SER2906-07; SER2923-24; SER4413.

4. The Agencies took a "hard look" at the impacts of the Project to GRIC's land and members.

As explained *supra* at pp.11-13, the FEIS provided a thorough analysis of the environmental consequences flowing from the potential action alternatives and compared them to each other and to the No-Action Alternative. SER1288-1479. The Agencies reasonably "structured the FEIS around specific subjects" and then talked about impacts to GRIC as appropriate within those subjects. *See Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013). When impacts affected GRIC uniquely, the Agencies discussed those impacts to GRIC specifically. When the general discussion of impacts covered the impacts to GRIC, the Agencies did not need to separately discuss those same impacts again. Thus, the district court "reviewed the chapters in the EIS that discuss the project's impacts and the [c]ourt

agree[d] with the Agencies that they did in fact evaluate the environmental impacts on GRIC." SER15. "An agency *** has discretion in deciding how to organize and present information in an EIS." *Montana Wilderness*, 725 F.3d at 1002; *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1112 (9th Cir. 2015). An agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate. It is not for this court to tell the [agency] what specific evidence to include, nor how specifically to present it." *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008).

GRIC has failed to establish that the Agencies' approach violated the "rule of reason," and GRIC points to no precedent foreclosing an agency from presenting its NEPA analysis this way. Br. 49-54. Instead, GRIC claims that the Agencies failed to adequately analyze environmental impacts to GRIC's land and members. Br. 49-54. But GRIC's Brief repeatedly mischaracterizes the record and FHWA's statements of fact. *Compare* Br. 49-54, *with* GRIC's ER7-77-79.

For example, GRIC states that: "The Agencies reviewed Community impacts based only on 'data available to the general public and on field observation as appropriate,' rather than seeking Community input and data on potential impacts." GRIC Br. 50. This statement is wrong.[6] The FEIS devotes a chapter to the Agencies'

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[6] Similarly, GRIC inaccurately suggests (Br. 19-20) that the Agencies never provided certain promised data to GRIC, but in fact, that data was supplied in the

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coordination with GRIC and "lists over 100 meetings held since the EIS process began in 2001 up until 2009." SER1209; SER1206-16; *see also* SER1515. The Agencies also met with GRIC numerous times after 2010 (SER1211-12), coordinated extensively with GRIC's Tribal Historic Preservation Officer (THPO) and GRIC's Department of Environmental Quality (SER757; SER751; SER754-55; SER760), and in 2014 held a special forum for GRIC (SER747). Indeed, the Bureau of Indian Affairs praised the extent to which the Agencies worked to include potentially affected tribes, particularly GRIC. SER4373.

The Agencies also reviewed and responded to all of GRIC's comments. *E.g.*, SER795-806; SER1902-23. And GRIC's input played a significant role in the development of the EISs, ROD, and Project, particularly mitigation measures. For example, GRIC and its THPO helped the Agencies develop enhancement and management plans for Traditional Cultural Properties (TCPs), as well as proposed mitigation for the South Mountain TCP. *See* SER1430-31; SER4310-49. When GRIC's THPO accepted the Traditional Cultural Enhancement Plan for two properties, he "reiterate[d] our appreciation to the [Agencies] for acknowledging and accepting the GRIC worldview." SER5349-50; *see also* SER5351. Similarly, in approving the scope of work for the mitigation plan, GRIC's Lieutenant Governor noted that the proposal "may be used in preparation and finalization of the

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ROD, FEIS, and air quality technical report. *E.g.*, SER763-66; SER1361-68; SER2908; SER2917-23.

Environmental Impact Statement (EIS)." SER4310. As another example, the Agencies revised the biological evaluation to evaluate species that GRIC identified as culturally important. SER1414; SER761; SER2832-33. The wildlife analysis also identified the potential "multifunctional crossings" where drainage structures would be designed to accommodate limited use by GRIC and also serve wildlife. SER1424-25; SER1413.

GRIC inaccurately claims that the Agencies "did not even evaluate impacts along the project corridor, let alone within the Community's boundaries." Br. 31; *see also* GRIC Br. 2, 4, 49-54. Not true. For example, the air quality analysis included a hot-spot analysis along the freeway corridor, and one of those hot spots included numerous receptors on GRIC's land—modeling air quality impacts on GRIC's land itself. SER765; SER2917. As the Agencies explained, "hot-spot analyses focus on the expected worst-case location along the project corridor," and since no violations of the NAAQS would occur immediately adjacent to the worst-case locations, no violations would be expected elsewhere on the corridor. SER803. Because the Agencies found that the particulate matter and carbon monoxide NAAQS were met at the freeway's boundary, and levels decrease rapidly with distance from the freeway, the Agencies could reasonably find that the standards would also be met on GRIC land. *See* SER803-04; SER764-66. GRIC is simply mistaken to think that the air quality analysis does not apply to GRIC. *See* GRIC Br. 52-53.

Similarly, the Agencies analyzed MSATs for the Project Study Area (which includes a substantial portion of GRIC land) and two subareas, including the Eastern Subarea (which includes the northern edge of GRIC's territory along the Eastern portion of the action alternatives). SER1366-67. Studies of these areas necessarily included impacts to GRIC. SER803-06. The Agencies also explained why they did not adopt a health-risk analysis, *e.g.*, SER806; SER764-66; SER1365-69; *supra* at 46-50, and GRIC points to no error in that explanation (Br. 53).

GRIC's other allegations about a lack of analysis are similarly unfounded. For example, GRIC complains (Br. 51) about only one noise receiver being on GRIC's land, but GRIC is mistaken. In fact, the Agencies placed numerous monitors at the GRIC boundary, and the noise analysis identified four receivers on GRIC's land. *See* SER2760-81 (M23-25, R30, R32, R34, R71); SER1377-86. It is true that the analysis determined only one location on GRIC land would be eligible for noise abatement. SER1378; SER1384. But that reflects the fact that, as also revealed in the land use section of the FEIS, the vast majority of GRIC's land adjacent to the potential action alternatives is either agricultural or undeveloped. SER1293 (color map); SER1304; SER2764-65 (aerial photos). Here is an aerial photo of part of GRIC's boundary (SER2765):

Finally, GRIC asserts that the analysis of transportation of hazardous materials should have separately addressed potential impacts to GRIC. GRIC Br. 52-53. But as explained *supra* at 39-41, the FEIS reasonably disclosed that "[a]ll population segments along the length of the proposed action would be exposed to trucks carrying hazardous cargo, but the probability of a spill of hazardous cargo is low." SER1327; SER1181; SER752. The Agencies did not need to provide more information because (1) such accidents are not reasonably foreseeable, and (2) FHWA's funding of this project will not cause such an accident.

GRIC suggests that further analysis is necessary because of the jurisdictional differences between GRIC and the State of Arizona. GRIC Br. 52-52. But GRIC did not raise this jurisdictional concern in its summary judgment briefing in district court or in its comments; GRIC therefore has forfeited this issue. *See Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 454-55 (9th Cir. 2016). Indeed, in its comments on this issue, GRIC actually requested that ADOT coordinate with the Tribal Emergency Response Commission, and in response, ADOT "committed to continued

coordination with certified emergency responders, which will include the referenced [GRIC] commission." SER802; SER742.

Furthermore, the State has authority over transportation on this route because the Project will be completely within the State's jurisdiction. 49 U.S.C. § 5112(a)(2). Section 5112 also creates a process for resolving certain disputes between States and tribes about designating routes for highway routing of hazardous materials. *Id.* § 5112(d). But FHWA has not issued any decision under § 5112 with respect to this Project, so those issues are not presented in this case. In any event, this jurisdictional issue does not affect the environmental impacts of the transport of such cargo, and this jurisdictional issue is controlled by § 5112, not the decision challenged here.

E. The Agencies reasonably discussed mitigation measures.

Citing to portions of the ROD summarizing mitigation measures, PARC contends that the Agencies failed to discuss mitigation in sufficient detail to meet their obligations under NEPA and § 4(f). Br. 30-32, 38-41. PARC appears to object to the fact that some of the mitigation measures will be further developed during later design phases for the Project. That argument fails for two reasons.

First, the FEIS discussed mitigation measures extensively in the context of every resource evaluated in the over two-hundred pages comprising Chapter 4 and Chapter 5. SER1288-1510. The district court correctly rejected PARC's argument, finding that the "Agencies' discussions in Chapter 4 of various environmental consequences of the proposed action include sufficient discussions of mitigation

measures. Similarly, Chapter 5, entitled 'Section 4(f) Evaluation,' includes several detailed discussions of 'Measures to Minimize Harm.'" SER23. The court gave some examples of the mitigation measures addressing displacement of households, businesses, and public facilities (SER23-24 (citing SER1333-41)) and measures to minimize harms to the SMPP (SER24 (citing SER1502-09)). Numerous other mitigation measures can be found in the FEIS. *See, e.g.*, SER1378-87; SER1394-96; SER1425-26.

Second, the Agencies reasonably incorporated some mitigation measures that will be further developed during the design and implementation phases for the Project. "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." *Laguna Greenbelt*, 42 F.3d at 528. "The Supreme Court has made it clear, however, that 'NEPA does not require a fully developed plan detailing what steps <u>will</u> be taken to mitigate adverse environmental impacts.'" *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000) (quoting *Robertson*, 490 U.S. at 359). "It would be a mistake, therefore, for us *** to base our evaluation of this EIS on whether its proposed mitigation features amount to a 'fully developed plan.'" *Carmel-By-The-Sea*, 123 F.3d at 1172; *see also Japanese Vill.*, 843 F.3d at 460. An analysis of mitigation measures is not flawed merely because the agency acknowledges that it will "refine and improve the implementation of those measures as the Project

progresses." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 582 (9th Cir. 2016). So too under § 4(f), the Agencies may finalize the plans to minimize harm as the project progresses. *See Citizens Against Burlington*, 938 F.2d at 204.

This case bears no similarity to those cited by PARC. Br. 32. In those cases, the underlying problem was a failure to analyze the actual environmental impacts of the proposals, and the agencies' discussion of mitigation could not cure that failure. For example, this Court rejected the agency's mitigation analysis in *N. Plains Res. Council, Inc. v. Surface Transp. Bd.* because the agency "use[d] mitigation measures as proxy for baseline data." 668 F.3d 1067, 1085 (9th Cir. 2011). And the Court has also rejected mitigation discussions which lacked an "assessment of whether the proposed mitigation measures can be effective." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (per curiam) (citation omitted) (internal quotation marks omitted). But PARC points to no specific environmental impact that has been overlooked and no failure to assess the effectiveness of mitigation. "Plaintiffs merely 'fly speck' the EIS rather than identify consequential flaws that would prevent the agency from sufficiently grasping the Project's potential environmental consequences." *Protect Our Communities*, 825 F.3d at 582.

F. The arguments in the *amicus* brief are forfeited and are incorrect.

Tohono O'odham and the Inter Tribal Association of Arizona (hereinafter, "*amici*") filed an *amicus* brief on January 25, 2017, arguing for a "heightened standard

of impact assessment because American Indian populations are affected." *Amici* Br. 5. This Court should not rule on the arguments presented in this brief because none of the parties to this case made these arguments: (1) in the administrative process; (2) before the district court; or (3) in their Opening Briefs on appeal. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 n.8 (9th Cir. 2009). The issues presented by *amici* have been forfeited. For example, *amici* rely on the Environmental Justice Executive Order, 59 Fed. Reg. 7629 (Feb. 11, 1994), and numerous statutes, such as the National Historic Preservation Act, that are not cited in either of the Plaintiffs' Briefs. This Court should not allow an *amicus* to insert new arguments involving such complex issues into this case. *See Zango*, 568 F.3d at 1176 n.8 (collecting cases). In any event, the Agencies complied with all these statutes, to the extent they are relevant. *See, e.g.*, SER1427-47.

Even if the Court reached this issue, the argument is wrong both factually and legally. Factually, the Agencies engaged in an extensive study of impacts to the Native American communities at issue here, particularly GRIC, and the analysis was not "diluted" (*amici* Br. 13) by the Agencies' study of other minority groups as well. SER1316-29. For example, the Environmental Justice analysis (SER2690-2733) repeatedly distinguishes the populations on GRIC's land from the rest of the population. *See, e.g.*, SER2709; SER2710-11. It disclosed that 81.4% of the population on GRIC's land is American Indian, and 47.8% is low-income. SER2709. Indeed, the Environmental Justice analysis used the data at "the census block" level,

which "is the smallest geographic unit used by the U.S. Census Bureau." SER2702. And the Agencies extensively considered potential impacts to GRIC and other Native American tribes, as well as to the South Mountains as a Traditional Cultural Property. *See, e.g.*, SER1325; SER1428-47. *Amici* point to no flaws in that analysis.

Legally, NEPA does not create a "heightened" standard for impacts to Native Americans, and this Court has recognized that the government's general trust obligation "is discharged by [its] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band*, 161 F.3d at 574. *Amici* invoke numerous statutes and suggest that the Court should "harmonize" them to create a "heightened standard." But the Supreme Court has emphasized that the United States' obligations to tribes are defined by statute and a tribe challenging the government's actions must identify "specific, applicable, trust-creating statute[s] or regulation[s]." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 184 (2011) (quoting *United States v. Navajo Nation (Navajo II)*, 556 U.S. 287, 302 (2009)). While *amici* are correct that Congress has "provide[d] specific statutory obligations" to protect Native American interests, the Courts "will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated." *Id.* at 185. This Court should not create a vague, undefined "heightened" NEPA standard when Congress has already provided detailed, specific obligations for the federal government with respect to Native Americans and tribes. Here, FHWA complied with all its obligations with respect to Native Americans and tribes, as revealed by the fact that

neither Plaintiffs nor *amici* can identify a specific provision of law with which the Agencies failed to comply.

II. The Agencies complied with § 4(f).

A. The Agencies reasonably found that there were no feasible and prudent alternatives that avoided the SMPP.

In 2005, Congress amended § 4(f) and changed the way Agencies evaluate feasible and prudent avoidance alternatives. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59 § 6009(b), 119 Stat. 1144 (2005). In the conference report, Congress stated that:

> In order to address inconsistent guidance and regional interpretations of the *Overton Park* decision, subsection 1514(b) directs the Secretary to issue regulations to clarify the factors to be considered and the standards to be applied in determining whether alternatives are "prudent and feasible." *** The fundamental legal standard contained in the *Overton Park* decision for evaluating the prudence and feasibility of avoidance alternatives will remain as the legal authority for these regulations, however, the Secretary will be able to provide more detailed guidance on applying these standards on a case-by-case basis.

SAFETEA-LU Conf. Report, H.R. Rep. No. 109-203, at 689-90 (2005), *reprinted in* 2005 U.S.C.C.A.N. 452, 1057-58; *see* 73 Fed. Reg. 13,368, 13,391 (2008) (rulemaking).

Acting under this authority, the Department of Transportation defined a "feasible and prudent avoidance alternative" as one that "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." 23 C.F.R. § 774.17. The regulations specify that "[a]n alternative is not feasible if it cannot be

built as a matter of sound engineering judgment" and that an alternative is not prudent if, among other things, it "compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need" or "results in additional construction, maintenance, or operational costs of an extraordinary magnitude." *Id.* The regulations also identify other factors that can render an alternative "not prudent." *Id.* An agency does not need to "use the terms 'extraordinary magnitude' or 'unique problems'" to reasonably find that an alternative is not prudent. *Conservation All. of St. Lucie Cty., Inc. v. DOT*, 847 F.3d 1309, 1324 (11th Cir. 2017); *see also Eagle Found., Inc. v. Dole*, 813 F.2d 798, 804 (7th Cir. 1987) ("[P]rudent *** calls for judgment, for balancing, for the practical settlement of disputes on which reasonable people will disagree."); *but see* GRIC Br. 30-31.

In the FEIS, the Agencies thoroughly considered § 4(f) properties, and through redesigns and mitigation, the Agencies managed to avoid all of the many identified § 4(f) properties except the SMPP. SER1480-92; *supra* at 11-13. The Agencies also carefully considered alternatives that would avoid the SMPP, but the Agencies found these alternatives were not feasible or prudent for the reasons articulated in Chapter 5 of the FEIS. SER1493-1501; *see also supra* at 29-34. Both PARC and GRIC make conclusory allegations to the contrary, listing numerous alternatives which were allegedly feasible and prudent (PARC Br. 35-37, GRIC Br. 48), but Plaintiffs largely fail to develop arguments actually engaging with the Agencies' stated reasons for finding that these alternatives were not feasible and prudent. Instead, they simply

ignore the Agencies' analysis. The Agencies also specifically responded to Plaintiffs' comments on allegedly feasible and prudent alternatives, and again, Plaintiffs fail to engage with the Agencies' reasoning. *See, e.g.*, SER813-16; SER334; SER971; SER1018-19; SER191-94.

The Agencies explained that alternatives north of the SMPP are not prudent because they will not meet the purpose and need of the Project, which is to provide a major transportation facility for the southwestern and southeastern portions of the Phoenix metropolitan area. *See* SER1497. They would not adequately improve travel times or mobility, and they also would cause substantial traffic performance problems and congestion on numerous other freeways in the Phoenix area. SER1497. Additionally, they would create adverse impacts of extraordinary magnitude to the homes and businesses north of the mountain and substantially disrupt the South Mountain Village community. SER1497.

Alternatives on GRIC land are not feasible because, although the Agencies engaged in extensive coordination with GRIC for over a decade, GRIC still opposed alternatives on its land, and ADOT cannot condemn GRIC land. SER1497. PARC suggests (Br. 35-36) that the Agencies needed to engage in further analysis of these GRIC alternatives with the goal of winning approval from GRIC, but having spent over a decade in outreach to GRIC, the Agencies could reasonably conclude otherwise. Moreover, PARC only discusses one specific GRIC alternative with any detail: PARC's recommendation that the Agencies consider extending Pecos Road

with arterial improvements. Br. 36 (quoting SER839). As the Agency explained in response, this alternative was eliminated not just because it requires use of GRIC land, but also because the modeling already included such improvements and showed that they were insufficient to address projected demand. SER839.

The Agencies also established that alternatives south of GRIC's land are not prudent because they do not satisfy the purpose and need for the Project since they are far to the south of the metropolitan area. SER1497; SER734-35; SER705; SER1226. As a result, they would not address the capacity deficiencies as people would not rely on such an alternative to move through southwestern and southeastern portions of the Phoenix metropolitan area. SER1226; SER705 (map).

The Agencies explained that the No-Action Alternative is not prudent because it would neither meet the Project's stated purpose and need, nor would it prevent non-federal projects (such as private developments and state and locally funded projects) from adversely affecting the SMPP. SER1497. The Agencies' modeling confirms this finding: the No–Action Alternative leaves the MAG transportation network with capacity to accommodate only 69% of projected demand. SER1203. And the non-freeway alternatives each only accommodate at most 5% of the projected demand. SER1221. It is undisputed that the transportation network is already congested and operates poorly, and without an action alternative: "Trips between locations in the Study Area and downtown Phoenix would take much longer in 2035 than they did in 2012; the projected travel time would increase by between 27

and 36 percent." SER1203. Thus, the No-Action Alternative and non-freeway alternatives do not meet the purpose and need of addressing existing congestion and projected growth in transportation demand, and "[a]lternatives that do not accomplish the purposes of the project may properly be rejected as imprudent." *Ariz. Past & Future*, 722 F.2d at 1428; *Alaska Ctr. for Env't v. Armbrister*, 131 F.3d 1285, 1289 (9th Cir. 1997) (same); *Neighborhood Ass'n Of The Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 65 (1st Cir. 2006) ("It is well settled that an alternative is not prudent if it does not meet the transportation needs of a project."); *City of Alexandria v. Slater*, 198 F.3d 862, 873 (D.C. Cir. 1999); *Druid Hills Civic Ass'n v. FHWA*, 772 F.2d 700, 715 (11th Cir. 1985).

The Agencies established that the rejected alternatives were not feasible and prudent, and thus the Agencies satisfied their obligations under § 4(f). *HonoluluTraffic.com*, 742 F.3d at 1227. Plaintiffs have failed to meet their burden of establishing that the Agencies' decision was arbitrary and capricious.

Plaintiffs cite *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), for the proposition that the no build alternative is feasible and prudent, but this argument fails. First, the case pre-dates the 2008 regulations which now clarify that an alternative is not prudent if, among other things, it "compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need." 23 C.F.R. § 774.17(3)(i). As explained above, the Agencies established that the No-Action Alternative was unreasonable under this legal standard. Second,

since *Stop H-3*, the Courts of Appeal have repeatedly ruled that an alternative that would not meet the purpose and need of the project is not prudent. *Ariz. Past & Future*, 722 F.2d at 1428; *Ass'ns. Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1131 (10th Cir. 1998) ("[A]n alternative that does not solve existing or future traffic problems *** may properly be rejected as imprudent."). In *Stop H-3*, the administrative record may not have supported such a finding, but the record here establishes that the No-Action Alternative does not meet the purpose and need.

Neither PARC nor GRIC have come forward with a specific avoidance alternative that is feasible and prudent; while they invoke many alternatives, they develop no clear argument about any single one. They have fallen far short of their burden to show that the Agencies' § 4(f) determination was arbitrary and capricious. *Adler v. Lewis*, 675 F.2d 1085, 1094 (9th Cir. 1982) ("Absent argument by appellants pointing to the record and demonstrating with specificity the alleged errors of judgment or irrelevant factors that formed the basis for [the] decision, we are not inclined to make their case for them.").

B. The Agencies also included all possible planning to minimize harm to the SMPP.

"All possible planning" means that "all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project." 23 C.F.R. § 774.17. The § 4(f) analysis includes a

detailed description of measures to minimize harm, SER1502-07, and the Agencies expressly committed to these measures in the ROD, SER744-45. Some of these measures have already been taken, such as locating the alignment on the southwestern edge of the SMPP (instead of bisecting it)—indeed, this minimization limited the potential alternatives in the Eastern Section. SER1502; SER1232. The Agencies also reduced the footprint from 40 acres to 31.3 acres. SER735. Thus, the Project will impact less than **0.2**% of this 16,600-acre area. SER1178. ADOT must also "provid[e] replacement lands to compensate for the use of 31.3 acres of the park." SER735; SER1503. ADOT also must use slope treatments, rock sculpting, and native vegetation landscaping to blend the freeway into natural environment. SER735.

As the district court noted (SER33), none of the Plaintiffs have identified any specific factors the Agencies did not consider, nor have they identified additional harm-minimizing measures the Agencies failed to take. Even if they had, such "flyspecking" of the analysis does not show that the Agencies' § 4(f) determination is arbitrary and capricious. *Adler*, 675 F.2d at 1095 ("[E]ven under the exacting § 4(f) requirements, the judicial branch may not 'fly speck,' if it appears, in its review, that all factors and standards were considered."); *Conservation All. of St. Lucie Cty.*, 847 F.3d at 1326 ("Section 4(f)(2) does not require the FHWA to avoid parkland at all cost."). Indeed, in *Citizens Against Burlington*, the D.C. Circuit refused to find a § 4(f) mitigation measure insufficient even when the agency had not yet identified "where exactly" in the park the campground would be relocated. 938 F.2d at 204.

Instead, PARC erroneously claims that the Agencies' § 4(f) determination cannot be sufficient because the Agencies have not completed the design process for the Project. Br. 38-39. Section 4(f) approval and the NEPA process must be complete before final design occurs. 23 C.F.R. § 771.113(a) (stating that final design must occur after the ROD is signed); *see also* 23 C.F.R. § 774.9(a) (requiring that "[t]he potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action"); *City of Alexandria*, 198 F.3d at 873 ("[I]ndeed the Administration is required to conduct such 'final design activities' after it completes its Final EIS."). The Agencies had sufficient information to determine the effects of the Project on the SMPP, such as the location, profile, number of lanes and bridges, and traffic volumes.

In 2008, ADOT published the Pre-Initial Location/Design Concept Report, which contained substantial discussion of the engineering plans, constraints, and costs, as well as typical engineering plans and profiles, crosssections, elevations, and estimates for the preferred alternative. In April 2013, ADOT updated the 2008 Report with the Initial Location/Design Concept Report. *See, e.g.*, SER5352-58. In the Appendix to the 2013 Report, ADOT presented the 15% Plans and Typical Sections of the Preferred Alternative. *See, e.g.*, SER5352-58. These Reports contain hundreds of pages providing extensive details on the preferred alternative, allowing the Agencies to determine appropriate mitigation measures. To avoid overburdening the Court, we provide only a few excerpts from these reports in the SER, but the full

Reports are available upon the Court's request. *See also* SER4483-4829 (Final Location/Design Concept Report).

PARC's reliance on *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 401 (4th Cir. 2014), *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971), and *Monroe Cty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 700 (2d Cir. 1972), is misplaced. Br. 40. *Defenders of Wildlife* is inapposite because that case did not address the extent to which design must be complete. Rather, it concerned the joint planning exception for § 4(f) properties, which is not at issue here. 762 F.3d at 401. Indeed, the Fourth Circuit expressly did "not engage in" an "analy[sis of] whether Section 4(f)'s substantive requirements had been met." *Id.*

In *D.C. Federation*, the court held that the Department of Transportation's approval of a bridge across the Potomac River violated § 4(f)'s "all possible planning" requirement because the Department had not even determined the acreage or location of parkland that would be used. 459 F.2d at 1239. There was no administrative record in that case and no formal findings with regards to § 4(f). In *Monroe County*, the federal agency had approved use of the park but then expressly "refused to impose conditions" on that use to protect the park. 472 F.2d at 700. Here, the administrative record shows that the Agencies carefully studied the effect of the Project on the SMPP, the Agencies explained how they had taken all reasonable measures to minimize or mitigate adverse impacts to the SMPP, and the ROD imposes those measures as conditions of the Project.

III. FHWA considered and will avoid impacts to GRIC's well sites.

The FEIS contains a thorough discussion of the Project's potential impacts to groundwater wells, including the three well sites that are held in trust by the Bureau of Indian Affairs for GRIC. SER800; SER1391 (map); SER1390-96; SER1408; *see also* SER1137; SER1154; SER1160; SER1211. While GRIC first mentioned its interest in these three sites in a footnote in its comment on the FEIS (SER800), the Agencies still covered the potential environmental impacts to such well sites in the FEIS. GRIC's Brief identifies no lacking analysis of environmental impacts in this section. *Metro. Edison*, 460 U.S. at 772 ("NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment."). And while GRIC invokes § 4(f), GRIC presents no theory that these sites qualify as § 4(f) properties. GRIC Br. 58-63; 23 C.F.R. § 774.17 (defining § 4(f) properties).

Instead, GRIC's theory appears to be that: (1) these sites cannot be condemned by ADOT (because they are held in trust by the United States) and (2) the preferred alternative would allegedly require such a condemnation. GRIC then contends that the Agencies' decision was arbitrary and capricious for failing to analyze this issue. GRIC's argument fails for multiple reasons. First, GRIC mentioned these sites only in a footnote in its comment on the FEIS, and even at that time, GRIC failed to mention that the sites were held in trust. *See* SER800. GRIC cannot fault the Agencies for failing to discuss issues in more detail during the administrative process

when GRIC failed to raise these issues adequately in its comments. *See DOT v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004). GRIC therefore has forfeited this issue. *Id.*

Second and more importantly, the Project will not impact these sites. ADOT's Request for Proposals states that the Developer must acknowledge that "ADOT has no power to condemn property rights and interests owned by or on behalf of the GRIC for or in connection with water wells." SER4830. Accordingly, the "Developer's design shall avoid and preserve the GRIC well properties, GRIC's legal access to GRIC well properties, and the water wells, pipes and ditches located therein." SER4831.

GRIC criticizes the draft avoidance schematics it received in November 2015. Br. 61-62. But ADOT and its contractor have developed a Project design that completely avoids the well sites. ADOT provided evidence of this avoidance during the district court proceedings. *See* SER670-72; SER681-88. To the extent the freeway crosses GRIC's easements, the Project will bridge over those easements and thus will not impact them. *See* SER670-72; SER681-88. GRIC's Opening Brief failed to acknowledge these new avoidance measures, much less prove they are inadequate. The modification to the Project to avoid the sites does not create any new significant environmental impacts. If any of the alterations were to result in significant environmental impacts, then the Agencies can conduct a reevaluation under NEPA as provided for in the regulations. *See* 23 C.F.R. § 771.129.

To the extent that the FEIS did not fully disclose that GRIC's three sites are held in trust, that omission is harmless error. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090-91 (9th Cir. 2013) ("Relief is available under the APA only for prejudicial error.") (citing 5 U.S.C. § 706); *Laguna Greenbelt*, 42 F.3d at 527 ("[T]his litigation itself has offered further opportunities for public involvement in the education of agency decision-makers, curing defects that might have existed in the EIS.").[7] Such a finding is particularly appropriate when GRIC itself failed to raise this issue before the Agencies.

[7] To the extent that GRIC argues a violation of the Fifth Amendment or a breach of trust, it did not plead such violations in its complaint. GRIC has not sought leave to amend its pleadings, and any new claim would be untimely.

CONCLUSION

The district court's judgment should be affirmed.[8]

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

ANDREW C. MERGEN
TYLER L. BURGESS
JOHN P. TUSTIN
ROBERT P. STOCKMAN
s/Robert P. Stockman
Attorneys, Appellate Section
Environment & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 353-1834
robert.stockman@usdoj.gov

Of Counsel:
COURTNEY LEAS
DIANE MOBLEY
Office of the Chief Counsel
Federal Highway Administration

MARCH 2017

90-1-4-14452

[8] PARC requests vacatur, injunctive relief, and fees in its Opening Brief, but it does not develop these arguments. Br. 41-42. If this Court concludes that the Service erred and that any error was not harmless, 5 U.S.C. § 706, this Court should remand to the district court to consider the appropriate remedy and fees. *See, e.g.*, *NRDC v. NMFS*, 421 F.3d 872 (9th Cir. 2005).

STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any other related cases within the meaning of Ninth Circuit Rule 28-2.6.

ROBERT P. STOCKMAN
s/Robert P. Stockman
Attorney, Appellate Section
Environment & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 353-1834

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-16586, 16-166

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/ Robert P. Stockman

Date: Mar 17, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

9th Circuit Case Number(s) 16-16586, 16-16605

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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 (date) Mar 17, 2017 .

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