No. 16-16605
Consolidated with No. 16-16586

In the United States Court of Appeals
For the Ninth Circuit

PROTECTING ARIZONA'S RESOURCES AND CHILDREN, ET AL.,

Plaintiff-Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.,

Defendants-Appellees.

GILA RIVER INDIAN COMMUNITY,

Plaintiff-Appellant,

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case Nos. 2:15-cv-00893-DJH and 2:15-cv-01219-DJH
The Honorable Diane J. Humetewa

BRIEF *AMICI CURIAE* OF THE TOHONO O'ODHAM NATION AND THE INTER TRIBAL ASSOCIATION OF ARIZONA IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

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BRIEF OF AMICI CURIAE

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Tohono O'odham Nation is a federally recognized Indian tribe with a land base located in Pima, Pinal, and Maricopa Counties in the State of Arizona. The Tohono O'odham Nation is organized into 11 Districts and is the second largest Indian reservation in the United States, encompassing 2.8 million acres of land. The Tohono O'odham have lived in the region known as Papagueria since time immemorial. Historic Papagueria extends over a much larger area than the present Tohono O'odham reservation; it extends south into Sonora, Mexico, north to central Arizona, west to the Gulf of California, and east to the San Pedro River. The present litigation impacts lands which were part of Papagueria, and thus lands which are culturally significant to the Tohono O'odham.

The Tohono O'odham Nation has a close cultural connection to the Gila River Indian Community ("GRIC"), as together they make up one-half of the four sister tribes along with the Ak-Chin Indian Community and the Salt River Pima Maricopa Indian Community ("SRPMIC"). The four sister tribes share a common ancestor -- the Hohokam -- share a language base, share various religious and

[1] This brief was written entirely by counsel for amici and not by counsel for any party. No party or party's counsel contributed money to prepare or submit this brief. No other person contributed money to prepare or submit this brief.

cultural ties; and are all O'odham. The Hohokam were one of the four major cultures of the American Southwest and Northern Mexico[2] living in and around modern day Pima, Maricopa, and Pinal counties approximately 600 years ago, and are considered to be the builders of the original canal system around the Phoenix metropolitan area[3]. In fact, the term Hohokam is borrowed from the O'odham language[4].

The Hohokam used *Muhadagi Doag*, more commonly known as South Mountain, as both a hunting and gathering ground, and a spiritual center. [5] *Muhadagi Doag* is a Traditional Cultural Property ("TCP"), and remains significant to the O'odham. As a descendant of the Hohokam, the Tohono O'odham have an interest in promoting and advocating for the protection of *Muhadagi Doag*, which contains numerous cultural resource sites. Several of these cultural resource sites will be affected by Appellees' project, the South Mountain Transportation Corridor ("SMTC").

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[2] D. Rose, *The Hohokam,* (February 2014) *at* http://www.arizonaruins.com/articles/hohokam/hohokam.html (last visited January 19, 2017).
[3] *Id*.
[4] *Id*.
[5] As illustrated by the large quantities of Hohokam rock carvings and village sites in South Mountain Park. *See also* "Hohokam Rock Art at South Mountain Park" *at* https://www.phoenix.gov/parkssite/Documents/109323.pdf (last visited January 19, 2017).

The Inter Tribal Association of Arizona ("ITAA") is an intertribal organization comprised of 21 federally recognized Indian Tribes with lands located in Arizona, California, New Mexico and Nevada. The Member Tribes of the ITAA have worked together since 1952 to provide a united voice for Tribal governments on common issues and concerns. The representatives of ITAA are the highest elected Tribal officials from each Tribe, including Tribal chairpersons, presidents and governors. The Gila River Indian Community and Tohono O'odham Nation are Members of ITAA.

SMTC contains both an eastern preferred alternative, and a western preferred alternative. Both preferred alternatives impact *Muhadagi Doag* and cultural resource sites therein. In fact, the preferred alternatives will impact no less than 12 prehistoric cultural resource sites. The W59 preferred alternative will impact two (2) village sites and three (3) artifact scatters, while the E1 alternative will impact one (1) artifact scatter, two (2) lithic quarry sites, and four (4) trail sites[6]. These cultural resource sites are all prehistoric Hohokam sites. Additionally, the E1 preferred alternative will also impact two (2) additional cultural resource sites: a petroglyph site, and an active shrine.[7] Although the active construction will avoid the petroglyph site and the active shrine, these two (2) sites

[6] Appellees' DEIS and Section 4(f) Evaluation at Table 4-46, p. 4-131.
[7] *Id.* at p. 4-130 and 4-131.

will foreseeably be impacted by increased access to the sites, including increased access by potential vandals. Moreover, the E1 preferred alternative will result in modification to the spiritual landscape of *Muhadagi Doag*, will alter access to culturally important places, and will interfere with traditional ceremonial practices and religious activities[8].

Amici have an interest in protecting Tribal sacred sites and TCPs for future generations; and an interest in protecting the cultural resources sites listed above and the *Muhadagi Doag* TCP from adverse impacts. *Amici* are concerned that the District Court ruling could set a dangerous precedent that would hinder Tribes' ability to protect their TCPs, maintain their cultural connections and worldviews, and practice their religious ceremonies in the future. Such precedent would result in substantial harm to the traditional, cultural and religious practices of Tribal people.

In finding that the Appellees had not violated the National Environmental Policy Act ("NEPA")[9], the District Court found no heightened standard applied to an assessment of the effects of the South Mountain Transportation Corridor ("SMTC") on the members of the GRIC. Significantly, the District Court found that an analysis of the impacts calculated across the entire impacted population was

[8] *Id.* at p. 4-132.
[9] 42 U.S.C. §§ 4321-4347.

sufficient to comply with NEPA. This finding is contrary to the body of law recognizing and protecting Indian tribes from disparate impacts of project development, and is contrary to federal policy.

In order to give American Indians and their TCPs the protection anticipated under the law, various federal laws and policies must be read in concert. When these laws and policies are read together, it gives rise to a heightened standard of assessment; particularly when environmental impacts will disproportionately affect American Indians. This heightened standard of assessment should have been applied in the instant case.

SUMMARY OF THE ARGUMENT

The District Court should have applied a heightened standard of impact assessment because American Indian populations are affected by the SMTC, and these populations will be affected disproportionately. This heightened standard is supported by NEPA, Federal Indian law and policy, and the federal government's trust responsibility to American Indians.

NEPA requires agencies to look at the impacts of their actions on the human environment[10], and also mandates that impact assessments be conducted for

[10] 40 C.F.R. § 1508.14

vulnerable populations, including minorities[11]. On its face, this mandate creates a heightened standard of impact assessment for American Indian populations. As Department of Justice guidance makes clear, American Indians are a subset of the vulnerable population category.[12] This heightened standard is also supported by the Department of Transportation's own regulations, which include American Indians in the definition of minorities.[13]

There are several components of compliance with NEPA's requirements, of which an Environmental Justice study is one.[14] The purpose of the Environmental Justice study is to assess the impacts of a project on vulnerable populations to ensure fair distribution of environmental burdens across all people. This assessment allows an agency to determine whether one or more vulnerable populations will suffer disproportionate impacts. While Appellees' conducted an

[11] 23 CFR § 771.125(a)(1) and Executive Order 12898, Federal Register Vol. 59 No. 32, 7629-7633 (February 16, 1994).
[12] U.S. Attorney General Eric H. Holder, Jr., Department of Justice Guidance on Environmental Justice (December 3, 2014)
[13] DOT Order 5610.2(a)
[14] Environmental justice policy can be found in Title VI of the Civil Right Act of 1964 (as amended); Executive Order 12898, issued February 11, 1994; the Memorandum of Understanding on Environmental Justice and Executive Order 12898, issued August 4, 2011; DOT Order 5610.2(a), Environmental Justice in Minority and Low-Income Populations, issued May 10, 2012; CEQ Guidance: "Environmental Justice: Guidance Under the National Environmental Policy Act," issued December 10, 1997; and the Revised Department of Transportation Environmental Justice Strategy, issued March 28, 2012.

Environmental Justice study, the study area included a 156 plus square mile area (known as the SMTC)[15] diluting the concentration of American Indians affected by the project[16], and failed to account for environmental burdens suffered by American Indians as a result of the cultural and religious significance of *Muhadagi Doag*.[17] Therefore, Appellees' Environmental Justice study did not adequately analyze the disproportionate impact of the proposed action on a vulnerable population. In the instant case, the only way to satisfy NEPA's requirement of impact assessments for vulnerable populations is to conduct an impact assessment specific to affected American Indian communities, particularly the GRIC. A broad, across the board assessment cannot suffice.

As discussed above, *Muhadagi Doag* is a TCP containing numerous cultural resource sites. For American Indians, TCPs are sites of past and present religious ceremony, cultural connection, and tribal patrimony. These sites affect the day-to-day living and religious practices of American Indians in a way that other groups of peoples are not affected. Impacts to American Indian TCPs are to be assessed, and avoided or mitigated under the National Historic Preservation Act

[15] South Mountain Corridor Team, Title VI and Environmental Justice Report (April 2013).
[16] *Id.*
[17] *Id.*

("NHPA")[18]. The requirement to preserve American Indian TCPs, and the special connections American Indians have to their TCPs support a heightened standard of impact assessment for American Indian populations.

The harmonization canon of statutory interpretation supports this interpretation.[19] This canon requires that the body of Federal Indian law be read together with federal statutes such as NEPA. Federal Indian law shows a clear Congressional intent to enact heightened standards of assessment when there are adverse impacts on American Indians. These laws include, among others, the Native American Graves Protection and Repatriation Act ("NAGPRA")[20], the NHPA, and the American Indian Religious Freedom Act ("AIRFA")[21]; all of which address special protections for American Indians and Indian Tribes. As the Department of Justice has recognized, "the federal government has special responsibilities involving federally recognized Indian tribes…attorneys litigating environmental justice cases affecting such tribes will confront additional issues

[18] 16 U.S.C. §§ 470a *et seq.*; *see also* 36 CFR § 800.1(a) ("The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.").
[19] *See Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974).
[20] 25 U.S.C. §§ 3001 *et seq.*
[21] 42 U.S.C. § 1996

involving the relationship between the Department of Justice, the Department of the Interior, and tribal nations."[22]

When Federal Indian policy is used as the backdrop against which Congressional action in the area of American Indian affairs is interpreted, it becomes clear that the heightened standards pertaining to American Indian community impacts are based on the tribes' unique relationship to the federal government and the federal government's trust responsibility to American Indians. Federal Indian policy drives Federal Indian law, and protecting American Indian communities and resources is at the heart of the current policy. Dismissing Appellants' claims on the grounds that executive policy does not create an enforceable right undermines the substantive application of federal law in the area of American Indian affairs, and undermines the purposes behind NEPA's Environmental Justice policy ("EJP").

REASONS FOR REVERSING THE DISTRICT COURT

The District Court's Order is contrary to the body of law recognizing and protecting Indian tribes from disparate impacts of project development, and is contrary to federal policy. Appellees' failed to satisfy the requirements of NEPA[23]

[22] U.S. Attorney General Eric H. Holder, Jr., Department of Justice Guidance on Environmental Justice (December 3, 2014), p. 12.
[23] 42 U.S.C. §§ 4321-4347.

by conducting an inadequate Environmental Justice study that failed to account for the disproportionate environmental burdens borne by the GRIC. A heightened standard of impact assessment should have been applied *vis-à-vis* the GRIC.

I. NEPA Mandates Impact Assessments on Vulnerable Populations, including American Indians.

NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") when they propose to undertake "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "The goals of NEPA are…to ensure the agency will have detailed information on significant environmental impacts when it makes its decision; and…to guarantee that this information will be available to a larger audience." *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 575 (9th Cir. 1998) (internal citations omitted). NEPA advances the federal government's continuing policy to use all practicable means to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.[24] "The procedural requirements prescribed in NEPA and its implementing regulations are to be strictly interpreted to the fullest extent possible." *State of Cal. v. Block*, 690

[24] 42 U.S.C. § 4331(a).

F.2d 753, 769 (9th Cir. 1982). And NEPA requires a final EIS is to document compliance with all applicable laws and Executive Orders.[25]

NEPA mandates both consultation with[26], and impact assessments on American Indians[27]. 40 CFR § 1501 *et seq*. NEPA implementing regulations require full consideration of the impacts of a proposal on the physical, biological, social and economic aspects of the human environment.[28] Additionally, the requirements of Executive Order 12898[29] are incorporated into NEPA, through the language of 23 CFR § 771.125(a)(1).[30]

Executive Order 12898 requires federal agencies to incorporate environmental justice in minority and low-income populations into their planning programs. The purpose of Executive Order 12898 is "to focus Federal attention on

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[25] 23 CFR § 771.125(a)(1).
[26] *See* Council on Environmental Quality, Regulations for Implementing NEPA §§ 1501.2(d)(2), 1501.7(a)(1) and 1506.6(b)(3)(ii).
[27] *See* Council on Environmental Quality, Environmental Justice: "Guidance Under the National Environmental Policy Act" (December 10, 1997) (listing American Indians as both a vulnerable and minority population).
[28] 40 C.F.R. § 1508.14.
[29] Federal Register Vol. 59 No. 32, 7629-7633 (February 16, 1994).
[30] While this question does not appear to have been settled as a matter of law in the Ninth Circuit, at least one circuit has held that an environmental justice analysis of the effects on minority and low-income populations in an EIS could be reviewed under NEPA and the APA. *See Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004); *See also Rattigan v. Holder*, 689 F.3d 764, 770 (D.C. Cir. 2012) (*finding* that Title VII and Executive Order 12968 were on equal footing).

the environmental and human health conditions in minority…and low-income communities with the goal of achieving environmental justice."[31] It was President Clinton's intent to underscore certain provisions of existing law that were important in efforts "to prevent those minority and low-income communities from being subject to disproportionately high and adverse environmental effects."[32] Executive Order 12898 sets forth a requirement for separate impact assessments when minority (including American Indian) and/or low-income communities are affected, and requires environmental human health analyses of multiple and cumulative exposures.

In the instant case, Appellees' conducted an Environmental Justice study over an area greater than 156 square miles.[33] Within that 156 plus square miles, Native Americans account for 0.2 percent of the population.[34] However, areas with the "greatest percentage of minority populations are located within ½ mile of the existing I-10 corridor and within the GRIC."[35] Three of the GRIC's seven

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[31] President William "Bill" Clinton, Memorandum on Environmental Justice (February 11, 1994) found at *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/index.php?pid=49639 (last visited January 22, 2017).
[32] *Id.*
[33] *See* South Mountain Corridor Team, Title VI and Environmental Justice Report (April 2013) at p. 1-1.
[34] *Id.* at. Table 2.
[35] *Id.* at p. 3-1.

districts are located within the SMTC study area.[36] And, the constitution of minorities in the GRIC is 98.8 percent; most of these classified as American Indian.[37] For purposes of the Environmental Justice study, the study area was overly broad. The disproportionate nature of impacts to the GRIC could not be adequately determined because the percentage of American Indians impacted by the project was diluted over the 156 plus square miles of the study area.

The Department of Transportation's ("DOT") own regulations support this analysis. DOT regulations integrating environmental justice into its policies and practices includes American Indians in its definition of minority, and establishes the regulations for the examination of the potential for disproportionately high and adverse effects on minority and low-income populations. DOT Order 5610.2(a) defines "disproportionately high and adverse effect on minority and low-income populations" as an effect that "…will be suffered by the minority population…and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population…."

In addition to the misleading representation of the concentration of American Indian populations in the Environmental Justice study, *Muhadagi Doag* is a TCP for the GRIC and is used for both religious and cultural activities.

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[36] *Id. at p. 3-2.*
[37] *Id.*

Considering that at least 14[38] cultural resource sites will be impacted by the project, and that the E1 preferred alternative will result in modification to the spiritual landscape of *Muhadagi Doag*, alter access to culturally important places, and will interfere with traditional ceremonial practices and religious activities[39], there is no question that the SMTC's impact on the GRIC will be greater in magnitude than that suffered by the general populace. Although Appellees' Environmental Justice study included American Indians, it did not include an assessment of the SMTC's impacts on the GRIC's social environment.[40] Without a specific assessment of the SMTC's impacts on the GRIC, the requirements of Executive Order 12898, as incorporated by NEPA, and DOT's own implementing regulations cannot be satisfied.

The lower court's finding that NEPA does not require a specific assessment of the impacts to the GRIC is both contrary to the law, and contrary to the federal government's commitment to environmental justice. If the District Court's Order were to be upheld, agencies could simply dilute vulnerable populations by expanding the geographical area of the study in an effort to force a finding of no

[38] *See* Appellees' DEIS and Section 4(f) Evaluation at pp. 4-130-132 (2 village sites, 4 artifact scatters, 2 lithic quarry sites, 4 trial sites, 1 active shrine, and 1 petroglyph site).
[39] *Id.* at p. 4-132.
[40] *See* South Mountain Corridor Team, Title VI and Environmental Justice Report (April 2013).

disproportionate impacts; circumventing NEPA's Environmental Justice policy and its concomitant requirements. When a concentrated vulnerable population exists, as it does in this case, the impact assessment must be more targeted.

II. Federal Indian Law and Policy Create a Heightened Standard of Impact Assessment When There are Impacts to American Indians.

A. Federal Laws Pertaining to American Indians Create a Heightened Standard of Impact Assessment.

When American Indian communities are impacted, the requirements of NEPA should be read against the wider backdrop of Federal Indian law. The body of Federal Indian law sets forth heightened standards when American Indians are impacted by agency action. NAGPRA[41] provides greater protection for American Indian burial sites, removal of American Indian human remains, funerary objects, sacred objects, and items of cultural patrimony. The NHPA provides specific protections for American Indian TCPs, and provides for consultation with Tribal Historic Preservation Offices.[42] The AIRFA protects American Indian religious freedoms, including access to sacred sites.[43] And, v*is-à-vis* American Indians, the

[41] 25 U.S.C. §§ 3001 *et seq.*
[42] 16 U.S.C. §§ 470a *et seq.*
[43] 42 U.S.C. § 1996.

requirement to protect cultural resources and accommodate sacred sites is supported by Executive Order 13007.[44]

These statutes cannot operate in a vacuum. Each of these laws, among others, work together to protect American Indians and their resources. To find otherwise would upend the entire field of Federal Indian law and policy.[45] Absent clear Congressional intent to the contrary, NEPA cannot be read as establishing the sole criteria for assessing impacts on American Indian communities. "Federal statutes, regulations, and executive orders pervade the field of Indian law…[and] judicial opinions play an important role in interpreting and harmonizing these multiple sources of law."[46] "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context…It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S.Ct. 2518 (2007) (internal citations omitted).

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[44] 61 Federal Register 26771-26772 (May 24, 1996) at Section 1.
[45] *See In re General Adjudication of All Right to Use Water in Gila River System and Source*, 201 Ariz. 307, 318, 35 P.3d 68, 79 (2001) ("In addition to history, the court should consider tribal culture…Preservation of culture benefits both Indians and non-Indians; for this reason, Congress has recognized the 'unique values of Indian culture' in our society.") (internal citations omitted).
[46] Cohen's Handbook on Federal Indian Law (2005 Ed.) at p. 1.

The harmonization canon of statutory interpretation requires that, "When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S.Ct. 593 (2001) (*quoting Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474 (1974)). "When courts, faced with two arguably conflicting laws (federal statutory law or otherwise), refuse to allow one law to override the other and instead invoke the goal of harmonization, they implicitly place the two potentially conflicting laws on equal footing." *Rattigan v. Holder*, 689 F.3d 764, 770 (D.C. Cir. 2012) (*citing J.E.M. Ag Supply, supra,* at 143-44 (2001)). "The meaning of one statute may be affected by other Acts, particularly where Congress has spoken…more significantly to the topic at hand." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291 (2000). And, "statutes dealing with similar subjects should be interpreted harmoniously." *U.S. v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (internal citations omitted).

As already discussed, Congress has repeatedly spoken on the subject of American Indians. NEPA and EJP must be read in harmony with existing Federal Indian law to give full intent to the federal regulatory scheme and statutory protections for American Indians. In the case at bar, there is no Congressional indication that NEPA was intended to circumvent or replace other statutory

protections for American Indians. Instead, NEPA furthers these other statutory protections. This Court should employ the harmonization canon of statutory interpretation and hold that federal law and policy establishes a heightened standard of impact assessment *vis-à-vis* American Indians.

B. Federal Law and Policy must be Read Together to Adequately Protect TCPs and Appropriately Fulfill Congress' Responsibility to American Indians.

The heightened standard is bolstered when read against the backdrop of Federal Indian policy.[47] While Federal Indian policy is a fluid and amorphous construct[48] most often described as a swinging pendulum, there is no doubt that it

[47] *See In re General, supra,* at 313 ("Indian reservations, however, are different. In its role as trustee of such lands, the government must act for the Indians' benefit. This fiduciary relationship is referred to as 'one of the primary cornerstones of Indian law.' Thus, treaties, statutes, and executive orders are construed liberally in the Indians' favor.") (internal citations omitted); and ("United States' policy [is] 'to promote Indian self-determination and economic self-sufficiency'…and Indian rights 'are given broader interpretation in order to further the federal goal.'") *Id.* at 316 (internal citations omitted).

[48] Cohen, *supra*, at p. 112 ("The 500 years of Indian policy reflect many changes of attitudes and circumstances…'it is perhaps possible,' Judge William Canby, Jr. notes, 'that the contending forces in Indian affairs have reached some sort of balance, and that no further major change of direction will occur…[but] nothing in the history of federal Indian policy…justifies confidence in such a conclusion.'"). *See also U.S. v. John*, 437 U.S.634, 98 S.Ct. 2541 (1978) for an illustrative example of the shift in federal Indian policy as it pertained to Mississippi Choctaw.

is the policy that drives the statutory landscape.[49] Since 1968, self-determination has been the Federal Indian policy.[50]

Just a few examples of policy driving law and statutory protections for American Indians are *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982), *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378 (1983), and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987). In each of these cases, the United States Supreme Court openly relied on Federal Indian policy and Executive Branch actions when rendering its decisions; specifically, the federal policy of self-governance and economic development.[51]

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[49] The policy of self-determination has resulted in the enactment of a wide range of laws pertaining specifically to American Indians, including but not limited to the Indian Civil Rights Act (25 U.S.C. §§ 1301-1304), the Indian Self-Determination and Education Assistance Act (25 U.S.C. §§ 450 *et seq.*), the Tribal Self-Governance Act (25 U.S.C. §§ 458aa – 458hh), the Indian Child Welfare Act (25 U.S.C. §§ 1901 *et seq.*), the Archeological Resources Protection Act (16 U.S.C. §§ 470aa – 470mm), the National Museum of the American Indian Act (20 U.S.C. § 80q), the Native American Graves Protection and Repatriation Act (25 U.S.C. §§ 3001 *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. § 1996), the Tribally Controlled Schools Act (25 U.S.C. §§ 2501 *et seq.*), the Indians Arts and Crafts Act (25 U.S.C. §§ 305 *et seq.*), the National Indian Forest Management Act (25 U.S.C. §§ 3101 *et seq.*), and the American Indian Trust Management Reform Act (25 U.S.C. §§ 4001 *et seq.*).

[50] *See* President Lyndon B. Johnson, Message to Congress on Indian Affairs, "The Forgotten American" (March 6, 1968) found at *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=28709 (last visited January 25, 2017).

[51] Matthew L. M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Nebraska Law Review, 172-174 (2006).

In *Merrion*, a case in which the Jicarilla Apache Tribe sought to tax nonmembers, the Court relied on executive actions citing to a number of Executive Orders when finding that, "official executive pronouncements have repeatedly recognized…." *Supra*, at 139. The *Merrion* Court also relied on "the views of each of the federal branches…and the conception of Indian tribes as domestic, dependent nations." *Id.* at 144. And the Court ultimately found that, "imposing such a tax would not contravene federal energy policy." *Id.* at 152.

In *Mescalero Apache*, the State sought to exercise concurrent jurisdiction over nonmembers hunting and fishing on Mescalero Apache lands. In denying the State, the Court stated, "the traditional notions of Indian sovereignty provide a crucial backdrop....Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Supra*, at 334-335 (internal citations omitted). The Court went on to state that, "We have stressed that Congress' objective of furthering tribal self-government…includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *Id*. at 335 (internal citations omitted). The *Mescalero Apache* Court ultimately found that

"the assertion of concurrent jurisdiction…would threaten to disrupt the federal and tribal regulatory scheme,"[52] along with threatening Congress' overriding objective.

Similarly in *Cabazon*, the State sought to exercise jurisdiction over bingo on Cabazon Band of Mission Indian lands. The *Cabazon* Court again relied on Federal Indian policy when denying the State, stating, "The federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, are important, and federal agencies, acting under federal laws, have sought to implement them….Such policies and actions are of particular relevance in this case." *Supra*, at 203. And ultimately finding that, "the current federal policy is to promote precisely what California seeks to prevent." *Id*. at 220.

It is against this backdrop of Federal Indian policy that federal environmental statutes, like NEPA, should be interpreted when impacts to American Indian communities are present. Since the United States Supreme Court's decisions comprising the Marshall Trilogy[53] were handed down, the federal government has had a duty to fulfill its trust responsibility to American

[52] *Mescalero Apache*, *supra*, at 341.
[53] *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

Indians and Indian Tribes.[54] It is through Federal Indian policy that the government's trust responsibility is carried out. And it is precisely this trust responsibility that gives rise to a heightened standard of impact assessment when American Indian communities, and their TCPs, are affected. Through NEPA, and other Federal Indian law and policy, the federal government has placed specific duties on agencies *vis-à-vis* American Indians. The District Court, in failing to recognize those duties, apply the heightened standard, and require a more targeted Environmental Justice study, failed to appropriately analyze Appellees' FEIS for NEPA compliance.

CONCLUSION

The decision of the District Court should be reversed because it fails to uphold the requirements of NEPA. Appellees' Environmental Justice study was inadequate because it significantly diluted the American Indian population in the study area from a concentrated 98.8 percent to 0.2 percent throughout the study area, and failed to account for the significant impacts suffered by GRIC. These impacts are to the *Muhadagi Doag* TCP, and include at least 14 cultural resource sites therein. Additionally, GRIC will be impacted by the modification to the spiritual landscape of *Muhadagi Doag*, the alteration in access to culturally

[54] *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *see also Seminole Nation v. United States*, 316 U.S. 286 (1942).

important places, and the interference with traditional ceremonial practices and religious activities. Appellees' inadequate Environmental Justice study is a violation of NEPA. Additionally, in the instant case, NEPA must be read against the backdrop of, and in harmony with, Federal Indian law and policy in order to give full effect to the federal government's statutory and regulatory scheme. When interpreted in this manner, a heightened standard of impact assessment must be applied to affected American Indian communities. The District Court failed to apply this standard.

January 25, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4) and (5), and Ninth Circuit Rule 32, I certify that the attached Brief Amici Curiae for the Tohono O'odham Nation is proportionally spaced, uses 14-point Times New Roman and contains 4933 words.

January 25, 2017 s/Virjinya R. A. Torrez

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2017, I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit, and served to counsel, via ECF system.

January 25, 2017 s/Virjinya R. A. Torrez