Nos. 22-15092, 22-15093

Oral argument scheduled June 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FALLON PAIUTE-SHOSHONE TRIBE, et al.,
Plaintiffs/Appellees and Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants/Cross-Appellees,

ORMAT NEVADA, INC.
Intervenor-Defendant/Appellant and Cross-Appellee.

Appeal from the United States District Court for Nevada
No. 3:21-cv-00512-RCJ (Hon. Jones, J.)

FEDERAL APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
ARMMP	Aquatic Resources Monitoring and Mitigation Plan
BLM	Bureau of Land Management
DVT	Dixie Valley Toad
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
GSA	Geothermal Steam Act
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
RDEA	Revised Draft Environmental Assessment
RFRA	Religious Freedom Restoration Act

INTRODUCTION

In November 2021, following more than a decade of tribal consultation and four years of environmental review (including two rounds of public comment), the Bureau of Land Management (BLM) authorized ORNI 32, LLC, a subsidiary of Ormat Nevada, Inc. (collectively, Ormat), to construct and operate two geothermal power plants on federal lands in Nevada's Dixie Valley (the project). Once construction is complete and operations begin, the project will circulate hot water between a deep geologic reservoir and two above-ground facilities to generate zero-emissions electricity available for dispatch 24 hours a day, 7 days a week.

Before BLM's approval, the Fallon Paiute-Shoshone Tribe (FPST or the Tribe) and the Center for Biological Diversity (CBD) voiced concern about the project. Although BLM determined, based on its analysis of all existing data, including drilling logs and the results of a 46-day flow test simulating operations, that the project would not have any significant impacts, the agency nonetheless modified the project in response to these concerns. To ensure geothermal operations would not materially alter the flow, chemistry, or temperature of the nearby Dixie Valley hot springs, a site important to the Tribe's religious practice and the only known habitat for the Dixie Valley Toad (DVT), BLM, in cooperation with partner agencies and Ormat, developed a comprehensive monitoring and mitigation plan. The plan established extensive monitoring requirements to alert

Ormat and BLM to changes in the riparian ecosystem and defined corrective measures BLM could require Ormat to take, including modifying or even halting operations, in the unexpected event any changes exceeded conservative, pre-defined thresholds. To address the Tribe's concerns about the project's effects on its religious practice, BLM accommodated every request FPST made short of abandoning the project. It also required Ormat to make substantial changes to the project to minimize the visual and auditory impacts of construction and operations on the Tribe; accordingly, Ormat adjusted the facility's siting, relocated the power line necessary to connect the facilities to the electric grid, and took other design and operational steps to minimize the project's noise and light impacts.

Despite BLM's good faith efforts to address their concerns, CBD and FPST remain opposed to the project. They jointly brought suit against BLM and sought a preliminary injunction to halt the project's construction during the pendency of the litigation. The district court held that Plaintiffs had not satisfied their burden of demonstrating that they were likely to succeed on the merits, and refused to enjoin the project beyond 90 days because, after that period, the harms to Ormat and the public interest outweighed any harms to Plaintiffs. The district court did not abuse its discretion in weighing the equities and crafting an appropriately limited injunction. This Court should therefore affirm.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*; the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* 2-SER-540.

On January 4, 2022, the district court entered an order granting Plaintiffs' motion for a preliminary injunction for 90 days and denying the injunction beyond that period. 1-ER-2. Intervenor-Defendant Ormat appealed on January 20, 2022. 5-ER-976. Plaintiffs CBD/FPST filed a notice of cross-appeal on January 21, 2022. 3-SER-592. Their appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The overarching issue is whether the district court abused its discretion in denying CBD/FPST a preliminary injunction beyond 90 days. That issue subsumes the following issues:

1. Whether the district court correctly concluded that Plaintiffs failed to demonstrate they are likely to succeed on the merits of their NEPA claims?

2. Whether the district court correctly concluded that Plaintiffs failed to demonstrate they are likely to succeed on the merits of their APA claim?

3. Whether the district court correctly concluded that Plaintiffs have failed to demonstrate FPST is likely to succeed on the merits of its Religious Freedom Restoration Act claim?

4. Whether the district court abused its discretion in concluding that, after 90 days, the balance of the equities and public interest disfavor an injunction?

STATEMENT OF THE CASE

A. Legal background

1. Geothermal Development on Public Lands

BLM administers about one-tenth of the U.S. land base, including 700 million acres of land in the Western United States. The Federal Land Policy and Management Act (FLPMA) directs BLM to manage these public lands for "multiple use and sustained yield," including the development of natural resources and the conservation of environmental, ecological, and recreational values. 43 U.S.C. § 1732(a); *see also id.* § 1701(a)(1)-(8). FLPMA requires BLM to prepare regional land use plans that set forth the allowable uses in that area, and these plans establish goals and objectives for the management of particular areas and tracts of land. *Id.* § 1712(a). Pursuant to the Geothermal Steam Act (GSA), 30 U.S.C. § 1001 *et seq.*, these goals may include the development of geothermal resources.

Congress enacted the GSA "to promote the development of geothermal leases on federal lands." *Geo-Energy Partners-1983 Ltd. v. Salazar*, 613 F.3d 946, 949 (9th Cir. 2010). The GSA provides a framework for developing and managing geothermal resources[1] on federal lands and directs the Secretary of the Interior to promulgate regulations governing the management and development of geothermal resources on the millions of acres of federal land in the western United States available for geothermal leasing. The Secretary has delegated authority for managing geothermal leases on all federal land to BLM.

The GSA and BLM's implementing regulations, 43 C.F.R. § 3200 *et seq*., govern all stages of the geothermal development process, from leasing through exploration, commercial use (or "utilization" in the GSA's parlance), and closeout and reclamation. Separate requirements, including permitting requirements, apply to geothermal exploration, drilling, and utilization. *See* 43 C.F.R. §§ 3250–3256 (exploration); *id.* §§ 3260–3267 (drilling); *id.* §§ 3270–3279 (utilization). After a geothermal lessee has completed exploration and drilling operations, determined the resource can support commercial use (e.g., an electricity generation facility that uses the geothermal resource as the fuel source), and decided to move forward with

[1] Geothermal resources are "(i) all products of geothermal processes, embracing indigenous steam, hot water and hot brines; (ii) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations; (iii) heat or other associated energy found in geothermal formations; and (iv) any byproduct derived from them." 30 U.S.C. § 1001(c).

commercial production, it must submit to BLM a utilization plan for approval. The utilization plan must fully describe the facility, including measures for environmental protection and mitigation to protect fish and wildlife and protect cultural and visual resources. *See* 43 C.F.R. § 3272.10; *id.* § 3272.12. BLM approves geothermal utilization plans and facility construction permits subject to the terms of its regulations and any additional conditions of approval it considers necessary. 43 C.F.R. § 3270.12; *id.* § 3272.14(c). Operators are also required to comply with their lease stipulations and all applicable federal, state, and local laws and regulations, including those related to sanitation, water quality, wildlife, safety, and reclamation. 43 C.F.R. § 3200.4; *id.* § 3275.12.

2. NEPA

NEPA requires federal agencies to examine the environmental effects of proposed federal actions and prepare an environmental impact statement (EIS) for any proposed action that will have a significant effect on the environment. 42 U.S.C. § 4332(c); 40 C.F.R. § 1501.3. While NEPA's requirement for analysis is intended to ensure informed decisionmaking, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–351 (1989).

Regulations promulgated by the Council on Environmental Quality (CEQ) provide that an agency may prepare an environmental assessment (EA) to

determine whether a proposed action may have a significant impact on the environment, and thus whether an EIS is necessary.[2] 40 C.F.R. § 1501.3, 1501.4. An EA is a concise document containing sufficient evidence and analysis for the agency to determine whether the proposed action's environmental effects may rise to the level of significance. *Id.* § 1508.9. If the agency determines, following its preparation of the EA, that the environmental effects may be significant, it must prepare an EIS. If the agency determines, however, that the proposed action will not significantly impact the environment, the agency may prepare a finding of no significant impact (FONSI) and authorize the proposed action without preparing an EIS. *Id.* § 1501.4(b), 1508.13.

An agency may include mitigation measures as a component of a proposed project's design to prevent or minimize impacts to the environment. *See id.* § 1508.20 (defining mitigation); *see generally* Council on Environmental Quality, *Guidance on Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact* (Jan. 14, 2011). Conditions mitigating the environmental consequences of an action may justify an agency's decision not to prepare an environmental impact statement. *See Friends*

[2] CEQ amended its NEPA regulations in 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). Because BLM started the NEPA process for this proposed action under the previous regulations, BLM opted to apply the pre-2020 regulations to apply to this action; therefore, the prior regulations govern this Court's review.

of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993).

3. RFRA

The Free Exercise Clause of the U.S. Constitution prohibits the government from imposing a substantial burden on a person's religious exercise unless the burden results from a valid and neutral law of general applicability. To legislatively expand the protection of religious exercise to all federal laws, including those that are neutral and of general applicability, Congress enacted RFRA. *See* 42 U.S.C. § 2000bb *et seq.* RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the government's action satisfies strict scrutiny. *Id.* § 2000bb-1.

B. Factual background

Dixie Valley, located approximately 43 miles northeast of Fallon in Churchill County, Nevada, consists of a mix of private and public lands. Most of the public lands and the associated mineral resources are administered by BLM's Carson City District Office. The U.S. Navy owns the surface rights to some land in the Dixie Valley.[3]

[3] The mineral rights to about 760 acres of U.S. Navy land are privately owned by Ormat. 3-ER-209.

In 2007, Ormat acquired multiple, contiguous leases covering around 17,500 acres of public land in the central part of the Dixie Valley, and in late 2010, Ormat also acquired several adjacent leases on approximately 4,600 acres of land. Together, these leased areas form the Combined Dixie Meadows Geothermal Unit Area (Lease Area).[4] 2-ER-157.

Ormat began developing geothermal resources in the Lease Area shortly after acquiring its leases. In 2010 and 2011, after conducting two EAs, BLM authorized Ormat to conduct exploration activities and drill multiple wells in the Lease Area. 3-ER-209. Ormat drilled several exploratory wells and conducted other exploratory activities in the Lease Area. This drilling indicated that significant geothermal resources were likely to exist near the western edge of the Dixie Valley, and Ormat concentrated subsequent exploratory drilling there. The company ultimately drilled nine wells in the Lease Area. 3-ER-209–211. Ormat also conducted a 46-day flow test, which simulated the facility's flow rate during the plant's first year of operation. Although the flow test was conducted primarily to assess the commercial viability of the resource, during the test period Ormat also monitored the test's impact on the chemistry and temperature at multiple spring locations. The company also sent tracer fluids to assess the degree of hydraulic

[4] Ormat also obtained an additional geothermal lease on the western side of the Leasing Area. 3-ER-210.

connectivity between the geothermal reservoir and springs in Dixie Meadows. 4-ER-730–772. The flow test supported Ormat's hydrogeologic model of the area, which posited that the geothermal reservoir was not directly connected to the Dixie Valley springs, and indicated that pumping would not impact the springs. 4-ER-730–733.

In 2015, Ormat informed BLM that it wished to commercially develop the geothermal resource. The company proposed to build and operate two 30-MW generation facilities on the western edge of the Dixie Valley, drill up to 16 geothermal production and injection well sites and 8 core hole wells, and construct and operate pipelines, roads, and associated facilities to support the power plants. 3-ER-222–223 (details about each of these project components can be found at 3-ER-228–241). Ormat also proposed to construct and operate a 48-mile power line to carry the power generated at the facilities to the grid (gen-tie line). 3-ER-241.

The facilities would generate power using Ormat's binary technology. 3-ER-207. Binary geothermal plants are closed loop systems that use the heat from the geothermal reservoir to heat a secondary fluid with a low boiling point; the heat from the geothermal fluid vaporizes the secondary fluid and the vapor drives the turbines to generate electricity. Minimal geothermal fluid is consumed in this process; once the heat has been extracted, the geothermal fluid is reinjected back in the ground to maintain reservoir pressure and be reheated. 3-ER-237.

BLM convened an internal project initiation meeting in June 2015 to discuss NEPA compliance and reinitiated tribal consultation shortly thereafter (see *infra*, argument section II.A. for more details on tribal consultation). 3-ER-405; 3-ER-(3-1). In May 2017, BLM released for public comment a 200-page draft EA and six appendices that outlined the proposed project and assessed the environmental impacts of constructing and operating the gen-tie line and the power plants and associated wells and pipelines. The draft EA described the current condition of the environment and evaluated the environmental impacts of the proposed project on 17 aspects of the Dixie Valley, including its water and soil resources, its wildlife and migratory birds, the region's vegetation, wetlands, and riparian areas, BLM sensitive species[5] including the DVT, the area's visual and cultural resources, and Native American religious concerns. It identified the potential for adverse impacts from the project, and contained a particularly extended discussion of the project's possible effects on the Dixie Valley meadows and associated springs as well as the potential for the project to impact the DVT.

In response to public comments that the draft EA did not sufficiently consider the project's potential impacts on the springs, BLM convened a technical working group comprising Ormat, BLM, and BLM's partner agencies (the U.S.

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[5] BLM sensitive species are native species found on BLM-administered lands whose conservation status may be affected by BLM's land management activities. *See* 3-ER-320.

Fish and Wildlife Service, the Navy, the U.S. Geological Survey, and the Nevada Department of Wildlife) to address these concerns. 4-ER-691. The working group recommended that Ormat, with technical working group input, develop a draft Aquatic Resource Monitoring and Mitigation Plan (ARMMP). A draft ARMMP and a revised draft EA (RDEA) were released for public comment in January 2021. 4-ER-774–975 (RDEA); 2-SER-378–539 (draft ARMMP).

The draft ARMMP required Ormat to maintain the Dixie Valley's existing aquatic, biological, and hydrological resources in their pre-approval condition and established quantitative metrics to ensure Ormat was meeting that objective. For example, the draft ARMMP set a goal of maintaining current groundwater and surface water quality conditions at Dixie Meadows and defined quantitative metrics to achieve this goal (e.g., maintaining spring temperatures and geothermal constituents of the springs within fixed ranges defined by data Ormat had been collecting since 2015).[6]

To permit BLM to verify that these goals were met, the draft ARMMP also set forth monitoring and reporting requirements. The draft ARMMP established that Ormat would implement ongoing monitoring throughout the life of the project at the existing monitoring locations, and added additional monitoring locations as

[6]Ormat collected data episodically between 2015 and 2018 at 15 sites, including 11 spring sites. *See* 4-ER-591 (list of sites); 4-ER-595–600 (monitoring data). Since 2018, Ormat has been collecting the same data quarterly. *See* 4-ER-595–600.

well. This monitoring would assess, on a monthly basis, temperature, pressure, and water chemistry at 9 ground water sites (i.e., in a shallow aquifer), 23 surface water sites, and 4 control sites. Ormat was also required to conduct annual biological monitoring to assess vegetation and species.

If monitoring revealed that the quantitative goals of the project were being exceeded and thus the springs were at risk of not being maintained in their current condition, the ARMMP detailed corrective actions BLM could require Ormat to take if monitoring detected changes in the ecosystem, such as adjusting geothermal reservoir pressure, modifying pumping and injection rates, installing a temporary injection pipeline to the springs in the event of losses of water volume or changes in pH or chemistry, and suspending geothermal production.

Recognizing that the Dixie Valley geothermal reservoir, springs, and meadow were complex, dynamic systems, the draft ARMMP also committed to using an adaptive management process, as authorized by the Department of the Interior's NEPA implementing regulations.[7] *See* 43 C.F.R. § 46.145. Accordingly, the draft ARMMP recognized that, as monitoring continued

[7] Under adaptive management, decisions about resource management are treated as working hypotheses so that future management actions can fully incorporate the knowledge and experience gained up to that time from monitoring, evaluation, and implementation. *See* Department of Interior Adaptive Management Technical Guide; *see also* 43 C.F.R. § 46.30. Used effectively, adaptive management promotes responsible decision-making in the face of uncertainties by allowing resource managers to adjust as outcomes from actions become better understood.

throughout the lifetime of the project, BLM's and Ormat's understanding of the geological reservoir and its connection to the springs might evolve. Given the potential for change and informed by ongoing experience with a complex, underground system, the draft ARMMP permitted the monitoring and threshold triggers to be adjusted over time. 2-SER-386.

The draft ARMMP and a second draft EA were noticed for public comment in January 2021, and, in response to these comments, BLM again revised both documents and issued a final EA and ARMMP in November 2021. 3-ER-194–453 (EA); 4-ER-539–644 (ARMMP). The final ARMMP included several notable changes. First, it increased the frequency of required monitoring. For surface and groundwater monitoring, monitoring requirements increased from monthly to weekly or, in some cases, daily. 4-ER-569; *see also* 4-ER-592, 4-ER-605. For biological data, monitoring was increased from annually to quarterly; BLM also required additional surveys and monitoring specific to the Dixie Valley toad. 4-ER-562–568. Second, the final ARMMP provided a more robust oversight role for the technical working group and clarified that BLM could require increased monitoring and reporting at any time. 4-ER-569. Finally, the final ARMMP required Ormat to conduct at least one year of additional monitoring and submit that data for BLM review before beginning operations. *Id*.

On November 23, 2021, BLM approved the project and issued a decision record, 2-ER-156–186, and FONSI, 2-ER-187–192. The decision record authorizing the project included several conditions. First, as required by the ARMMP, Ormat could begin operations only after the company collected 12 months of data and submitted it, along with a summary report, to BLM. Upon receiving the report and deeming it satisfactory, BLM could give Ormat approval to begin partial operations at the site. 2-ER-160.

Second, Ormat will be required to implement phased operational start-up. In the first phase, Ormat would operate only one of the two facilities, and would do so at less than half of nameplate capacity (up to 12 GW). After a year of such operations, and assuming ongoing monitoring demonstrated that operations had not adversely impacted groundwater or surface water or other habitat and hydraulic resources at the site, Ormat could begin to construct and operate its second facility. 2-ER-160–161.

Third, the decision record made clear that Ormat would have an ongoing obligation to implement the environmental conditions outlined in Appendix J (4-ER-678–707), including the ARMMP, abide by a Memorandum of Agreement negotiated with the FPST (4-ER-708–720), and follow all lease stipulations and conditions of approval. 2-ER-159–61.

The FONSI explained that, because the extensive monitoring required by the ARMMP would alert BLM to any concerning trends or impacts and the ARMMP permitted BLM to require responsive actions, including suspending power plant operations "until and unless appropriate mitigation" is "implemented, and shown effective," the project would have no significant adverse impacts. 2-ER-188; 2-ER-191–92. BLM thus concluded that "[i]mplementing the ARMMP, lease stipulations, and environmental protection measures together are sufficient to mitigate significant adverse effects to the hydrologic resources, aquatic habitat, and sensitive species known to be present in the Dixie Meadows." 2-ER-189.

C. Procedural History

CBD and FPST jointly filed suit in December 2021, asserting, as relevant here, that BLM's approval of the project violated RFRA and was arbitrary and capricious in violation of the APA for failure to comply with NEPA and two departmental policies concerning tribal-U.S. Government relationships. 2-SER-540. Ormat moved to intervene. 5-ER-986 (ECF 6). On December 22, CBD/FPST moved for a preliminary injunction and temporary restraining order. 1-SER-90. While those motions were pending, proposed Intervenor-Defendant Ormat agreed to suspend site work until January 6 to permit time for a ruling on Plaintiffs' TRO/PI motion. 5-ER-987 (ECF 18, 23). The district court held a hearing on the emergency motions on January 4.

At the hearing, the court granted Ormat's motion to intervene and issued a 90-day preliminary injunction but denied an injunction beyond 90 days. 1-ER-19 (minute order); 1-ER-21–105 (hearing transcript). In its written order, issued January 14, the court explained that it was denying the preliminary injunction beyond 90 days because it "cannot find that Plaintiffs are likely to succeed on the merits of these claims." 1-ER-6. Because the EA was based on "detailed baseline analysis of the water resources in the Project area" and "[s]ufficient information regarding species preferences, encounters, and habitat," the court held that CBD/FPST failed to demonstrate that BLM's FONSI was arbitrary or capricious. 1-ER-7–8. Nor had Plaintiffs convinced the court that the ARMMP's mitigation measures were inadequate; the court reasoned that the mitigation provided an "adequate buffer against the negative impacts that may result from the authorized activity." 1-ER-8–9 (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2011)). The court also rejected Plaintiffs' claim that BLM had failed to take a hard look at the project's impacts, noting that BLM "considered and took substantial steps to minimize the visual impacts of the project [on the Tribe]." 1-ER-10.

The court was similarly unpersuaded regarding Plaintiffs' APA and RFRA claims. As to the claim that BLM had disregarded the Department of the Interior's recent policy statements, the court explained that these policy statements did not

create enforceable legal obligations, and, in any event, CBD/FPST had failed to "demonstrate how the extensive consultation BLM has undertaken since 2007 regarding the Project was insufficient consideration of the topics raised in the policy documents under the *State Farm* standard." 1-ER-11. As to Plaintiffs' RFRA claim, the court held that, under controlling Ninth Circuit precedent, BLM's approval of the project did not constitute a "substantial burden" under RFRA. *Id.*

Turning to irreparable harm, the court first recognized that most of the alleged harms "arise[] from the long-term operation of the Project—not the construction that would occur over the pendency of this case," and thus the relevant question was whether *construction* would result in irreparable harm. 1-ER-12. The court found no evidence in the record that project construction would harm the environment generally or the toad specifically, but nonetheless concluded that the project's construction would irreparably harm Plaintiffs' aesthetic and recreational interests. 1-ER-12–13. As to the remaining injunction factors, the court held that, beyond 90 days, the equities and the public interest tip sharply toward permitting construction. 1-ER-15. The court found relevant that a construction delay beyond 90 days would make it "all but certain that Ormat would not be able to complete construction by the end of 2022," which would cost Ormat up to $30 million, and jeopardize the project and its significant public benefits,

including avoiding greenhouse gas emissions and providing government royalties. *Id.*

On January 10, Ormat moved the district court to modify the injunction, asserting that it would be irreparably harmed after 45 days. 5-ER-989 (ECF 35). The court denied the motion on January 19. 1-ER-17. Ormat appealed and Plaintiffs cross-appealed. 5-ER-976; 3-SER-592. After noticing its appeal, Ormat moved this Court for a stay of the injunction, or, in the alternative, expedited briefing. No. 22-15092, ECF 4. Plaintiffs also sought expedited briefing. *Id.*, ECF 9. In a minute order issued February 4, this Court stayed the injunction and ordered expedited briefing. *Id.*, ECF 20.

D. Post-decisional developments

In September 2017, CBD petitioned the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, to list the Dixie Valley Toad as a threatened or endangered species. 1-SER-254. In June 2018, FWS published an initial finding that the petition presented substantial scientific or commercial information indicating the petitioned action (listing) may be warranted. 1-SER-289; *see also* 2-SER-302.

In February 2020, CBD sued FWS in the District Court for the District of Columbia to compel it to make ESA determinations regarding 241 species, including the Dixie Valley Toad. *See Center for Biological Diversity v. Debra*

Haaland, et al., No. 1:20-cv-573 (D.D.C.), ECF 1. In February 2022, FWS and CBD entered into a court-approved partial settlement agreement in the case pending before the District Court for the District of Columbia. That settlement agreement required FWS to make a determination regarding the status of the Dixie Valley Toad by April 4, 2022. *See id.*, ECF 28.

On April 7, FWS published in the Federal Register an emergency rule to list the DVT as endangered and a proposed rule to list the DVT as endangered. *See* 16 U.S.C. § 1533(b)(7); 87 Fed. Reg. 20,336 (April 7, 2022) (emergency listing); 87 Fed. Reg. 20,374 (April 7, 2022) (proposed listing). The emergency listing is effective for 240 days (i.e., until December 2, 2022). The proposed rule is open for public comment until June 6, 2022.

The emergency listing triggered protections for the DVT under ESA sections 7 and 9. 16 U.S.C. § 1536; *id.* § 1538. As these obligations pertain to the federal government, BLM is now required to ensure that any action it authorizes is not likely to jeopardize the continued existence of the DVT. 16 U.S.C. § 1536(a). BLM is currently preparing a biological assessment to reevaluate the potential effects of the project on the DVT. *See* 50 C.F.R. § 402.12. BLM and FWS initiated informal consultation on April 7 to inform the BLM's drafting of the biological assessment. 50 C.F.R. § 402.13. BLM also anticipates that it will request formal consultation with FWS, and expects formal consultation will

commence no later than summer of this year. *See* 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.14.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in refusing to enjoin the project beyond 90 days because it correctly determined that CBD/FPST failed to carry their burden of showing they are entitled to the "extraordinary and drastic remedy" of preliminary injunction, *Munaf v. Geren*, 553 U.S. 674, 689 (2008), which is granted only "upon a clear showing that the plaintiff is entitled to such relief," *Winter v. NRDC*, 555 U.S. 7, 22 (2008).

1. CBD/FPST failed to carry its burden of establishing that it was likely to succeed on the merits or even raise serious questions going to the merits.

Plaintiffs have not shown that BLM's decision not to prepare an EIS was arbitrary and capricious. To the contrary, BLM's FONSI was reasonable in light the available data, all of which indicated that the project would not alter the springs, and the comprehensive monitoring and mitigation contained in the ARMMP, which provides additional guarantees that the project will not adversely affect the springs. Additionally, although Plaintiffs maintain that BLM failed to take a hard look at the project's possible impacts, these accusations are belied by the thorough EA, which includes detailed consideration of the project's possible

impacts on the springs as well as the impacts on the Tribe's religious practice due to the project's visual and aesthetic impact.

Nor have CBD/FPST demonstrated that BLM ignore the policies adopted by Secretary Haaland in November 2021. Even assuming those policies are legally enforceable, the policies simply reiterate long-standing agency policy with which BLM has complied. BLM repeatedly consulted with the Tribe between 2007 and the project's 2021 approval. This engagement resulted in a Memorandum of Agreement to resolve the Tribe's concerns; in addition, BLM also accommodated multiple changes to the project to reduce the project's impacts on the Tribe's religious practices. Through those efforts, BLM has fully satisfied the letter and spirit of every applicable statute, regulation, and Department policy.

Finally, CBD/FPST have not demonstrated that BLM violated RFRA, as they do not allege that the project imposes a "substantial burden," as this Court defines that term, on their religious practice.

2. The district court did not abuse its discretion in determining that, after 90 days, the public interest and balance of equities tips against enjoining the project. Although the court acknowledged Plaintiffs would be irreparably harmed by the project's construction, the district court reasonably concluded that, after 90 days, the balance of the harms and the public interest favored defendants. The court's determination that enjoining construction beyond 90 days would harm the public

interest was based on its view, supported by the record, that Ormat would likely abandon the project if it could not start construction within 90 days. The project provides numerous public benefits, including providing a zero-emission source of energy 24 hours a day, 7 days a week, meeting the needs of state renewable energy standards, and providing public revenue in the form of geothermal royalties. Thus, the court did not abuse its discretion in concluding that the risk that the developer would abandon a project with significant public benefits outweighed any harm to Plaintiffs caused by the project's construction.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs bear the burden of establishing that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm without preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Id.* at 20 (2008). "A plaintiff must make a showing as to each of these elements, although in [the Ninth C]ircuit 'if a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of the harms tips *sharply* in the plaintiff's favor, and the other two *Winter* factors are satisfied.'" *Feldman v. Arizona Sec. of State's Off.*, 843 F.3d 366, 375 (9th Cir.

2016) (emphasis in original) (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)).

This Court reviews a district court's order concerning a preliminary injunction for abuse of discretion. *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017). A district court abuses its discretion if its decision is based on an "erroneous view of the law or on a clearly erroneous assessment of the evidence." *CTIA v. City of Berkeley*, 928 F.3d 832, 838 (9th Cir. 2019). A factual finding is clearly erroneous if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019).

The APA, 5 U.S.C. §§ 701-706, governs judicial review of Plaintiffs' NEPA and APA claims. The plaintiff bears the "heavy burden of showing that 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision 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." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Under that "highly deferential" standard, "the agency's decision is "entitled to a presumption of regularity, and [a court] may not

substitute [its] judgment for that of the agency." *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

ARGUMENT

I. Plaintiffs failed to establish a likelihood of success on the merits.

The district court did not err in concluding that Plaintiffs failed to establish a likelihood of success on the merits.[8] The Court can affirm on this basis alone. *See Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

A. BLM was not required to prepare an EIS because it reasonably concluded that the project will not have significant impacts.

Judicial review of agency NEPA decisions may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (citing 5 U.S.C. § 706(2)(A)). When an agency has prepared an EA and concluded a proposed action will not have significant environmental effects, this Court has

[8] Plaintiffs argue the district court should have considered whether there were serious questions on the merits. Second Br. 23–24. The United States continues to question the viability of the "serious questions" standard, but it remains the law in this circuit. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011); *but see Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir 2009) (Kavanaugh, J., concurring). Nonetheless, Plaintiffs have not raised serious questions about the merits here. Even if they had done so, however, the district court did not find that the equities tip sharply in Plaintiffs' favor, as is required for the serious questions test to apply, and accordingly the district court did not abuse its discretion in applying the 'likelihood of success' standard.

explained that its "inquiry is whether the 'responsible agency has reasonably concluded that the project will have no significant adverse environmental consequences." *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

BLM concluded that the construction and operation of the geothermal facility would not significantly affect the human environment. It first reasoned that the information the agency had about the subsurface hydrogeology suggested that significant impacts were unlikely. But it also relied on the robust protections embodied in the ARMMP and the agency's stepwise operational requirements to conclude that the project would not have significant impacts. This decision was reasonable and supported by the record.

1. The available data, coupled with the ARMMP and stepwise implementation, informed BLM's reasonable conclusion that the project will not have any significant impacts.

When Ormat obtained its Dixie Valley leases in 2007, it had a general, high-level understanding of the area's major fault systems and aquifers based on the company's background geologic expertise and experience with other projects, knowledge of the area's surface geology, and the results of existing drilling and geoscientific studies. But as the subsurface is a complex system that contains an intricate network of faults and fractures—millions of them, ranging in dimension from kilometers to micrometers, that can change over time—Ormat needed to gain

further understanding of the subsurface necessary to develop the resources within it. To do so, Ormat developed a conceptual model to represent the subsurface, and in particular represent critical aspects of the area's subsurface necessary to operate a geothermal project, such the relationship between fault systems and subsurface aquifers. 4-ER-645–677. Although the model was based on sound geoscientific principles and the company's general knowledge of the local faults, it remained a conceptual model that required further data to refine. Ormat gathered that information during its exploratory activities, drilling 9 exploratory wells and conducting a 46-day flow test. *See* 4-ER-721–728 (exploration summary); 5-ER-730–773 (flow test summary). This data affirmed the model and built BLM's and Ormat's confidence in Ormat's understanding of the subsurface and the relationship between the geothermal aquifer and the shallow aquifer feeding the springs. The model and the data both supported Ormat's view that the geothermal reservoir and the springs were only indirectly connected.

BLM appropriately relied on all available evidence, including the results of exploration, the conceptual model, and the 46-day flow test, to make a reasonable, data-based assessment that the environmental effects of geothermal operations would be insignificant. As BLM noted in its EA, that flow test provided evidence that pumping necessary for power production would not impair the springs and confirmed Ormat's hydrogeologic model. 3-ER-286; 3-ER-394.

But, recognizing the inherent uncertainty in natural systems, BLM also created an extensive plan—the ARMMP—to cope with any remaining uncertainty and to incorporate knowledge of the subsurface that Ormat would continue to collect through operations. The ARMMP was developed in coordination with a team of technical experts from multiple agencies and based on data Ormat had been collecting since 2015. 3-ER-219. It establishes multiple goals that include maintaining the springs' flow and temperature within their natural range, and quantitatively defines what will constitute a material departure from that range. 4-ER-573–577. It requires Ormat to monitor 23 surface water locations and 13 groundwater locations on a weekly basis for changes to flow, temperature, and chemistry and to submit these results in regular reports to BLM for independent validation that the ARMMP's goals are being met. 4-ER-555–569. As an adaptive management tool, the ARMMP also permits BLM, at any time, to direct Ormat to increase the frequency of monitoring, the number of monitoring locations, or the type of data collected, or to require more stringent triggers (e.g., narrower acceptable ranges for maintaining temperature or flow). And the ARMMP was not the only measure; BLM also provided an extra buffer by requiring operations to proceed in a stepwise manner, to verify no impacts to the springs. 2-ER-160–161.

Put another way, the ARMMP requires Ormat to continuously collect data to ensure that the company's conceptual model and understanding of the relationship

between the subsurface and the springs is as precise as possible. But it also erects important guardrails (the goals and objectives specifying, e.g., that Ormat must maintain current conditions at the springs) and empowers BLM to verify that Ormat is not approaching those guardrails (quantitative monitoring requirements, which BLM can increase at any time). In addition, the ARMMP also gives BLM authority to require Ormat to take decisive action if it looks like the company might be approaching the guardrails (mitigation). Based on the ARMMP's comprehensive monitoring requirements and its provision that BLM may adjust monitoring or require corrective action *at any time* should data or information that suggests the natural system is responding to geothermal operations in unexpected ways, the agency was satisfied that this monitoring would serve as an effective early warning system, permitting BLM and Ormat to address potentially concerning changes—including by requiring Ormat to cease operations—before they became significant.

By requiring Ormat to implement the ARMMP and only increase production in a phased manner, BLM has gone beyond what NEPA requires to assure itself that the project will not have significant environmental impacts. Although of course some uncertainty remains regarding precisely how the complex hydrogeologic system will respond to geothermal operations, neither complete certainty nor perfect information was necessary to conclude that there will be no

significant impacts. *See American Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1008 (9th Cir. 2020) ("Some 'quotient of uncertainty . . . is always present when making predictions about the natural world.'") (quoting *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009)); *Envtl. Protection Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006) ("The [NEPA] regulations do not anticipate the need for an EIS anytime there is *some* uncertainty; but only if the effects of the project are highly uncertain") (citation omitted). The ARMMP—coupled with BLM's requirement that Ormat begin production in a phased manner—is a reasonable way to manage unforeseen consequences and ensure that there will not be any significant impacts.

2. BLM's FONSI was based on robust baseline data.

As this Court has explained, NEPA requires agencies to establish and document baseline environmental conditions to consider what effects their proposed actions may have on the environment, as measured from that baseline. *See Great Basin Resource Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016). As the district court correctly concluded, that requirement was met here.

The final EA provides a comprehensive overview of relevant baseline data about the Dixie Valley, including extensive qualitative information and quantitative data on ground and surface water temperature, flows, and chemistry,

3-ER 265–281, as well as detailed information about the Dixie Valley Toad (discussed in a section on sensitive species), 3-ER-320–342, other wildlife such as migratory birds, soil, and vegetation, among other baseline conditions. The EA's exhaustive discussion of the current biological and hydrological conditions in the Dixie Valley was based on all available scientific information and provided BLM with sufficient information to assess whether and how the geothermal utilization plan might impact those baseline conditions.

Plaintiffs cannot and do not deny that the agency had copious information about the Valley's environment, informed by existing studies as well as multiple years of Ormat's monitoring data, the company's drilling results, and 46-day flow test. Plaintiffs also cannot and do not deny that the agency considered and explained how the project might alter baseline conditions, including air quality, wildlife, and hydrogeologic conditions such as chemistry and temperature of the springs. 3-ER-285–286 (quantity); 3-ER-288.

In Plaintiffs' view, however, BLM's failure to require Ormat to collect data at every one of the 122 springs and seeps in the Valley, or to count every toad in the wetlands, renders the agency's decision unreasonable. There is no authority supporting their position that BLM must have perfect, complete knowledge of the meadows, springs, or the complex natural system that sits thousands of feet underground. Plaintiffs also point to the fact that BLM is requiring Ormat to

collect an additional 12 months of data on the springs as evidence that baseline data is lacking. Plaintiffs are mistaken that this additional 12 months of data is baseline data as that term is defined is used in the NEPA context. In the NEPA context, baseline data is information necessary to inform an agency whether the action will have significant environmental impacts. But, as noted above, BLM had sufficient data at the time of the FONSI to make a determination the project will not have significant effects; here, the potential impacts to the springs—in terms of temperature and flows—are identified and understood.

BLM requires additional data collection *not* to inform its understanding of whether to the project will have significant impacts and thus whether it needed to prepare an EIS, but to understand the thresholds necessary to refine its corrective measures. That is, this additional data is not *baseline* data in the NEPA sense because it does not inform BLM's decision regarding whether there *could be* significant change. It ensures that, in the context of climate change and the microseasonal variation that affects the hydrology of the area, BLM can tailor any corrective actions to assure there are no impacts on the springs' temperature, chemistry, and flow. Further, it would be perverse to punish the agency for requiring additional and ongoing data collection by treating such data collection as evidence that it had insufficient data to begin with. That BLM more data to assure itself that any corrective measures are informed by the timely and accurate

information about minute systemic variances is permissible and in no way suggests that the existing data was inadequate.

3. BLM took an appropriately hard look at the proposed mitigation measures.

"An agency's decision to forego issuing an EIS may be justified by the presence of mitigating measures." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1106, 1121 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011). The relevant question is whether the proposed mitigation measures "constitute an adequate buffer against the negative impacts that [may] result from the authorized activity to render such impacts so minor as to not warrant an EIS." *Wetlands Action Network*, 222 F.3d at 1121.

The ARMMP provides an adequate buffer against both the *possibility* of adverse impacts, and the actuality of adverse impacts, should they occur. First, and despite Plaintiffs' failure to recognize it as such, the ARMMP's monitoring *is* a form of mitigation. Ormat's understanding of the subsurface and the relationship between the subsurface hydrology and the surface expressions (i.e., the springs) will continuously improve as Ormat implements commercial operations. That monitoring allows Ormat's understanding of the subsurface and its relationship to surface discharges to evolve quickly. In the event monitoring suggests that there may be impending and previously unpredicted impacts to the springs, Ormat can

make (and BLM can require) nearly real-time adjustments to ensure its operations do not trigger exceedances of set objectives. This is, after all, in Ormat's interest—both because it presumably does not want to undermine the ARMMP's objectives and risk BLM issuing a shut-down order and because having an accurate understanding of the hydrogeology of the area is essential to ensuring that the geothermal system will continue to be viable for commercial geothermal production.

But the ARMMP goes further, permitting BLM to require Ormat to take corrective measures, such as requiring reinjection in a different location, or ceasing operations altogether, *if* adverse impacts materialize. Although Plaintiffs criticize the corrective measures as insufficiently detailed, but fully developed, detailed response measures are not feasible for unpredictable, hypothetical future problems; appropriate mitigation depends on the cause, nature, and scope of a problem that is not yet known and might never arise.

This Court has approved mitigation plans that, like the ARMMP, set parameters within which detailed mitigation plans will be developed, if and when specific problems arise. In *Wetlands Action Network*, for instance, the agency issued a permit "before all the details of the mitigation plan had been finalized" but required instead that the permittee develop mitigation plans according to specified guidelines. *Wetlands Action Network*, 222 F.3d at 1121. This Court disagreed

with the challengers in that case that leaving those details for another day rendered the mitigation plan incomplete. The Court explained that the mitigation measures had been "developed to a reasonable degree and had been reviewed by . . . federal agencies at the time the permit issued. Moreover, the special conditions included in the permit and reviewed by the various agencies were extremely detailed." *Id.* So, too, here. The mitigation in the ARMMP, including both monitoring and corrective measures, has been developed to a reasonable degree and reviewed by the technical working group, which includes both state and federal agencies. Moreover, the "special conditions" in the *Wetlands Action Network* permits are like the goals and objectives identified in the ARMMP, which are themselves extremely detailed.

The circumstances of this case also resemble those considered by this Court to be adequate in *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 476 (9th Cir. 2000). There, plaintiffs challenged the Forest Service's approval of a gold mine. The EIS predicted that, based on geochemical modeling, any seepage from the mine's waste pit would have "low overall impact on ground water quality" but nonetheless required ground water monitoring for the lifetime of the project. *Id.* at 473–474. It also provided a general list of possible corrective measures in the unexpected event that water quality problems subsequently developed. Plaintiffs claimed the corrective measures were inadequately

developed, and the Forest Service was required to include supporting documentation regarding the effectiveness, reliability, cost, and feasibility of the corrective measures. This Court disagreed. In its view, the mitigation plan was satisfactory because the EIS predicted that the effects would be minimal, "but extensive monitoring will be required nonetheless. The EIS then proposes several ways to prevent overflow form the mine-pit lake from affecting water quality. If those measures are unsuccessful, the EIS then provides a process for achieving compliance with water quality standards." *Id.* at 476. The Court's reasoning in *Okanogan Highlands* applies equally here. BLM presumes, based on all available data and reasonable confidence in Ormat's hydrogeologic model, that there will be no significant impacts on the spring from production. But BLM has nonetheless provided mitigation in the form of (1) monitoring throughout the lifetime of the project and (2) a suite of corrective measures that could be implemented in the unexpected event that concerning impacts appear imminent. And, as in *Okanogan Highlands*, although the corrective measures are "stated in somewhat general terms . . . this format is not deficient in the circumstances: The exact environmental problems that will have to be mitigated are not yet known because the Project does not exist." *Id.* Indeed, the ARMMP provides *more* protection than the mitigation measures in *Okanogan*, as it reserves BLM's authority to require additional monitoring or even halt project operations unless and until Ormat demonstrates to

BLM's satisfaction that mitigation is effective. BLM therefore reasonably concluded that the ARMMP (coupled with phased implementation) provided an "adequate buffer" against significant adverse impacts.

4. The disagreements over the project do not constitute a "controversy" requiring preparation of an EIS, nor does the ARMMP entail unknown risks.

When "substantial questions are raised as to whether a project . . . may cause significant [environmental] degradation," these questions may indicate the need for an EIS. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001), (quoting *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1539 (9th Cir. 1997)), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–158 (2010).

Plaintiffs insist there is controversy over the environmental effects of the action, relying on the comments of other government agencies concerning the results of the flow test and the characteristics of the subsurface.[9] BLM acknowledges there were conflicting scientific views about this project, but these disputes were a paradigmatic example of what this Court has characterized as "a battle of the experts." *Id.* at 736 n.14. In such circumstances, the question for the Court is not which agency was correct, but whether "the [action] agency

[9] Federal defendants continue to believe that Plaintiffs did not adequately develop this argument below and this Court need not pass on it. *See* Fed. Def. Opp'n to Mot. for Prelim. Inj., ECF 25, at 12 n.17.

considered conflicting expert testimony in preparing its FONSI, and whether the agency's methodology indicates that it took a hard look at the proposed action by reasonably and fully informing itself of the facts." *Id.; cf. Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000) ("The Postal Service is not required . . . to defer to the Fish and Wildlife Service's conclusions. NEPA requires only that the responsible agency 'consider [] these agencies' initial concerns, address[] them, and 'explain[] why it found them unpersuasive.'") (citing *California Trout v. Schaefer*, 58 F.3d 469, 475 (9th Cir. 1995)); *see also Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013).

BLM was aware of commenters' differing views about the area's hydrogeology, but reasonably rejected their interpretation of the data. Although Plaintiffs disparage BLM's responses to agency comments as "conclusory," this misrepresents the record. Second Br. 37. For instance, Plaintiffs quote the Nevada Department of Wildlife's interpretation of the flow test data, citing that agency's concern that the flow test negatively influences the springs. Second Br. 36, quoting 4-ER-493. Plaintiffs omit BLM's well-reasoned, data-based rebuttal, which disagreed that the data were concerning: "[T]here is no clear evidence of impacts to spring pool stage, temp[erature,] or EC were observed [sic] during the 46 day flow test, conducted at rates between 2,100 to 1,650 [gallons per minute]. A possible temperature increase as a result of the flow test was measured from

about 139 to 145°F. However, this rise in temperature is not conclusively a result of the flow test, as post-test monitoring of temperatures ranged from 141 to 150°F (increasing trend) and the range of historical temperature measurements at [that spring] has been between 130 to 160°F, so temperatures throughout the flow test and post-test remained within the mid-range of historical measurements." 4-ER-493–494.

BLM similarly took a hard look at FWS' allegation that the hydrogeologic model conflicted with prior studies and the flow test data. It disagreed, explaining: "The inferences [by FWS] that the Dixie Meadows geothermal reservoir is associated with the Piedmont fault are incorrect. The EGS (2014) work [cited by FWS] was not intended to define the geothermal reservoir, nor did it have sufficient data to define the reservoir at the project development level. The geothermal reservoir that has been defined and tested by Ormat is a unique condition of permeability and temperature in Paleozoic sedimentary rocks (shale) which [are] typically not permeable, and resides deeper and west of the range-front fault system . . . Ormat has developed a 3D geologic framework model, using all available geologic data, which forms the basis for the Figure 16 cross-section, and conceptual flow system . . . The temp-gradient data . . . supports the flow system interpretation of thermal waters that are mixed with cooler meteoric groundwater discharging in Dixie Meadows." *Id.* Although BLM and commenters disagreed

about how to best interpret the existing data, *see, e.g.*, 4-ER-518–519; 4-ER-461, the critical point is that BLM, drawing on its expertise and knowledge of the record, responded with its own reasonable interpretation of the data. As this Court has explained, "when the record reveals that an agency based a finding of no significant impact upon relevant and substantial data, the fact that the record also contains evidence supporting a different scientific opinion does not render the agency's decision arbitrary and capricious." *Wetlands Action Network*, 222 F.3d at 1120–1121.

The same holds true for BLM's responsive comments on the ARMMP. First, the ARMMP's underlying premise—that aggressive monitoring would lead to early detection of any problems, and that early detection could prevent significant impacts—appears to have been accepted by all commenters. FWS did question the efficacy of the ARMMP's corrective measures, but, as with the dispute over the fault system, BLM expressly acknowledged that FWS disagreed but noted its own view that the ARMMP was "a sufficient tool to ensure significant adverse impacts do not occur" and explained its reasoning. 4-ER-531. These disagreements provide no evidence that BLM's decision not to prepare an EIS was arbitrary and capricious.

B. BLM's EA took a hard look at the project's potential impacts.

CBD/FPST also allege that the EA failed to include necessary information and therefore BLM did not take a sufficiently hard look at the project's impacts. The claims are meritless.

1. BLM took a hard look at the possibility that the project could alter spring flows.

CBD/FPST claim that BLM overlooked the risk that the project could irreparably harm the springs. Second Br. 37–40. The claim is misleading. BLM *did* consider the possibility that the project could affect the springs' flow. BLM's EA expressly recognized that the project could affect water resources (including the springs) by degrading surface water quality, altering water quantity, decreasing groundwater supply, or interfering with groundwater discharge, 3-ER-283, and acknowledged the presumed impact on surface water of a different geothermal facility in nearby Jersey Valley, 3-ER-394. *See also* 3-ER-395 (explaining that the project "has the potential to cumulatively affect the water quality, quantity, and/or temperature [in the Dixie Valley]"). For instance, BLM explained "[c]hanges in thermal feature surface expressions [i.e., hot springs] can accompany a geothermal development. Changes such as declines in thermal-water discharge, increases in fumarolic[10] steam discharge, and surface subsidence have been documented,

[10] Fumaroles are openings in the earth's surface that emit steam and volcanic gases.

including geothermal developments in Dixie Valley." 3-ER-285–286. BLM cautioned that "[m]onitoring and mitigation measures would minimize, but may not completely avoid, long-term effects on the water quantity in the system." 3-ER-287. Far from "knowingly ignor[ing]" the possible impacts that the springs' flow could change, as Plaintiffs charge, BLM acknowledged that decreased water availability or other changes to the springs were possible. Second Br. 39.

But, because of the agency's confidence in the geologic model, the results of the flow test, and the protections afforded by the ARMMP, BLM did not believe that irreparable damage from dewatering was reasonably foreseeable—and so it was not required to consider the worst-case scenario in which the wetlands dried up. *See* 40 C.F.R. § 1508.8 (agency must consider effects of action that are reasonably foreseeable). Plaintiffs disagree with BLM's substantive conclusion that the impacts would be minimal, primarily because they disagree with the agency's assessment of the region's geology and they disagree about the effectiveness of the ARMMP. In other words, Plaintiffs have not identified a defect in the adequacy of the agency's *analysis*, and there was none. BLM took the requisite hard look at the project's potential effects on the springs.

2. BLM took a hard look at and mitigated the project's visual and aesthetic impacts on the Tribe.

CBD/FPST maintain that BLM "wholly fail[ed] to consider or address [the project's] visual and aesthetic impacts" on the Tribe, Second Br. 40, and that

"BLM's *only* analysis of visual impacts is based on a 'casual observer' from six points on Dixie Valley Road, with no analysis from the springs themselves, and no consideration of heightened impacts to Tribal users," *id.* at 41 (emphasis added). The allegation that BLM failed to consider or mitigate the visual and aesthetic impacts of the project on the Tribe is false.[11]

Plaintiffs complain that the visual impacts analysis contained in Appendix E fails to analyze the impacts the project will have specifically on Tribal users, but the purpose of *that* appendix is to analyze the project's visual impact from key points accessible to the general public.[12] There is a *separate* section devoted solely to analyzing the impact of the project on the Tribe's religious practices, which discusses the visual and aesthetic impact of the project on the Tribe's religious

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[11] Plaintiffs also misstate the size of the facilities. Together, the facilities will take up to 32 acres, *not* the 126 acres Plaintiffs' allege. *Compare* 3-ER-223 *with* Second Br. 41. Even including acreage for well pads, pipelines, access roads, and the *entire* 48-mile gen-tie line, the project's total acreage disturbance will be 111 acres, not 126 acres. 3-ER-223.

[12] To assess visual impacts of a proposed project on a landscape, BLM's standard practice is to take photos from "key observation points" where the general public might be present (e.g., from a public road). *See generally* 3-ER-361–365.

Plaintiffs bemoan the fact that BLM did not provide "analysis from the springs themselves"—in effect, suggesting that BLM should have made the view from the springs a key observation point. Second Br. 41. But the general public would not be present at the springs, which are of sacred importance to the Tribe and not a well-known public location.

practice. *See* 3-ER-375–380 (Native American Religious Concerns).[13] In particular, that section recognizes that the project "would have impacts on" the Tribe "if it resulted in . . . [o]bstructing the view of Job Peak from the Dixie Meadows Hot Springs site, due to construction of the power plant(s), transmission lines, or other project components." 3-ER-378. The EA further notes that "BLM, in consultation with [Ormat], has redesigned the project to avoid, lessen, or minimize adverse audible or visual impacts and to avoid unnecessary interference with tribal religious practices," 3-ER-380, including by "[r]edesigning the project to move the location of one power plant farther south and the transmission line farther east from the Dixie Meadows Springs to lessen impacts on religious expression and adverse effects on the site[.]" 3-ER-379. The notion that BLM ignored the project's visual impacts on the Tribe's religious practice or failed to mitigate them is therefore belied by the record.

[13] The visual and aesthetic impact of the project on the Tribe is also addressed in the EA's section discussing cultural resources, which specifically acknowledges that "Indirect impacts on cultural resources would include changing the character of the property's use or physical features in the property's setting, and introducing visual, atmospheric, or audible elements that diminish the integrity of the property's features. Construction of a geothermal plant, well pads, and associated facilities would place modern features onto a landscape that did not have them previously . . . The adverse effects [to the historic property] include visual and auditory indirect effects from the presence of power plants[.]" 3-ER-372–373.

C. BLM complied with all laws, regulations, and policies governing tribal consultation.

1. Tribal Consultation Background

BLM first conducted tribal outreach and consultation concerning geothermal development in the Dixie Valley in 2007, when Ormat acquired its leases in the area. Since that time, as the record demonstrates, BLM has consistently solicited FPST's informal and formal input and engagement. *See* 3-ER-369–375; 3-ER-375–380; 3-ER-401; 3-ER-404–409. This engagement, which fulfilled the agency's duties under NEPA, the National Historic Preservation Act Section 106, 54 U.S.C. § 300101 *et seq.*, the agency's relevant policy manuals,[14] and all other departmental policies, has taken the form of dozens of informal interactions between the BLM field office's archeologist and the Tribe (including in-person meetings and email and telephonic communications), as well as ten formal, government-to-government meetings. *See* 1-FASER-5; 3-ER-404–409.

BLM first initiated Tribal consultation in April 2007, immediately before the lease sale at which Ormat acquired its initial leases. 3-ER-404. In 2010, when Ormat planned to conduct exploration activities, BLM sent the Tribe a letter including a project proposal, map, and request for information regarding cultural and ethnographic resources and requested a face-to-face meeting. 3-ER-405.

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[14] These include BLM Manual 170 (Tribal Relations) and BLM Handbook H-1780-1 (Improving and Sustaining BLM-Tribal Relations). 3-ER-375.

During Ormat's exploration phase (between 2010 and 2015), BLM met with FPST nine times. *Id.*[15]

After BLM learned Ormat intended to develop the resource for commercial production, BLM formally reached out again to the Tribe to consult about the project. 3-ER-405. As part of its obligations under the National Historic Preservation Act (NHPA), BLM, in consultation with the Nevada State Historic Preservation Officer, determined that the project was an undertaking that would adversely affect a historic property (i.e., the springs).[16] As a result and as required by that Act, BLM considered, in consultation with the Tribe and others, how the agency could avoid, minimize, and mitigate those effects.

Over the course of several years, BLM conducted outreach to the Tribe, both formal and informal, and engaged in government-to-government consultation. As part of this outreach, BLM conducted several field trips to the Dixie Valley hot springs with the FPST so that BLM could identify the facilities' intended location,

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[15] Records documenting the substance of BLM-FPST communications are in the administrative record to be lodged in the district court.

[16] Section 106 of the NHPA requires federal agencies to consider the effect of their actions on historic properties, consult with affected tribes when federal projects may affect historic properties of tribal religious or cultural significance, and provide the Advisory Council on Historic Preservation with an opportunity to comment on projects before implementation. It also requires agencies to create a Memorandum of Agreement resolving any adverse effects to a historic property. FPST has not alleged that BLM violated the NHPA. *See* 2-SER-582–588 (complaint).

discuss potential impacts, and solicit the Tribe's views on the project and how BLM could resolve (or at least consider) any Tribal concerns during decision-making. 3-ER-405. After multiple conversations with the Tribe, and pursuant to its NHPA obligations, BLM drafted a Memorandum of Agreement (MOA) to resolve how BLM would address adverse effects. The MOA reflected BLM's consultation with the Tribe, State Historic Preservation Officer, and Advisory Council on Historic Preservation, and its purpose was to formally memorialize resolutions to the Project's adverse effects. At BLM's invitation, the Tribe provided BLM with comments, recommendations, and proposed edits. This "productive and meaningful coordination . . . continued through the eventual execution of the [MOA] in September 2021." 1-FASER-7. BLM implemented all mitigation measures and resolutions brought forward by the Tribe in the MOA process, and did not refuse any Tribal request short of abandoning the project. 3-SER-599.

Besides the actions outlined in the MOA, which concerned impacts to the historic property, BLM also took several additional steps beyond those embodied in the MOA to accommodate the Tribe's concerns about the project's impacts on the Tribe's religious practice, such as by modifying the location of the gen-tie lie and resiting one of the power plants. 1-FASER-9–10; 4-ER-708–720; 3-ER-379–380; 3-ER-370–374; 3-SER-599–601. BLM also considered the Tribe's input on

the draft EAs and, in response to the Tribe's comments (and the comments of others), developed the draft ARMMP. 1-FASER-9–10; 3-SER-601.

2. BLM considered the FPST's input and accordingly its decision was not arbitrary and capricious.

On November 15, 2021, Secretary of the Interior Debra Haaland issued Secretarial Order No. 3403, directing land management agencies to recognize the importance of tribal consultation and collaboration when making land management decisions. 1-SER-35–40. On November 16, Secretary Haaland also signed an interagency Memorandum of Understanding (MOU) among federal agencies "affirm[ing] their commitment to improve the protection of, and access to, Indigenous sacred sites through enhanced and improved interdepartmental coordination, collaboration, and action." 1-SER-42. The MOU, consistent with a prior Executive Order, defines "sacred site" as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe." 1-SER-43. The MOU commits the departmental signatories to developing consistent policies and processes for addressing sacred sites and establishes a working group toward that end, 1-SER-44, and encourages agencies to continue to consider sacred sites early in agency decision-making and consult with tribes, 1-SER-45.

CBD/FPST allege that these policies provide for "enhanced consideration and protection of sacred sites." Second Br. 45. But these documents are high-level, general statements of policy that reaffirm long-standing principles and

requirements embodied in other laws and directives to involve tribal stakeholders in agency decision-making and consider tribal input to the extent feasible.

Contrary to Plaintiffs' assertion that BLM ignored the Tribe's input, the record establishes that BLM reached out to FPST at the earliest opportunities, engaged in significant and frequent consultation with the Tribe, recognized the Tribe's concerns about the project, and negotiated in good faith an MOA with the Tribe and, at the Tribe's request, the Advisory Council on Historic Preservation to address those concerns.

The notion that BLM ignored FPST's input is also belied by the MOA and BLM's other actions to modify the Project to minimize the impact on the Tribe. The MOA incorporates and adopts every single one of the requested resolutions the Tribe brought forward, including to develop additional ethnographic and archeological information, erect fencing around the site to protect ethnobotanicals from livestock, create improved trail access to the site, and conduct ethnobotanical surveys. 3-SER-599–601; 3-ER-373–374; 4-ER-710–711; 3-SER-599–602. And in addition to the MOA's specific resolutions, BLM also took several concrete actions to change the project to address the Tribe's expressed concerns. For example, one of the power plants was moved further south and the gen-tie line was moved further east from the hot springs to minimize noise, light, auditory and visual impacts on the Tribe's religious practice. 3-ER-367. BLM required other

mitigation measures which will protect the Tribe's religious practice, such as requiring noise-dampening fencing and dark-sky compliant lighting. 4-ER-683–685. BLM also developed and adopted the ARMMP in response to the concerns about the project's impacts on the springs expressed by FPST and others. 3-SER-600–601. The ARMMP's required monitoring includes for the health of the springs and Ormat is also required to monitor ethnobotanicals identified by the Tribe. 3-SER-600. And, of course, BLM has ensured that Tribal members will have continued access to their sacred site. *Id.*

Although the Tribe characterizes its claims in terms of BLM ignoring specific concerns, their real grievance is that BLM did not disapprove the project. The agency's ultimate decision to move forward with the project, however, is not per se evidence that the agency did not comply with these policies. The Tribe may disagree with BLM's decision to move forward with the project despite FPST's continued objections, but nothing in the November 2021 policy statements required BLM to disapprove the project. BLM must consult the Tribe and take its comments into account—which BLM indisputably did—not obtain the Tribe's consent. *Cf. Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 869 n.26 (9th Cir. 2017) (noting that the Ninth Circuit has held "that federal agencies are not *compelled* to withdraw large tracts of public land from particular uses because of the potential impact on tribal resources"); *South Fork Band Council of W. Shoshone of Nevada*

v. U.S. Dep't of Interior, 588 F.3d 718, 724–725 (9th Cir. 2009) (upholding BLM action against a tribe's claim that agency was arbitrary and capricious for failing to treat entire mountain as sacred when the agency consulted tribe, assured tribe's continued access to and use of discrete sacred sites, and tribe did not articulate how their interest in the entire mountain could be accommodated).

D. Plaintiffs' RFRA claim lacks merit.

RFRA provides that the federal government shall not impose a "substantial burden" on an individual's religious exercise unless the "application of the burden to the person" furthers a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. FPST argues that the project substantially burdens their religious exercise because, in their view, the geothermal facility will desecrate the site, making their religious exercise "impossible." Second Br. 51.

FPST's argument is foreclosed by this Court's decision in *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063, 1069 (9th Cir. 2008) (en banc). In that case, plaintiffs, including several Tribes, alleged that the Forest Service's decision to permit the use of recycled wastewater to make snow at a ski resort on federal land would desecrate a sacred mountain and prevent them from performing religious ceremonies. In plaintiffs' view, the permit approval constituted a substantial burden and thus violated RFRA. *Id.* at 1063.

This Court rejected that argument. As this Court recognized, Congress intended for substantial burden "to be defined by reference to Supreme Court precedent," *id.* at 1063, and, after analyzing that precedent in detail, this Court held that the Forest Service's decision did not violate RFRA. As the Court explained, "Under RFRA, a 'substantial burden' is imposed only when individuals are *forced to choose* between following the tenets of their religion and receiving a government benefit or [are] *coerced* to act contrary to their religious beliefs by the threat of civil or criminal sanctions. Any burden imposed on the exercise of religion short of that'—that is, without such forced choice or exercise of coercive power over the individual's liberty or property rights—"is not a 'substantial burden within the meaning of RFRA." *Id.* at 1069–1070 (emphasis added); *see also Snoqualmie Indian Tribe v. Federal Electricity Regulatory Comm'n*, 545 F.3d 1207, 1214 (9th Cir. 2008).

The *Navajo Nation* Court found instructive *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *See Navajo Nation*, 535 F.3d at 1071–73. In *Lyng*, a group of Native Americans challenged the U.S. Forest Service's approval of a proposed road, which would disrupt the serenity and quiet of the forest necessary for their religious practice. The Supreme Court acknowledged that the road would "have severe adverse effects on the practice of [plaintiffs'] religion" by "diminish[ing] the sacredness" of the area and

"render[ing] any meaningful continuation of traditional practices impossible." 485 U.S. at 447, 451. Despite its sympathies for plaintiffs, the Court held that the government's use of federal land did not impose a cognizable burden on plaintiffs because they were neither "coerced by the Government's action into violating their religious beliefs" nor would the government's decision "penalize religious activity by denying" an otherwise-available benefit. *Id.* at 449. Government decisions "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require the government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450. "However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 452.

This case is indistinguishable from *Lyng* and *Navajo Nation*. As in *Navajo Nation* and *Lyng*, Plaintiffs challenge a project on federal land, alleging that it will make their worship "impossible" by diminishing their spiritual fulfillment. *See Navajo Nation*, 535 F.3d at 1072. But here, as in *Lyng* and *Navajo Nation*, there is no forced choice or other coercion at work. The presence of construction and geothermal pumping on the government's land does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it

condition a governmental benefit upon conduct that would violate their religious beliefs.

Plaintiffs' attempt to distinguish these controlling precedents, but the cases on which they rely are inapposite because they involve incarcerated plaintiffs, over whom the government exerts a degree of coercive "control unparalleled in civilian society," *Cutter v. Wilkinson*, 544 U.S. 709, 720–721 (2005), or government regulations of the plaintiffs' *own* property. These situations may involve the exercise of coercive power over an individual's liberty or property, but, as this Court recognized in *Navajo Nation*, government use of federal land does not. Absent such coercion, Plaintiffs cannot demonstrate the challenged action constitutes a substantial burden under RFRA and so have failed to demonstrate a likelihood of success on that claim.

II. The remaining *Winter* factors counsel against an injunction.

The proper focus of this Court's inquiry on the remaining *Winter* factors is whether the district court's balancing of the hardships was an abuse of discretion—that is, if the district court's relative weighing of the harms and equities leaves this Court "with the definite and firm conviction that a mistake has been committed." *See Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393–94 (1992) (O'Connor, J., concurring) ("If

the District Court takes into account the relevant considerations . . . and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance."). Plaintiffs are not entitled to an injunction unless the *only* reasonable exercise of discretion would have been for the district court to find that the equities sharply favor Plaintiffs. The record here does not compel such a conclusion. To the contrary, the district court logically concluded that the remaining *Winter* factors weigh against enjoining the project's construction.

A. The district court correctly concluded Plaintiffs have not demonstrated irreparable harm from project *operations*.

The question before this Court is not whether irreparable harm will occur at some future point when the project's operations eventually begin, but whether Plaintiffs will suffer irreparable harm before a decision on the merits can be reached. The district court correctly found that construction, which is not occurring in the riparian area, will not itself harm the springs or the toad. The district court also reasoned that, based on its schedule and the parties' interest in expeditiously addressing the merits, it has time to adjudicate the merits prior to the start of operations. 1-ER-12. Thus, the proper focus of the irreparable harm inquiry is properly on harm *from construction*, not operations.

Recent developments make the prospect of operations commencing before a merits decision even more remote. In light of the emergency listing, BLM has started informal consultation with FWS, and expects formal consultation to begin soon. Formal consultation will likely entail the adoption of reasonable and prudent measures to further protect the toad. BLM's commitment to the ongoing consultation and the agency's desire to finish that consultation expeditiously make it improbable that Plaintiffs' interest in the springs or the toad will be harmed before this case can be resolved on the merits.

B. The district court did not abuse its discretion concluding that, after 90 days, the equities weigh against an injunction.

The district court found that construction would irreparably harm Plaintiffs' recreational and aesthetic interests in the project area, but that Plaintiffs' harms from construction were outweighed by the harms to Ormat and the public of enjoining the project. The record supports the district court's factual findings, and the district court's ultimate conclusion was a reasonable exercise of discretion.

The district court found that Plaintiffs had articulated a cognizable and irreparable harm to their aesthetic and recreational interests.[17] Three

[17] BLM does not agree that the temporary, intermittent noise- and light-related harms Plaintiffs allege that they suffer from construction are irreparable. Given the deferential standard of review and the fact-bound nature of the ultimate determination, however, BLM does not challenge the district court's contrary conclusion.

considerations diminish the weight of Plaintiffs' alleged harm. The first factor mitigating the weight of Plaintiffs' harm is the context in which the construction takes place. No member of Plaintiffs' organizations, nor any other person, lives near the construction site. It is possible that Tribal members could experience construction's visual and auditory impacts if they visit the sacred site—which is approximately half a mile from the construction site—but the record contains no information about how often members visit the springs and at what times, and thus, there is no record evidence concerning the extent of their harm. Additionally, and contrary to Plaintiffs' assertions, the landscape prior to construction was not undisturbed; there are multiple existing wells in Dixie Meadows as well as a major transmission line. *See, e.g.*, 1-SER-28; 1-SER-31.

The second factor that reduces the weight of the harm to the Tribe is its own conduct. BLM has been engaged in ongoing consultation with the Tribe about this project, and could have accommodated a request to impose reasonable limitations or prohibitions on construction during certain times of the day or certain days to avoid disturbing FPST members' religious practice. The Tribe made no such request, however, and without more information about the Tribe's use of the site, BLM could not direct Ormat to follow a construction schedule that could have avoided or mitigated the Tribe's injury.

The third factor reducing the weight of Plaintiffs' harm is that, in the event Plaintiffs succeed in permanently halting this project, all aboveground facilities can be removed and the surface reclaimed. *Cf.* 3-ER-239 (requiring, at the end of operations, all aboveground facilities and surface disturbances to be removed and reclaimed). This fact distinguishes this case from cases where there may be long-term damage to the environment, such as those involving logging of old growth forest. Here, in the event of an adverse ruling, BLM could require all structures to be removed and the ground replaced and reseeded with native plants, effectively restoring the landscape to its pre-construction condition.

The district court also appropriately weighed Ormat's substantial investment of resources in the project and the public interest. The district court noted the $68 million Ormat has spent to date on the project and the decade the company invested in developing the site's geothermal potential, as well as the company's need to finish construction before the end of the year to make its investment economically feasible, as reasons in favor of denying a longer injunction. 1-ER-14–15. The court also appropriately recognized the public's interest in meeting state renewable energy goals, the royalties that would accrue to the federal government from the project, the development of geothermal energy on federal lands (which Congress encouraged by passing the GSA), and the project's positive climate impact due to its ability to provide "clean energy 24 hours per day, 7 days

per week." 1-ER-15. In light of these considerations, the district court did not abuse its discretion in concluding that an injunction longer than 90 days was inappropriate.

Notably, Plaintiffs do not contend that the court's reasoning was an abuse of discretion. They instead list other factors in an attempt to persuade this Court to balance the harms anew. But in any event, they are incorrect. Although CBD/FPST suggest that the project's benefits would accrue solely to Ormat, this is mistaken. The public benefits of the project also include reduced greenhouse gas emissions, the provision of a source of zero-emissions baseload power, and increased federal royalties. CBD/FPST also assert that there is a strong public interest in protecting the Tribe's sacred site, but BLM has adequately protected that public interest by complying with the NHPA, addressing adverse impacts to the Tribe through the negotiated MOA, and requiring Ormat to take other steps to minimize the project's aesthetic impacts to the site.

In reply, CBD/FPST may also argue that the emergency listing of the Dixie Valley Toad tips the balance of the equities and the public interest in their favor. This new development, however, is not relevant to whether the district court abused its discretion in denying an injunction beyond 90 days. The appropriate time to consider the emergency listing is if and when Plaintiffs bring claims alleging ESA violations, not in this appeal concerning the propriety of enjoining

BLM's purported violations of NEPA, the APA, and RFRA. In any event, the listing does not automatically justify injunctive relief. FWS listed the species in part due to that agency's concerns that the project's *operations* could impact the toad. The listing decision in no way suggested the toad would be harmed by the construction activities now underway, and a merits decision can be reached before operations commence. Moreover, in the absence of allegations and evidence to the contrary, this Court should assume that the ongoing consultation process between BLM and FWS will adequately protect the DVT.

For the reasons explained above, the district did not abuse its discretion in concluding that the balance of the equities and public interest favored a limited, 90-day injunction.[18]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of an injunction beyond 90 days.

[18] If this Court concludes Plaintiffs are entitled to an injunction, BLM requests that the Court limit the scope of the injunction to construction activities and exclude from the injunction the collection of any monitoring data required by the ARMMP.

Respectfully submitted,

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STATEMENT OF PRIOR OR RELATED CASES

The United States is not aware of any related cases.

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9th Cir. Case Number(s) 22-15092, 22-15093

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