Nos. 22-15092, 22-15093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FALLON PAIUTE-SHOSHONE TRIBE and the CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs–Appellees, Cross-Appellants,

v.

U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, and JAKE VIALPANDO, in his official capacity as Field Manager of the Bureau of Land Management Stillwater Field Office,
Defendants–Appellants, Cross-Appellees,

and

ORMAT NEVADA INC.,
Intervenor-Defendant–Appellant, Cross-Appellee.

On Appeal from the United States District Court for the District of Nevada
District Court No. 3:21-cv-00512-RCJ-CSD
Honorable Robert C. Jones, District Judge

ORMAT NEVADA INC.'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendant Appellant, Cross-Appellee states that:

- Ormat Nevada Inc. is owned 100% by Ormat Technologies, Inc.
- Ormat Technologies, Inc. is publicly traded on the New York Stock Exchange.

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AIRFA	American Indian Religious Freedom Act
APA	Administrative Procedure Act
BLM	Bureau of Land Management
CBD	Center for Biological Diversity
EA	Environmental Assessment
EIS	Environmental Impact Statement
ER	Excerpts of Record
FONSI	Finding of No Significant Impact
MW	Megawatts
MWh	Megawatt hours
NEPA	National Environmental Policy Act
Ormat	Ormat Nevada Inc.
PPA	Power Purchase Agreement
Project	Dixie Meadows Geothermal Utilization Project
RFRA	Religious Freedom Restoration Act of 1993
Tribe	Fallon Paiute-Shoshone Tribe

INTRODUCTION

In this preliminary injunction appeal, Ormat Nevada Inc. ("Ormat") asks the Court to vacate the District Court's improper 90-day injunction, which halted site preparation work for Ormat's Dixie Meadows Geothermal Utilization Project (the "Dixie Meadows Project" or "Project"). The injunction should be vacated because:

(1) The District Court erred as a matter of law by issuing a preliminary injunction despite expressly, and correctly, finding that the Fallon Paiute-Shoshone Tribe (the "Tribe") and the Center for Biological Diversity ("CBD") (collectively, "Appellees") had not met their burden to demonstrate a likelihood of success on the merits of their National Environmental Policy Act ("NEPA"), Religious Freedom Restoration Act ("RFRA"), and other claims; and

(2) The 90-day duration of the injunction was chosen arbitrarily and without a basis in the record, despite evidence that the injunction would result in irreparable harm to Ormat, including a loss of $30 million in Project revenue that threatens the financial viability of the Project as a whole.

The Dixie Meadows Project is a clean, renewable, baseload energy geothermal project to be constructed on federal geothermal leases in north-central Nevada. In November 2021, the Bureau of Land Management ("BLM") authorized the Project, after more than six years of intensive environmental and cultural resource review and tribal consultation. Ormat planned to begin site preparation work in January 2022 to bring the first 12 megawatts ("MW") of the Project online by the end of December 2022 in order to take advantage of its existing power purchase agreement ("PPA"). If Ormat cannot complete the first Project phase ("Phase I") by the end of the year, it stands to lose $30 million in Project revenue and may be forced to abandon the Project entirely.

Appellees oppose the Project. Their primary concern is that the eventual (potentially years down the road) development of the full-scale 60 MW Project could adversely affect warm springs in Dixie Valley considered sacred to the Tribe and also home to the Dixie Valley toad. For purposes of this preliminary injunction appeal, however, Appellees' alleged harm over the next several months (the time in which the District Court has committed to issuing a decision on the merits of Appellees' claims) is limited to the inconvenience of potentially seeing Phase I site preparation work take place adjacent to an already disturbed area. Actual geothermal production will not begin until December 2022.

The District Court determined that Appellees were not likely to succeed on the merits of their claims. Indeed, the record demonstrates that BLM satisfied its NEPA obligation by taking a hard look at Project effects (construction and operations) by relying on a 46-day flow test that simulated Phase I production and a robust Aquatic Resources Monitoring and Mitigation Plan ("ARMMP") to determine that the Project would not have significant environmental effects. Moreover, Appellees failed to demonstrate a RFRA violation because the Project does not result in loss of a governmental benefit or criminal or civil sanctions for Tribal members engaged in religious practices. And finally, Appellees could not state a claim for alleged violations of tribal consultation policies that are not legally enforceable. Because of these deficiencies, the District Court concluded that Appellees had not demonstrated a likelihood of success on the merits of their claims, but still ordered a 90-day injunction.

The extraordinary remedy of a preliminary injunction cannot issue unless Appellees demonstrate a likelihood of success on the merits. Thus, the injunction must be vacated. Moreover, even if the injunction had been properly issued, there is no record basis for its 90-day duration, indicating that the District Court abused its discretion in issuing the injunction for a full 90 days in light of the unrefuted harm to Ormat and the Project after 45 days, and loss of renewable energy to combat climate change.

JURISDICTION STATEMENT

This Court has jurisdiction to hear Appellees' NEPA and other claims under 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The Court has appellate jurisdiction over Ormat's interlocutory appeal and Appellees' cross-appeal pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err as a matter of law in granting a 90-day preliminary injunction even though the District Court could not find that Appellees were likely to succeed on the merits of their NEPA, RFRA, and other claims?

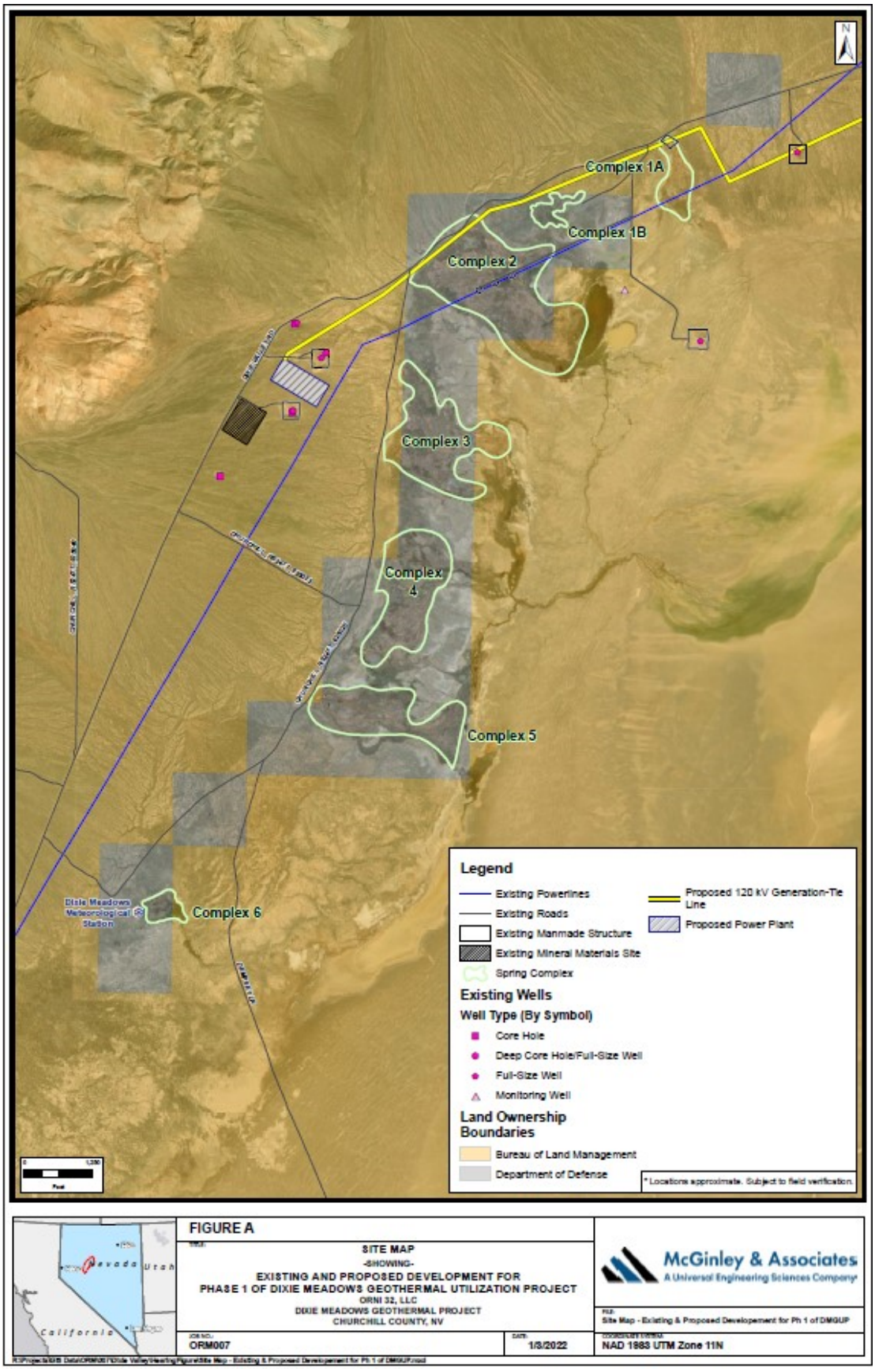
2. Did the District Court abuse its discretion by arbitrarily choosing 90 days as the duration of the preliminary injunction without record evidence to support that timeframe and despite record evidence that irreparable harm to Ormat will occur if the injunction extends beyond 45 days?

STATEMENT OF THE CASE

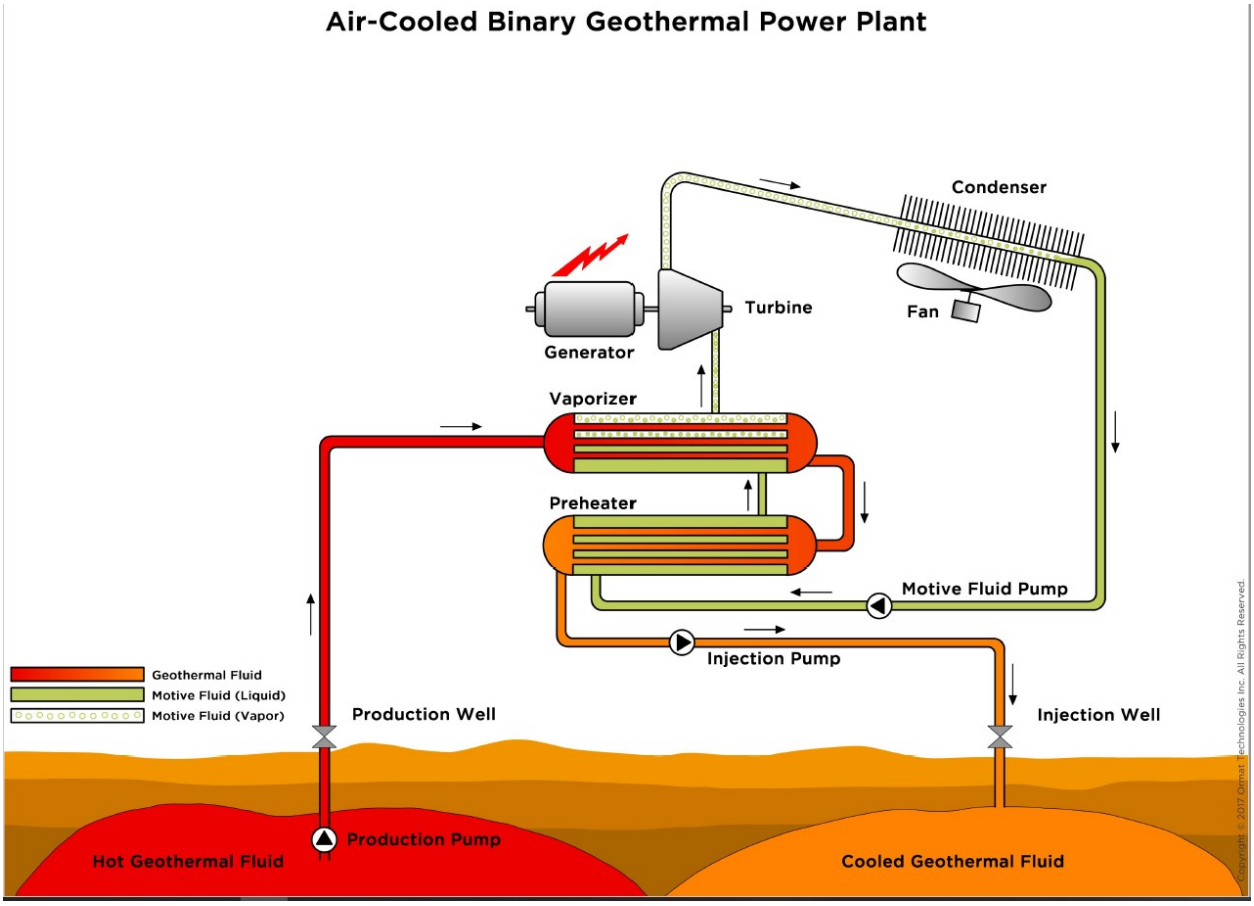
I. Background Facts

A. The Dixie Meadows Geothermal Utilization Project

The Dixie Meadows Project is a geothermal energy facility to be constructed in Dixie Valley, about 43 miles northeast of Fallon, Nevada, on public lands already crisscrossed by power lines, existing geothermal wells, a mineral materials site, roads, and fences. Excerpts of Record (hereinafter, "ER") at 3-ER-0204, 0209–10, 0366 (Environmental Assessment ("EA"), at 1-1, 1-6 to 1-7, 3-113). The Project would be built in phases, beginning with a 12 MW plant that would operate for at least one year before additional construction and energy production would be permitted. 2-ER-0160–61 (Decision Record at 5–6). Phase I would include construction of a power plant on a 10-acre site, but would not require new production or injection wells; existing wells would be utilized. 2-ER-0135 (Declaration of Paul Thomsen ("Thomsen Decl.") ¶ 10). Along with the power plant, Ormat would install aboveground pipelines from the well locations to the power plant and a 48-mile, 120-kilovolt transmission line to connect the Project to the existing power grid. 3-ER-0222–23, 0242 (EA at 2-1 to 2-2, 2-21). The below map depicts the springs and existing infrastructure in the Project area, as well as the Phase I proposed power plant location and transmission line. *See* 2-ER-0110, 0115 (Third Declaration of Paul Thomsen ("Thomsen Third Decl.") ¶ 8, Attachment A).


N
Complex 1A
Complex 1B
Complex 2
Complex 3
Complex 4
Complex 5
Complex 6
Dixie Meadows Meteorological Station
Legend
Existing Powerlines
Existing Roads
Existing Manmade Structure
Existing Mineral Materials Site
Spring Complex
Proposed 120 kV Generation-Tie Line
Proposed Power Plant
Existing Wells
Well Type (By Symbol)
Core Hole
Deep Core Hole/Full-Size Well
Full-Size Well
Monitoring Well
Land Ownership Boundaries
Bureau of Land Management
Department of Defense
* Locations approximate. Subject to field verification.
Nevada
Utah
California
FIGURE A
SITE MAP
-SHOWING-
EXISTING AND PROPOSED DEVELOPMENT FOR
PHASE 1 OF DIXIE MEADOWS GEOTHERMAL UTILIZATION PROJECT
ORNI 32, LLC
DIXIE MEADOWS GEOTHERMAL PROJECT
CHURCHILL COUNTY, NV
JOB NO.: ORM007
DATE: 1/3/2022
McGinley & Associates
A Universal Engineering Sciences Company
FILE: Site Map - Existing & Proposed Development for Ph 1 of DMGUP
COORDINATE SYSTEM: NAD 1983 UTM Zone 11N

Power production would make use of Ormat's state-of-the-art "binary" technology. As depicted in the figure below, geothermal fluids produced from wells tapping the deep geothermal reservoir would flow to the power plant and then circulate through the facility, heating separated but adjacent fluids used to produce electricity, and then flow back to the well field to be reinjected into the geothermal reservoir with ***virtually no loss of geothermal fluid***. 2-ER-0120, 0126 (Second Declaration of Paul Thomsen ("Thomsen Second Decl.") ¶ 4, Attachment 1); 3-ER-0237 (EA at 2-16).



Geothermal fluid leaving the reservoir would be approximately 300 degrees Fahrenheit and would return to the reservoir at a minimum temperature of 150 to 170 degrees Fahrenheit, harvesting approximately 130 degrees of heat/energy. 3-ER-0238 (EA at 2-17).

If Phase I is successful and the water balance at the springs is maintained, Ormat may construct future phases of the Project. At full build-out, the Project would consist of two power plants of up to 30 MW each and 18 potential well pads, along with associated aboveground pipelines. 3-ER-0222–23 (EA at 2-1 to 2-2).

B. Dixie Meadows Geothermal Exploration and Modeling

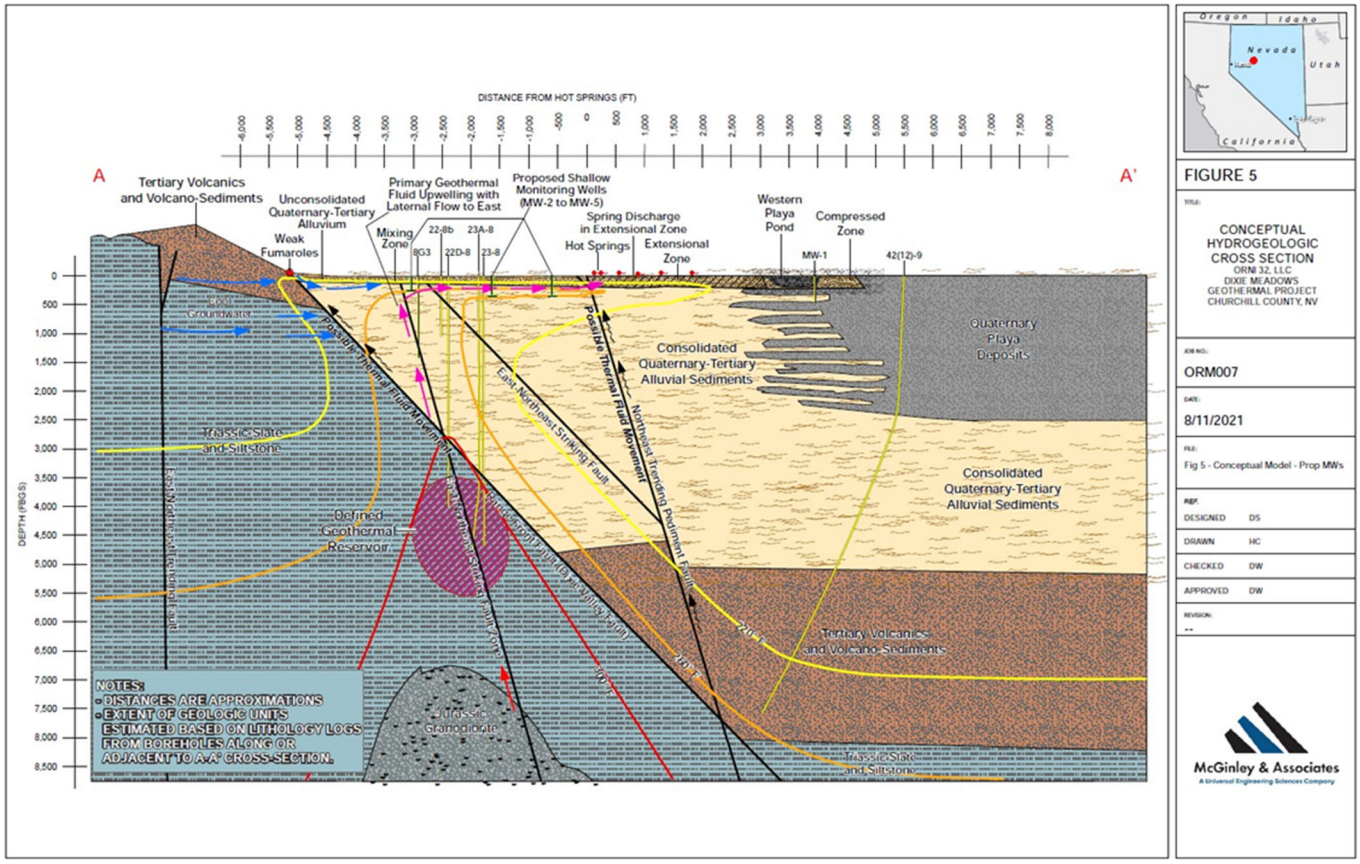
As explained below, the issuance of BLM's Decision Record was the culmination of Ormat's $68 million investment in geological, hydrological, and engineering studies, along with exploratory drilling and testing of production and injection wells installed over a ten-year period to confirm the viability of the proposed geothermal energy plant in this precise location and configuration. 2-ER-0138 (Thomsen Decl. ¶ 17). Beginning in 2010, Ormat acquired geothermal leases for the Project area. 3-ER-0209 (EA at 1-6). Consultation with the Tribe over the leases began in 2007 and continued with "[n]umerous meetings and field trips to consult and communicate on geothermal proposals for Dixie Meadows . . . between 2010 and 2021." 3-ER-0376 (EA at 3-123). In 2010 and 2012, BLM completed two separate Environmental Assessments ("EAs") analyzing the potential environmental

impacts of geothermal exploration on the leases and approved up to 34 well pads for exploration. 3-ER-0209 (EA at 1-6). Neither CBD nor the Tribe challenged the geothermal leases or the two separate exploration permits, 2-ER-0120 (Thomsen Second Decl. ¶ 5), despite multiple in-person meetings and site visits with the Tribe. 3-ER-0404–05 (EA 5-1 to 5-2).

Between 2011 and 2020, Ormat drilled nine exploration wells, some of which were ultimately deemed suitable as production wells and others as reinjection wells for Phase I. 3-ER-0209 (EA at 1-6); 4-ER-0721–26 (EA, App. L at L-1 to L-6). The primary purposes of the exploration program were: (1) to determine whether a commercially viable geothermal resource existed, and (2) to refine existing local hydrogeological information to develop the Hydrogeologic Conceptual Model (the "Model") to support both the assessment of the potential Project impacts and the development of a monitoring and mitigation plan.[1] *See* 4-ER-0722–23 (EA, App. L at L-2 to L-3); *see generally* 4-ER-0645–77 (ARMMP, App. D, Model). Exploration indicated that economically viable geothermal resources are most likely to exist near the western edge of the Dixie Valley along the Stillwater Mountain Range. 3-ER-

[1] The Model was built on existing hydrological and geological datasets from numerous studies of the Dixie Valley over the past 35 years. *See* 4-ER-0549 (ARMMP at 6); 4-ER-0645–77 (Model). Exploratory drilling, flow testing, and ground and surface water monitoring added necessary detail to better understand the hydrogeology of the local Project area.

0209–10 (EA at 1-6 to 1-7). The geothermal reservoir exists about a mile deep in east, northeast trending faults that are separated from the shallow alluvial aquifer by impermeable rock layers. *See* 4-ER-0649 (Model at D-5). Hydrologic, geochemical, and geophysical data also indicate that some geothermal fluid migrates upward through the east-northeast trending fault structures to the shallow aquifer west of the springs in Dixie Valley, then migrates laterally, mixing with cooler alluvial waters before discharging at the springs. 4-ER-0649–50, 0658–59 (Model at D-5 to D-6, D-14 to D-15); 3-ER-0279–80 (EA at 3-26 to 3-27). The below figure is a cross-sectional depiction of the Hydrogeologic Conceptual Model. 4-ER-0628 (ARMMP at Figure 5).



In 2017, Ormat conducted a 46-day flow and injection test to better understand the potential impacts of geothermal fluid production on the springs in Dixie Meadows and to better define the Model. 4-ER-0548 (ARMMP at 5); *see generally* 5-ER-0730–73 (EA, App. M). An average of 1,600 gallons per minute—the same quantity as needed for the Phase I production—flowed from the production well and was reinjected at two separate injection wells. 5-ER-0730 (EA, App. M at M-1). Five spring locations were monitored for temperature, electrical conductivity, and water level. 5-ER-0731 (EA, App. M at M-2). During the test, there was ***no observable influence on the springs***—springs temperatures and spring levels both remained stable or varied only within normal ranges. 5-ER-0731–32 (EA, App. M at M-2 to M-3). Overall, the 46-day flow test supported the Model's conclusion that the deep geothermal reservoir is ***not directly*** connected to the springs and that the springs will not be impacted by geothermal production. *See* 3-ER-0288 (EA at 3-35) (observing that the test indicated "there were no apparent influences of pumping and injection activities observed at [the springs]"); 4-ER-0649 (Model at D-5) ("Geochemical and stable isotope data suggests that there is not a direct hydraulic connection between the geothermal reservoir and the springs . . . .").

In 2018, to add to the growing body of knowledge regarding the source water for the springs in Dixie Valley, Ormat began systematic baseline data collection of temperature, water level, and fluid chemistry at several of the springs. 4-ER-0553

(ARMMP at 10); 4-ER-0656–58 (Model at D-12 to D-14); 3-ER-0271 (EA at 3-18). The fluid chemistry in the water samples from the springs is distinct from that of the water samples collected from the deep geothermal reservoir, again supporting the Model's assumption that the reservoir and source of water for the springs are not directly connected and the geothermal fluid undergoes significant mixing with cooler alluvial waters before flowing to the springs. *Compare* 4-ER-0656–58 (Model at D-12 to D-14), *with* 4-ER-0649 (Model at D-5). Baseline water quantity and quality monitoring is ongoing and will be enhanced under BLM's ARMMP. 4-ER-0553–54 (ARMMP at 10–11).

In sum, multiple independent lines of evidence—exploration-well sampling, operation of the flow test, and the markedly different chemistry of the water in the geothermal resources as opposed to the springs—all support the Model developed by Ormat and accepted by BLM. This Model indicates the presence of ***two*** main aquifers: a deeper confined reservoir in the bedrock that is the target of the geothermal development and a shallower aquifer in the alluvium in which limited geothermal fluids mix and flow to the springs. 3-ER-0279 (EA at 3-26); 4-ER-0647 (Model at D-3).

C. BLM's Environmental Review and Development of the ARMMP

In 2015, given the strong indication of a valuable geothermal resource at the lease locations, Ormat applied for a geothermal utilization permit to develop the

geothermal resource. 2-ER-0134 (Thomsen Decl. ¶ 9). In May 2017, BLM released for public review and comment the first draft EA ("Draft EA") analyzing the environmental impacts of Project construction and operation. One of the primary resource concerns identified in comments was the potential for the Project to affect springs and aquatic habitat in Dixie Meadows. 3-ER-0219 (EA at 1-16). In particular, commenters, including Appellees, voiced concern that geothermal development could adversely affect the warm springs, and in turn, the "Dixie Valley" toad species.[2] 3-ER-0330–32 (EA at 3-77 to 3-79); 4-ER-0458 (EA, App. G at G-2).

In response to comments on the Draft EA, BLM assembled a technical working group comprised of BLM hydrologists and biologists, along with representatives of the USFWS, Nevada Department of Wildlife ("NDOW"), the Navy (which owns lands in Dixie Valley), and the U.S. Geological Survey, and in

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[2] In 2017, just months after BLM released the Draft EA, CBD petitioned the U.S. Fish and Wildlife Service ("USFWS") to list the toad as threatened or endangered. 3-ER-0330 (EA at 3-77). Though the USFWS found that the petition presented sufficient information indicating that listing may be warranted, 83 Fed. Reg. 30,091, 30,091–93 (June 27, 2018), a final decision is not expected until September 2022. If the USFWS decides that listing is warranted and proposes to list the species, a listing may follow in approximately a year. 16 U.S.C. § 1533(b)(6). Once listed, BLM would potentially be required to reinitiate consultation with the USFWS under Section 7 of the Endangered Species Act regarding any remaining discretionary actions BLM must take for the Project, 50 C.F.R. § 402.16(a), which may or may not result in additional protective measures for the species.

collaboration with Ormat, to develop the ARMMP. 3-ER-0219 (EA at 1-16); 4-ER-0545 (ARMMP at 2). Even though the flow test, water chemistry, and Model all strongly indicate that the springs in Dixie Meadows are not directly connected with and will not generally be affected by development and reinjection of the deep geothermal fluids, there are inherent uncertainties in any natural system. To plan for these uncertainties, BLM used the Model to develop the ARMMP's monitoring and mitigation plan to immediately address water and species impacts, if they occur. *See* 4-ER-0547 (ARMMP at 4); *see also* 2-ER-0160 (Decision Record at 5).

The ARMMP is the most comprehensive and costly aquatic monitoring and mitigation plan ever developed for an Ormat geothermal project. 2-ER-0121–22 (Thomsen Second Decl. ¶¶ 9-10). It includes three elements. First, Ormat must continue and enhance baseline data collection to further understand the baseline variations in hydrologic and biological conditions in the springs of concern. 4-ER-0551–54 (ARMMP at 8–11). Second, the ARMMP sets "early warning" thresholds—such as water levels, temperature, and chemical composition—to be monitored either continuously or on a weekly basis and reported to the technical working group. 4-ER-0570–76 (ARMMP at 27–33); 2-ER-0175 (Decision Record at 20). Third, if the thresholds are reached, the ARMMP requires Ormat to implement mitigation measures, as required by BLM, to address those observed impacts, including, but not limited to, modifying pumping or reinjection rates of

geothermal fluids, altering pumping or reinjection locations, supplementing or replacing existing water supplies, and, ultimately, stopping pumping or reinjection operations. 4-ER-0577–79, 0608–10 (ARMMP at 34–36, Table 12). "Using this approach, baseline conditions, thresholds, management actions, and mitigation measures will be adapted throughout the life of the project to respond to the needs of the hydrologic and biologic resources, and to ensure mitigation is appropriate to reduce impacts to hydrologic resources, aquatic habitat, or sensitive species." 2-ER-0160 (Decision Record at 5).

In January 2021, BLM released a revised draft EA ("Revised Draft EA") for the Project and the draft ARMMP for public comment. 3-ER-0219 (EA at 1-16). Again, BLM received numerous comments from Appellees and state and federal agencies, resulting in further refinement of the ARMMP, including increased frequency of monitoring to facilitate faster mitigation response times. 3-ER-0219–20 (EA at 1-16 to 1-17); 2-ER-0175 (Decision Record at 20). As an adaptive management measure, the ARMMP is intended to be further refined by the technical working group before the Project begins energy production and throughout the life of the Project as real-time monitoring occurs. 4-ER-0545–46 (ARMMP at 2–3); 2-ER-0160 (Decision Record at 5).

D. BLM's Significant Tribal Consultation and Resulting Mitigation Measures

Consistent with years of prior consultation letters, meetings, and site visits with the Tribe regarding Dixie Valley geothermal projects, BLM initiated consultation with the Tribe on this specific Project in 2015 by sending the Tribe's Chairman a letter and map of the Project location requesting feedback. 3-ER-0405 (EA at 5-2); Draft EA at 3-108.[3] In formal consultation in September 2016, the Tribe raised concerns about the possible impact of the Project on the Dixie Meadows Hot Springs, specifically the Tribe's "access to" the springs, "[i]mpacts on the plants at the . . . [s]prings," and the temperature, flow rate, and composition of the springs. 3-ER-0406 (EA at 5-3). In the course of this and subsequent consultations, BLM decided to "record[] the Dixie Meadow Hot Springs . . . as a historic property." 3-ER-0371–72 (EA at 3-118 to 3-119). BLM determined that "the spring is a sacred locality" and "has been used as a traditional ceremonial place" by the Tribe, citing both "the hydrological conditions" and "the ethnobiotic resources" at the springs. 3-ER-0372 (EA at 3-119). BLM did not discuss either the uplands surrounding the springs or the nearby land (where a mineral materials site, wellpads, and other

[3] The Draft EA is available at BLM's eplanning website at https://eplanning.blm.gov/public_projects/nepa/75996/106090/129658/Dixie_Meadows_DraftEA.pdf. The Court may take judicial notice of the Draft EA under Federal Rule of Evidence 201(b)(2).

permitted development already exist) as contributing factors to or part of the springs' designation.

After receiving the Draft EA and its accompanying site maps, the Tribe raised concerns over Project impacts on the springs and the proximity of the Project to the springs. 5-ER-0789, 0798 (Revised Draft EA at 1-8, 2-3) (site maps); Revised Draft EA, Responses to Comment, App. G at G-40, G-44[4] (the Tribe's comments raising concerns about possible impacts to the springs' temperature, noise and light pollution, obstructed views, and impacts on "access and use [of] the springs as a cultural and spiritual site").[5] The Tribe suggested that to mitigate these potential concerns BLM should site the Project "farther from the springs" and include a "robust final monitoring and mitigation plan with set thresholds for triggering concrete responses." Revised Draft EA, App. G at G-47. These and other comments

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[4] Comments on the Revised Draft EA are available on BLM's eplanning website in Appendix G, at https://eplanning.blm.gov/public_projects/75996/200167265/20032768/250038967/Dixie_Meadows_EA_Appendix_G-Response-to-Comments_508.pdf. The Court may take judicial notice of Appendix G to the Revised Draft EA under Federal Rule of Evidence 201(b)(2).

[5] At the preliminary injunction hearing before the District Court, the Tribe's counsel represented that the location of the power plant was not disclosed to the Tribe until right before the Tribe filed its motion for an injunction. 1-ER-0054 (Transcript of Hearing, January 4, 2022 ("Tr.") at 34:16–23). However, maps included in the Draft EA and the 2021 Revised Draft EA clearly identify the location of the proposed power plant in relation to the springs. *See* Draft EA at 3-10; 5-ER-0789, 0798 (Revised Draft EA at 1-8, 2-3).

led BLM to prepare the Revised Draft EA and ARRMP. BLM again sought comments from the Tribe, 3-ER-0408 (EA at 5-5), noting that in response to the Tribe's comments, Ormat moved the location of one power plant and ultimately "realigned the portion of the gen-tie [power line] that formerly crossed wetlands and riparian areas in Dixie Meadows," and "follow the existing Dixie Valley Road" instead. 5-ER-0814, 0823–24 (Revised Draft EA at 2-19, 2-28 to 2-29); 3-ER-0367, 0379 (EA at 3-114, 3-126).

Despite these changes, the Tribe repeated its concerns about the impact of "noise and visual pollution on users of the hot springs," and emphasized "that the location of two geothermal power plants directly *adjacent to* a sacred site," or even "located more than 500 feet but still in very close proximity to a sacred site imposes significant harms." 4-ER-0467, 0473, 0487 (EA Ex. G at G-11, G-17, G-31) (emphasis added).[6] The final EA made multiple efforts to mitigate these possible

[6] In the Tribe's Reply brief filed with the District Court prior to the preliminary injunction hearing, the Tribe asserted for the first time that the land on which Ormat previously built wellpads and plans to build the current Project is part of the Tribe's "sacred site." *See* [Appellees'] Reply in Support of Motion for a Temporary Restraining Order or Preliminary Injunction, at 4, ECF No. 27. This is directly contrary to the record and the Tribe's comments during the consultation process which claimed the springs and the view from the springs as the sacred site—not the physical uplands surrounding the springs. Appellees "forfeit[] any objection" based on issues not raised in their comments. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004). "Absent exceptional circumstances, such belatedly raised

visual and auditory impacts, directing Ormat to use "previously disturbed areas for equipment laydown sites," to paint the structures "an appropriate color to blend with the area," and to "hood[] and shield[] light fixtures" to prevent "upward- or outward-shining light." 3-ER-0366–67 (EA at 3-113 to 3-114).[7] By virtue of these requirements, BLM determined that the Project "would be noticeable to sensitive receptors but would not dominate their view," given "[t]he presence of other disturbances and structural elements [that] already influence[] the visual landscape." 3-ER-0368 (EA at 3-115).

In a further attempt to address the Tribe's concerns, BLM also engaged in consultation with the Tribe and State Historic Preservation Officer regarding the visual and auditory effects from the presence of the power plants, as well as the potential effects to the springs and ethnobotanical plant communities in Dixie Meadows. *See* 3-ER-0373 (EA at 3-120). The consultation process resulted in development of a Memorandum of Agreement ("MOA") among numerous agencies, requiring Ormat to prepare and implement a historic properties treatment plan to

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issues may not form a basis for reversal of an agency decision." *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (per curiam).

[7] BLM's preliminary visual quality analysis noted that "existing utility poles and lines, Dixie Valley Road, a gravel site, other human-made structures, fence lines, and other areas with exposed natural sediment . . . [already] influence the visual landscape." 3-ER-0366 (EA at 3-113).

minimize and mitigate adverse Project impacts in addition to the protections enshrined in the ARMMP. 4-ER-0710 (MOA at 3). Due to its ongoing opposition to the Project, the Tribe ultimately decided not to sign the MOA. 2-ER-0143. Regardless, the Project is subject to its terms.

On November 23, 2021, BLM issued its Finding of No Significant Impact ("FONSI") and Decision Record approving the Project. The Project is conditioned on Ormat's implementation of the ARMMP; the MOA (including preparing and adhering to a historic properties treatment plan); and dozens of other mitigation measures to minimize impacts to water, soils, and other resources. *See* 2-ER-0159–60 (Decision Record at 4-5). In addition to these protections, BLM approved only Phase I, i.e., 12 MW of production, to ensure that production does not outpace the geothermal recharge from the natural system. 2-ER-0160 (Decision Record at 5). Additional phases cannot proceed unless the initial facility has been in successful operation (no monitoring thresholds have been exceeded) for at least 12 months and the geothermal reservoir data indicate that additional production is sustainable. 2-ER-0160–61 (Decision Record at 5–6). BLM ultimately determined that the Project will not result in significant impacts to hydrologic or biological resources. *See generally* 2-ER-0156–86 (Decision Record); *see also* 2-ER-0187 (FONSI at 1).

E. Ormat's Project Construction Schedule

In 2017, Ormat entered into a PPA that allows Ormat to sell power from projects coming online before the end of 2022 at a fixed price of about $75 per megawatt hour ("MWh").[8] 2-ER-0138 (Thomsen Decl. ¶ 17). This rate is approximately $15 per MWh above current market rates and is part of the reason the Dixie Meadows Project is financially viable, despite Ormat's extensive and costly monitoring and mitigation commitments. 2-ER-0138 (Thomsen Decl. ¶¶ 17-18); 2-ER-0109 (Thomsen Third Decl. ¶ 6). If the Project does not begin delivering 12 MW of power by the end of December 2022, Ormat stands to lose up to $30 million in revenue over 20 years, which puts the financial viability of the entire Project at risk. 2-ER-0138 (Thomsen Decl. ¶ 17); 2-ER-0123 (Thomsen Second Decl. ¶ 14).

Ormat originally planned to begin the 12 to 24 months of Project construction in early 2021, anticipating a final BLM decision shortly after the close of the public comment period on the Revised Draft EA. 2-ER-0135 (Thomsen Decl. ¶ 11); 3-ER-0227 (EA at 2-6) (providing for a 12- to 24-month construction schedule). As the months passed, Ormat saw its construction window narrow. Finally, in November

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[8] PPAs directly between energy customers and generators have long played a critical role in the growth of the renewable energy industry by providing the certainty necessary to finance renewable energy projects. *See* John J. Beardsworth, Jr., *Financing Power Projects in Emerging Markets: Power Purchase Agreements and Related Financial Issues*, 1036 P.L.I. Corp. 89, 91 (1998).

2021, BLM approved the Project, and a month later it issued the final sundry notices clearing Ormat to begin construction. *See generally* 2-ER-0156–86 (Decision Record); *see also* 2-ER-0145–55 (Geothermal Sundry Notices, Dec. 21, 2021).

Ormat was prepared to commence Project construction upon BLM's approval in December 2021. 2-ER-0119 (Thomsen Second Decl. ¶ 3). However, it agreed to delay the start of construction to January 6, 2022, once Appellees initiated the proceedings below—leaving just under 12 months to complete the Project pursuant to the PPA timeline. 2-ER-0119 (Thomsen Second Decl. ¶ 3). Under this timeline, construction would begin with grading and leveling approximately 10 acres for the power plant site, which lies between 0.25 and 1.5 miles from the spring complexes. 2-ER-0120 (Thomsen Second Decl. ¶ 4); 2-ER-0136 (Thomsen Decl. ¶ 12). Next, Ormat would pour the concrete foundation, followed by construction of the power plant itself. 2-ER-0120 (Thomsen Second Decl. ¶ 4). Ormat further anticipated that the transmission line would be constructed over 5 months beginning in May 2022, power plant testing would begin in mid-October, and, if successful, power delivery would begin in mid-December 2022. 2-ER-0120 (Thomsen Second Decl. ¶ 4). With a January 6th start date, Ormat was already working under an extremely tight 12-month timeframe to complete the Project by the end of the year.

II. Procedural History

On December 15, 2021, Appellees filed their Complaint challenging the Project, alleging violations of NEPA, RFRA, the American Indian Religious Freedom Act ("AIRFA"), the Federal Land Policy and Management Act, and federal policies for tribal consultation. One week later, Appellees moved for a temporary restraining order or preliminary injunction to halt the Project.[9] *See generally* [Appellees'] Motion for a Temporary Restraining Order or Preliminary Injunction, ECF Nos. 13, 14 ("Motion for PI"). After expedited briefing of the preliminary injunction, the District Court heard arguments on January 4, 2022. At the close of the hearing, Judge Jones, ruling from the bench, issued a 90-day preliminary injunction. He stated, "I really can't say as I sit here whether there would be a likelihood of success on the merits." 1-ER-0099 (Tr. at 79:20–21). Nevertheless, he explained, that a 90-day injunction would "allow[] plaintiffs to get to the circuit," after which point "the relative damages really shift" to Ormat. 1-ER-0103 (Tr. at 83:12–14).

On January 14, 2022, the District Court issued its written Order memorializing the 90-day injunction, finding "that a preliminary injunction beyond 90 days is not

[9] Appellees advanced their NEPA, RFRA, AIRFA, and tribal consultation claims in their motion for preliminary injunction but did not raise arguments under the Federal Land Policy and Management Act.

appropriate because *the Court cannot find that Plaintiffs are likely to succeed on the merits* and, after 90 days, the balance of the harms tips sharply to Ormat." 1-ER-0006 (Order at 5) (emphasis added). Specifically, with regard to Appellees' NEPA claims, the District Court found that Appellees "have not demonstrated that the baseline data was insufficient to support BLM's environmental review" and "have not demonstrated that it was arbitrary and capricious for BLM to rely on the ARMMP." 1-ER-0007–08 (Order at 6–7). Regarding Appellees' RFRA claim, the court found that it too was unlikely to succeed because "the facts here do not support the merits of [Appellees'] claim that the Tribe's right to practice its religion will be 'substantially burdened' by the alleged impacts of the Project." 1-ER-0012 (Order at 11). The District Court further concluded that Appellees' APA claims merely "attempt to elevate non-binding policy statements to the status of law." 1-ER-0010 (Order at 9).

While the Order relied on record evidence to conclude that Ormat stands to lose $30 million over 20 years if it cannot complete Project construction by the end of 2022, the Order assumed that this harm would only come to pass if the injunction lasted beyond 90 days.[10] 1-ER-0006, 0015 (Order at 5, 14). However, no party

[10] The District Court recognized that the harm "may also be irreparable" because Ormat would be forced to reevaluate the economic viability of the Project altogether, yielding additional harms to federal, state, and local governments and the public at large. 1-ER-0015 (Order at 14).

presented evidence below that the Project could be completed by the end of the year with a 90-day delay. Rather, Ormat presented evidence to the District Court in late December that "a delay of even a few weeks could mean the difference between completing the Project before the end of 2022 or not," 2-ER-0119 (Thomsen Second Decl. ¶ 3), and Appellees did not contest this evidence.

After the January 4th hearing, Ormat immediately re-evaluated its construction schedule to identify any possibility to compress the already tight construction timeline so Ormat could still deliver Project power by December 31, 2022, if construction began after the 90-day injunction expired. 2-ER-0111 (Thomsen Third Decl. ¶ 12). Ormat explored numerous options for expediting construction, including hiring multiple contractors to work in parallel, extending construction hours, and compressing every phase of the construction timeline. 2-ER-0111 (Thomsen Third Decl. ¶ 12). Based on these discussions and Ormat's collective experience building similar facilities in Nevada, Ormat determined that it would be *virtually impossible* to complete the Project by December 31, 2022 (in eight and a half months) if construction is delayed 90 days. 2-ER-0111 (Thomsen Third Decl. ¶ 13). However, by expediting the construction schedule, eliminating all contingencies (e.g., weather events, contractor availability, and delays related to the ongoing COVID-19 pandemic), and leaving no margin for error, Ormat could conceivably complete construction and commence power generation by the end of

the year only if it were to begin construction by **February 28, 2022**. 2-ER-0111–12 (Thomsen Third Decl. ¶¶ 13–16).

Based on this additional information, Ormat moved the District Court to either modify its injunction by shortening it to 45 days or stay the effect of the injunction pending appeal to this Court. *See* Ormat's Motion to Modify the Preliminary Injunction, or in the Alternative, for Stay Pending Appeal, ECF No. 35 ("Motion to Modify or Stay"). Therein, Ormat demonstrated that, in reality, "the relative damages really shift" toward Ormat at approximately 45 days, not 90 days. Ormat argued that this additional information, coupled with the District Court's finding that Appellees had not demonstrated a likelihood of success on the merits, were sufficient bases to modify or stay the injunction. *Id*. On January 19, 2022, without discussing the merits of Ormat's Motion to Modify or Stay, the District Court denied the motion. 1-ER-0017–18 (Order, January 19, 2022 at 1–2). This preliminary injunction appeal was timely filed on January 20, 2022. Appellees cross-appealed on January 21, 2022.

On January 21, 2022, Ormat moved the Court to stay or modify the preliminary injunction pending appeal, or, in the alternative, expedite the appeal for decision by February 18, 2022. Appellees opposed the motion to stay or modify, but also requested expedited review with a decision by April 4, 2022. The Court has not yet ruled on the motions. However, in keeping with Ormat's proposed schedule

for expedited briefing and a decision by February 18, 2022, Ormat files this Opening Brief on February 1, 2022.

STANDARD OF REVIEW

This Court generally reviews a district court's grant of a preliminary injunction for abuse of discretion. A preliminary injunction constitutes abuse of discretion where the district court's balancing of the equitable factors is "illogical, implausible, or without support in the record." *Doe v. Kelly*, 878 F.3d 710, 713 (9th Cir. 2017). The District Court's interpretation of the underlying legal principles, however, is subject to de novo review. *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999). Thus, "an order 'will be reversed . . . if the district court relied on an erroneous legal premise or abused its discretion.'" *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam) (quoting *Sports Form, Inc. v. United Press Int'l., Inc.*, 686 F.2d 750, 752 (9th Cir. 1982)).

SUMMARY OF ARGUMENT

The District Court's 90-day preliminary injunction should be vacated for two reasons. First, the District Court erred as a matter of law by invoking the extraordinary remedy of a preliminary injunction while simultaneously finding that Appellees did not meet their burden to demonstrate a likelihood of success on the merits of their claims. Second, the District Court's 90-day preliminary injunction

was an abuse of discretion because the duration was chosen at random with the intent to allow sufficient time for Appellees to seek review in this Court, and not based on any evidence in the record regarding when the balance of harms would "tip sharply" to Ormat. In fact, the record below demonstrated that the balance shifts to Ormat in 45, not 90 days, and the District Court failed to consider this information in its decision. Thus, the Court should vacate the injunction.

ARGUMENT

I. A Preliminary Injunction Cannot Issue Where Appellees Failed to Demonstrate a Likelihood of Success on the Merits.

A. The District Court Did Not Find a Likelihood of Success or Serious Questions on the Merits.

A finding that Appellees are likely to succeed on the merits of their NEPA, RFRA, or APA claims is ***mandatory*** for an injunction of ***any*** length of time. *See Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). Proving likelihood of success on the merits was Appellees' burden, and this Court has routinely dissolved injunctions where, as here, appellees failed to meet that burden. *See Pimentel v. Dreyfu*s, 670 F.3d 1096, 1111 (9th Cir. 2012) (per curiam) (concluding that because the plaintiff "will not succeed on the merits of her claims. . . . [a]lthough the other *Winter* factors may tip in her favor and in fact remain unchallenged," the injunction would be vacated); *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 462 (9th Cir. 1994) (vacating an injunction because the appellees "have shown

neither a likelihood of success nor the existence of a serious question on the merits" of their NEPA claim); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) (determining that where the appellee "failed to demonstrate a likelihood of success on the merits" the preliminary injunction "must be dissolved"); *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 401 (9th Cir. 1989) (the Court "vacate[d] the preliminary injunction entirely" where the appellee did "not demonstrate[] a likelihood of success on the merits of his claim"); *Angoon v. Marsh*, 749 F.2d 1413, 1418 (9th Cir. 1984) (vacating an injunction because "[t]he district court erred in . . . conclud[ing] that [the plaintiff] had demonstrated a fair chance of success on the merits").

Here, the District Court committed legal error in granting a preliminary injunction despite finding the Appellees had not demonstrated a likelihood of success on the merits. *See Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009) (affirming the District Court's denial of a preliminary injunction without considering irreparable injury because the plaintiff "failed to show a likelihood of success on the merits"). As the District Court explained in its Order: "Given the facts presented at hearing and in the parties' briefing, the Court *cannot find* that Plaintiffs are likely to succeed on the merits of these claims at this early stage in the litigation." 1-ER-0006 (Order at 5) (emphasis added); *id*. ("Plaintiffs Have Not Demonstrated that

They Are Likely to Succeed on the Merits"). To the contrary, the District Court correctly held that:

(1) Applying the APA's deferential arbitrary and capricious standard to the NEPA claims, Appellees *failed* to demonstrate that "baseline data was insufficient," that it was arbitrary and capricious for BLM to rely on the ARMMP, or that BLM did not "meaningfully consider impacts of constructing the Project on areas visible from the springs," 1-ER-0007–9 (Order at 6–8);

(2) Appellees' claims that the Project "detracts" from their ability to exercise their spiritual traditions did not meet their "substantial burden" under RFRA to show "coerc[ion] . . . to act contrary to their religion under the threat of civil or criminal sanctions," 1-ER-0011–12 (Order at 10–11); and

(3) Appellees' APA claims failed because the tribal consultation policies on which they relied "lack the force of law," 1-ER-0010–11 (Order at 9–10).

Appellees may attempt to avoid the District Court's legal error by alleging they were merely obligated to raise "serious questions" going to the merits, citing the Ninth Circuit's "sliding scale" standard. *See* Appellees' Response in Opposition to Motion to Stay or Modify the Preliminary Injunction Pending Appeal and Motion

for Expedited Review under Circuit Rules 3-3(c) and 27-12 at 8–9, ECF No. 9-1. But the District Court did not find that Appellees even raised serious questions going to the merits. Rather, the District Court affirmatively concluded that based on the "briefing" and "facts presented at hearing," Appellees were unlikely to succeed on the merits of their claims. 1-ER-0006 (Order at 5). While Judge Jones at hearing telegraphed to the parties that he would have "serious questions" for the parties to answer, he did not conclude there were "serious questions" going to the merits of Appellees' legal claims. *Compare* 1-ER-0028–29 (Tr. at 8:7–9, 9:7–10), *with* 1-ER-0002-16 (Order). Thus, notwithstanding Appellees' selective quotation from the hearing transcript, the plain language of the District Court's Order, which expresses the District Court's conclusions regarding the likelihood of success on the merits, shows that the District Court did not find "serious questions" going to the merits. *See Hong v. United States*, 363 F.2d 116, 120 (9th Cir. 1966) (the Court evaluates the lower court's written findings and "should not, on . . . appeal, review [the lower court's oral] statements"); *White v. Wash. Pub. Power Supply Sys.*, 692 F.2d 1286, 1289 n.1 (9th Cir. 1982) ("the rule in this circuit is that formal findings of fact and conclusions of law supersede the oral decision").

Moreover, even if the District Court had found serious questions going to the merits, the lower bar does not apply absent a showing that the balance of harms "tips sharply" in favor of the injunction. *All. for the Wild Rockies v. Pena*, 865 F.3d 1211,

1217 (9th Cir. 2017). The District Court found just the opposite—that "the balance of harms tips sharply *to Ormat*," 1-ER-0006 (Order at 5) (emphasis added), at the point that construction delays "make it all but certain" that Ormat will be unable to complete Phase I construction by the end of 2022, risking the financial viability of the Project.[11] 1-ER-0014–15 (Order at 13–14). Thus, even if the District Court had concerns about the alleged harms of Project construction, it did not find that the balance of harms tipped sharply in favor of Appellees, so the "serious questions" test does not apply.

Here, given the District Court's express finding that it could not determine that Appellees were likely to succeed on the merits, the injunction was improperly issued.

B. The Record Supports the District Court's Finding that Appellees Are Not Likely to Succeed on Their Claims.

The record before the District Court supported its conclusion that Appellees are not likely to prevail on the merits of this case and did not raise serious questions going to the merits of their NEPA, RFRA, and other claims.

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[11] While the District Court correctly found that the balance of harms would tip sharply to Ormat, it erroneously chose, at the close of the preliminary injunction hearing, 90 days as the point at which the balance would shift without any record basis or argument. *See infra* at Argument, Section II.

1. BLM Followed NEPA's Environmental Review Procedures, and the District Court Properly Deferred to the Agencies' Technical Expertise.

NEPA requires that agencies prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3.[12] Not every major Federal action requires an EIS. If an agency prepares an EA, and concludes that project impacts will be insignificant, it may issue a FONSI. *See* 40 C.F.R. §§ 1501.3, 1501.4(c)–(e), 1508.9. Although an EA "need not conform to all the requirements of an EIS, . . . it must be sufficient to establish the reasonableness of the decision not to prepare an EIS." *Cal. Trout v. F.E.R.C.*, 572 F.3d 1003, 1016 (9th Cir. 2009) (citation omitted). "In reviewing an agency's finding that a project has no significant effects, courts must determine whether the agency has met NEPA's hard look requirement, 'based [its decision] on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.'" *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020) (citation omitted). Courts make a "pragmatic judgment" whether the NEPA analysis includes

[12] The NEPA regulations were revised, effective September 14, 2020, *see* 85 Fed. Reg. 43,304 (July 16, 2020), but because the Draft EA was published prior to that date, BLM elected for the pre-2020 regulations to apply. 3-ER-0392 (EA at 4-1). Thus, citations in this brief are to the regulations in place prior to September 14, 2020.

"a *reasonably thorough* discussion of the *significant aspects* of the *probable* environmental consequences." *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1150–51 (9th Cir. 1997) (citations and quotations omitted, emphases added).

An agency's NEPA compliance is reviewed under the APA. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Courts may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although this review is "searching and careful," the standard is "narrow, and [the Court] cannot substitute [its] own judgment for that of the [agency]." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2004) (citations omitted).

> In general, a court will uphold agency decisions so long as the agencies have considered the relevant factors and articulated a rational connection between the factors found and the choices made. This deference is particularly appropriate when a court is reviewing issues of fact, where analysis of the relevant documents requires a high level of technical expertise.

Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 578 (9th Cir. 2016) (citations and quotations omitted). Accordingly, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 378 (1989).

a. BLM Had Sufficient Baseline Data to Inform Its Rational Decision.

The District Court properly rejected Appellees' argument that BLM failed to adequately gather sufficient data or set an environmental baseline to support the environmental impact analysis. Motion for PI at 17. NEPA generally requires an EA to "succinctly describe the environment of the area(s) to be affected," 40 C.F.R. § 1502.15, and assess direct, indirect, and cumulative effects of the proposed action and alternatives on the environment, *id*. § 1502.16. The description of the affected environment "shall be no longer than is necessary to understand the effects of the alternatives." *Id*. § 1502.15. The Ninth Circuit has made clear that "[a]n agency need not conduct measurements of actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer modeling, or some other reasonable method." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016); *see also League of Wilderness Defs. v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) (agency need not "conduct any particular test" or "use any particular method").

The EA and relevant case law wholly undermine Appellees' claims below regarding an inadequate baseline analysis. In support of their argument, Appellees cited *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, in which this Court concluded that the "fail[ure] to set forth *any* baseline conditions" before issuing a final decision violates NEPA. 857 F.2d 505, 510 (9th Cir. 1988) (emphasis added).

That is far from the case for the Dixie Meadows EA. The EA lays out a detailed baseline analysis of the water resources in the Project area. *See* 3-ER-0262–83 (EA at § 3.3.1). This analysis is both comprehensive—detailing data regarding groundwater and surface water temperatures, geochemical properties, pressures, and more—and supported by studies conducted over many years. *See, e.g.*, 3-ER-0268–71 (EA at 3-15 to 3-18); 4-ER-0553 (ARMMP at 10); 4-ER-0656–58 (Model at D-12 to D-14).

Likewise, a variety of baseline data were collected to better understand species distribution and populations in the area. 3-ER-0321–42 (EA at § 3.8.1). Specifically for the Dixie Valley toad, BLM relied on life cycle studies from 2013 and 2017, as well as more recent survey data from the U.S. Geological Survey that indicates habitat preference and typical range within 45 feet of aquatic environments. 3-ER-0330–32 (EA at 3-77 to 3-79); 4-ER-0565–66 (ARMMP at 22–23). While Appellees may argue that population-level toad figures are not yet available, sufficient information regarding species preferences, encounters, and habitat was available to inform BLM's development of the ARMMP and assessment of effects. *See Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 (9th Cir. 2006) (collecting cases where the Court found the use of "habitat as a proxy for population" as an "eminently reasonable" substitute for counting individual animals, particularly

where the government also conducted "site-specific, project-specific, and species-specific analys[e]s"); *see also Great Basin Res. Watch*, 844 F.3d at 1101.

Thus, BLM drew reasonable inferences from the best available scientific information, and the District Court properly found that Appellees did not demonstrate sufficient grounds to second guess the agency's technical judgment. *See Protect Our Cmtys. Found.*, 825 F.3d at 583.

b. BLM's Finding of No Significant Impact is Supported by the Record, Including the ARMMP.

Appellees complained below that BLM did not justify its FONSI because the ARMMP is too vague and uncertain, and BLM did not demonstrate the effectiveness of the ARMMP to ensure "all impacts can be mitigated." Motion for PI at 16–18. But that is not the standard. BLM is not required to mitigate impacts to "zero" to justify a FONSI. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000) ("If significant measures are taken to 'mitigate the project's effects, they need not completely compensate for adverse environmental impacts.'" (citation omitted)), *overruled on other grounds in Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc). Likewise, a complete mitigation plan detailing "the precise nature of the mitigation measures" is not mandated; rather, the proposed mitigation must be "developed to a reasonable degree." *Id*. Mitigation must be discussed in "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Protect Our Cmtys.*

Found., 825 F.3d at 582 (citation omitted). In evaluating the sufficiency of mitigation measures, a court must consider whether the mitigation measures "constitute an adequate buffer against the negative impacts that may result from the authorized activity." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001). The agency is entitled to deference in making these types of determinations based on technical data. *Protect Our Cmtys. Found.*, 825 F.3d at 578.

In the case of Dixie Meadows, to address the potential impacts to the springs, aquatic habitat, and aquatic species (including the toad), BLM relied first on the Model, confirmed in a 46-day flow test, that indicated no or de minimis effects to the springs. *See generally* 4-ER-0645–77 (Model); *see also* 4-ER-0548 (ARMMP at 5); 3-ER-0288 (EA at 3-35). BLM also implemented phased development, requiring Ormat to demonstrate successful operation of the 12 MW facility for one year before additional energy production can be authorized. 2-ER-0160–61 (Decision Record at 5–6). As a final layer of conservatism, and at the Tribe's request, BLM and Ormat then developed the robust ARMMP in conjunction with the technical working group to detect any measurable impacts, should they occur.

Appellees complained below that the ARMMP is inadequate because it is a mere plan to make a plan. The cases Appellees cited, however, involved vastly different mitigation plans with "mere lists" of mitigation measures and meager

support or discussion. For instance, in *National Parks Conservation Association v. Babbitt,* 241 F.3d 728, 734–35 (9th Cir. 2001), the National Park Service authorized a 72% increase in cruise vessel traffic in Glacier Bay National Park, acknowledged the impacts to marine species were largely unknown, and did not provide "criteria for an ongoing examination of [effects] or for taking any needed corrective action," let alone ensuring mitigation measures such as vessel speed limits would be enforced. In *Western Land Exchange Project v. BLM*, 315 F. Supp. 2d 1068, 1091–92 (D. Nev. 2004), BLM authorized privatization of 6,000 acres of public land in desert tortoise habitat and merely listed mitigation measures that "could be employed" during unspecified future permitting decisions, without further definition or any assurance that such measures would ever be adopted.

As Ormat argued below, and the District Court found, this case is more like *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473–77 (9th Cir. 2000) and *Wetlands Action Network,* 222 F.3d at 1121. In *Okanogan*, the agency conducted geochemical modeling of the potential impacts of mining on water quality and quantity, required monitoring measures to quantify impacts, and used a rating system to anticipate the probable effectiveness of mitigation, ranking measures as "high," "moderate," or "low." 236 F.3d at 473–77. In *Wetlands Action Network*, the court upheld the agency's reliance on mitigation measures to reach its FONSI for a large-scale, mixed-use development site. 222 F.3d at 1110–11, 1121. Even

though a "complete mitigation plan had yet to be set forth with specificity," the Ninth Circuit noted that the detailed permit conditions, reviewed by various agencies, were enforceable against the permittee. *Id.* at 1121.

As in *Okanogan*, the ARMMP here is supported by the Model, which is in turn based on scientific datasets dating back to 1987 as supplemented by water chemistry data, geological logs, exploratory drilling, and a flow test to define the local hydrogeology. *See generally* 4-ER-0645–77 (Model). These analytical data, along with an enforceable monitoring and mitigation plan (as in *Wetland Action Network*), developed in coordination with the USFWS, NDOW, the Navy, and Ormat, include hard triggers requiring rapid responses for variances in the quality and quantity of water, aquatic habitat, and species parameters. 4-ER-0570–79 (ARMMP at 27–36). As the District Court found, BLM's reliance on the ARMMP was reasonable and grounded in its own experts' assessment of the Model and ARMMP. 1-ER-0008 (Order at 7).

Comments from USFWS and NDOW on early drafts of the EA do not undermine BLM's adaptive management approach. BLM considered USFWS's and NDOW's concerns, but BLM ultimately concluded that the EA analyzed sufficient data and science available at the time, and determined it had applied a reasonable mitigation approach based on the Model. 4-ER-0494–95 (EA, App. G at G-38 to G-39). It is axiomatic that "[w]hen specialists express conflicting views, an agency

must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh,* 490 U.S. at 378; *see also City of Carmel-By-The-Sea*, 123 F.3d at 1154–55 (interagency criticisms alone are not sufficient to invalidate the discussion of environmental impacts and mitigation measures).

Here, as the District Court concluded, Appellees failed to demonstrate that BLM violated NEPA in its consideration of impacts to the springs and aquatic habitat. 1-ER-0007–9 (Order at 6–8). The agency reasonably determined that, given that impacts to springs and aquatic species are anticipated to be minor, an adaptive management approach was prudent to monitor real world data and respond accordingly. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000) (mere disagreement with any agency's substantive conclusions does not prove a NEPA violation).

c. BLM Reasonably Considered the Tribe's Interests in the Springs and Surrounding Landscape.

Appellees alleged below that BLM did not meaningfully consider in the EA the impacts of constructing the Project on the springs, a sacred site for the Tribe. Motion for PI at 18. But the EA's detailed analysis of water, plant, and species impacts fully evaluates the effects to the springs and surrounding plant and animal life. Given BLM's detailed evaluation of spring impacts, the Tribe questions the adequacy of BLM's consideration of impacts to the landscape setting—i.e., the

visual and aesthetic impacts to Tribal members who may see and hear the Project while at the springs.[13] *Id*. But this approach also fails. The EA details the visual impact of the Project in the Dixie Valley and requires mitigation, 3-ER-0400 (EA at 4-9), including painting buildings consistent with BLM's visual color guidelines, application of best available technologies to minimize noise, and "dark-sky"-compliant lighting practices, such as lighting limited only to those areas needed for safety and shielded to minimize the likelihood of artificial light extending beyond the Project area. 3-ER-0367 (EA at 3-114); *see* 4-ER-0685–87 (EA App. J at J-4 to J-6) (Environmental Protection Measures). While the low-profile (35-foot) power plant (3-ER-0235, EA at 2-14) may be seen and sometimes heard while traveling on roads in close proximity across the generally flat Dixie Valley, the mere presence of the Project in the landscape does not render its impacts significant. 3-ER-0367–68 (EA at 3-114 to 3-115). Indeed, the Project complies with visual resource management classifications in the area that allow for moderate changes to landscape character that do not "dominate [the] view." 3-ER-0361–62, 0368 (EA at 3-108 to 3-109, 3-115). Thus, BLM's FONSI was reasonable.

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[13] In the context of the National Historic Preservation Act, the Ninth Circuit has held that "[a]lthough it is understandable that the Tribe values the landscape of the project area as a whole, the NHPA requires that the BLM protect only against adverse effects on the features of these areas that make them eligible for the National Register." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 611 (9th Cir. 2010).

Moreover, the Tribe at no time during over six years of consultation leading up to BLM's decision took the position that the physical structure of the geothermal power plant would be on or within areas utilized by the Tribe for religious or ceremonial purposes. *See supra* Statement of the Case, Section I.D. Thus, the District Court was correct in concluding that BLM adequately considered impacts to Tribal concerns and religious interests in the EA. 1-ER-0009–10 (Order at 8–9).

2. Appellees Failed to State a Claim Under RFRA.

"To establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find" that "the activities the plaintiff claims are burdened" are an "exercise of religion" and then that "the government action . . . 'substantially burden[s]' the plaintiff's exercise of religion." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc) (quoting 42 U.S.C. § 2000bb-1(a)). "If the plaintiff cannot prove either element, his RFRA claim fails." *Id.* To demonstrate a "substantial burden," it is not sufficient to allege that activities are burdened in some way; the Tribe must specifically establish that the challenged government action will cause it to "lose a government benefit or face criminal or civil sanctions for practicing their religion." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214–15 (9th Cir. 2008). Thus, Appellees' claim below that the Project "substantially detract[s]" from or "destroy[s]" the Tribe's ability to

exercise its spiritual traditions, Motion for PI at 6, 9, does not demonstrate a "substantial burden" under this Circuit's RFRA precedent.

Experiencing a "decrease [in] spiritual fulfillment" because a sacred area has been "spiritually desecrate[d]" does not constitute "coerc[ion] . . . to act contrary to their religion under the threat of civil or criminal sanctions," and is therefore not a "substantial burden." *Navajo Nation*, 535 F.3d at 1070; *see Snoqualmie Indian Tribe*, 545 F.3d at 1213–15. "Even if we assume that" the Project "will 'virtually destroy the . . . Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding [the plaintiffs'] legal claims." *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451–52 (1988)); *see also Stronghold v. United States*, 519 F. Supp. 3d 591, 607–08 (D. Ariz. 2021) (concluding that even if government action "*physically destroy[s]*" the land in question, the Tribe's "RFRA . . . claims must fail" where the Tribes were "not 'coerced by the Government's action into violating their religious beliefs' nor did the 'governmental action penalize religious activity by denying [the Tribe] an equal share of . . . benefits'" (emphasis added) (citation omitted)). Although the Appellees claimed below that the Project will "make observance of the Tribe's traditional religious practices impossible," Motion for PI at 19, they did not claim BLM is coercing them into violating their beliefs or that they will be penalized for their religious activity. *Id.* at 18-19. Thus,

the facts below did not support the merits of Appellees' claim that the Tribe's right to practice its religion will be "substantially burdened" within the meaning of RFRA by the alleged impacts of the Project on Dixie Meadows, and the District Court correctly concluded as much.

3. Appellees' APA Claims Regarding Sacred Sites Legally Fail Because They Rest on Non-Binding Policy Statements.

Appellees did not demonstrate they were likely to prevail on the merits of their APA claims based on BLM's sacred site policies because they attempted to elevate non-binding policy statements to the status of law. The APA evaluates agency compliance with substantive rules, meaning "a 'legislative-type rule,'—as one 'affecting individual rights and obligations.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979) (internal citations omitted); *see Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376, 1382 n.6 (9th Cir. 1979). In the District Court, Appellees attempted to claim that BLM's alleged failure to adequately consider relevant, policy statements in the AIRFA, in Executive Order 13007 regarding sacred sites, and in the November 9, 2021 Inter-agency Memorandum of Understanding ("MOU") regarding sacred sites constituted violations of the APA. But those policies no way purport to create binding obligations under law and thus cannot support a claim under the APA.

Appellees acknowledged that the bases for their argument were mere "policy statements," but maintained that BLM "failed to adequately consider" them,

violating the APA. Motion for PI at 20. But "AIRFA . . . does not mandate any discrete agency action that defendants must undertake. Consequently, plaintiffs fail to state a claim pursuant to the APA for any violation of AIRFA." *Winnemem Wintu Tribe v. U.S. DOI*, 725 F. Supp. 2d 1119, 1146 (E.D. Cal. 2010); 4-ER-0472–73 (EA App. G at G-16 to G-17) (BLM's response to Appellees' comments regarding its AIRFA claims). Similarly, President Clinton's Executive Order 13007 "does [not] . . . create any right . . . enforceable at law." 61 Fed. Reg. 26,771, 26,772 (May 24, 1996). Finally, the MOU explicitly states that it "is a voluntary agreement that . . . is not intended to be legally binding." Because the AIRFA, Executive Order 13007, and the MOU do not create legal rights that are enforceable under the APA, the District Court correctly found Appellees were not likely to succeed on their APA claims.

Lastly, the November 15, 2021 Joint Secretarial Order No. 3403, cited by Appellees, only exhorts the relevant agencies to "affirm the following principles" by "collaborat[ing] with Indian Tribes," "engag[ing] . . . in meaningful consultation," and "giving due consideration to Tribal recommendations." Joint Sec. Order 3403 § 3(a)–(c) (Nov. 15, 2021). The Tribe never argued below that BLM failed to consult with them. To the contrary, the record is replete with examples of the BLM's extensive consultation efforts. *See supra* Statement of the Case, Section I.D. For instance, BLM consulted with the Tribe about Dixie Valley leases since 2007, 3-ER-

0376 (EA at 3-123), adopted various mitigation measures as a result, 3-ER-0373–74, 0379–80 (EA at 3-120 to 3-121, 3-126 to 3-127), developed the ARMMP with adaptive management triggers in response to the Tribe's comments, Revised Draft EA, Ex. G at G-47, and ultimately "[r]edesign[ed] the project . . . to lessen impacts on religious expression and adverse effects on the site." 3-ER-0379 (EA at 3-126). These detailed consultation efforts and resulting changes to address Tribal concerns demonstrate that the BLM adequately consulted with the Tribe.

Because the record demonstrates that BLM devoted substantial attention to the issues in the cited policy statements and Appellees failed to articulate a valid claim under the APA with regard to sacred site policies, the District Court correctly rejected these arguments as the basis of a preliminary injunction.

In sum, the District Court correctly found that Appellees had not met their burden below to demonstrate a likelihood of success on the merits.

II. The District Court Abused Its Discretion in Granting a 90-Day Injunction, and Denying the Motion to Modify, Given the Record Evidence that Ormat Would Be Irreparably Harmed by an Injunction Longer Than 45 Days.

A preliminary injunction constitutes abuse of discretion where the district court's balancing of the equitable factors is "illogical, implausible, or without support in the record." *Doe*, 878 F.3d at 713. Here, the District Court determined that, as a factual matter, at a certain point, the balance of harms "tips sharply to Ormat." 1-ER-0006 (Order at 5). As the District Court explained, Ormat has

invested $68 million in the 10-year process to begin Project construction and has continued to pursue the Project in large part because of the favorable PPA it negotiated for the Dixie Meadows and other projects in 2017. 1-ER-0014 (Order at 13); *see also* 2-ER-0138 (Thomsen Decl. ¶ 17). The non-monetary loss would include over ten years of scientific analysis to support the viability of a geothermal power plant in this precise location and configuration.

The PPA enables Ormat to maintain an economically viable project by commencing production before the end of 2022 to take advantage of the price negotiated in 2017. Thus, time is of the essence to bring the Project online before the end of the year, or Ormat stands to lose $30 million in revenue over the 20-year life of the PPA and years of painstaking scientific and engineering effort to support the Project. It is precisely that $30 million in revenue that currently make the Project economically feasible, given the $15 million expense to implement the ARMMP. 2-ER-0138 (Thomsen Decl. ¶ 17); 2-ER-0109 (Thomsen Third Decl. ¶ 7). Without commencement of construction by February 28, 2022, the very real possibility exists that Ormat may have to abandon the Project entirely if it cannot sell Phase I energy under the existing PPA.

Although the District Court recognized the monetary and non-monetary loss to Ormat and the significant risk to the Project, its decision to choose 90 days as the duration of the injunction was arbitrary. No party presented evidence below that the

Project could be completed by the end of the year with a 90-day delay. Rather, at the time of the hearing, the evidence before the District Court was that Ormat planned to begin construction on January 6, 2022, and was already on an expedited timeline to complete the Project by the end of the year. 2-ER-0119 (Thomsen Second Decl. ¶ 3) (stating, prior to issuance of the preliminary injunction, that "a delay of even a few weeks could mean the difference between completing the Project before the end of 2022 or not"). The District Court inquired whether the Project could proceed six months from now and still make the end-of-the-year deadline, and Ormat's counsel clarified that it could not. 1-ER-0088 (Tr. at 68:8–15). Yet, at the close of the hearing, and without further argument, the Court chose 90 days for the injunction, finding that after that timeframe, the "relative damages really shift" toward Ormat.[14] 1-ER-0102–03 (Tr. at 82:18–21, 83:12–14).

After the hearing, Ormat submitted supplemental evidence in support of its Motion to Modify or Stay that a 90-day preliminary injunction makes irreparable harm to Ormat a virtual certainty. As described above, Ormat explored numerous

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[14] Appellees may argue that the District Court balanced the harms assuming that Ormat *would* suffer injury if it could not begin construction immediately, and still decided to impose a 90-day injunction. That argument, however, cannot be reconciled with the District Court's finding that the harms "tip sharply" toward Ormat *after* 90 days. 1-ER-0015 (Order at 14). The only reasonable interpretation of the Court's position is that it believed (albeit contrary to the record evidence) that Ormat could successfully construct the Project if it began construction in 90 days, but not thereafter.

options for expediting construction, including hiring multiple contractors to work in parallel, extending construction hours, and compressing every phase of the timeline. 2-ER-0111 (Thomsen Third Decl. ¶ 12). If all circumstances align favorably, Ormat could conceivably complete construction and commence energy generation by the end of the year, only if it were to begin construction by **February 28, 2022**. 2-ER-0111–12 (Thomsen Third Decl. ¶¶ 13–16). Construction beginning at a later date is virtually certain to cost Ormat $30 million in lost revenue if it cannot produce the 12 MW of Phase I energy under the PPA. *See* 2-ER-0113 (Thomsen Third Decl. ¶ 17); 2-ER-0123 (Thomsen Second Decl. ¶ 14). And more importantly, the monetary loss puts the entire Project at risk, which is not only a loss to Ormat, but to the public interest in clean, renewable baseload energy. 2-ER-0138 (Thomsen Decl. ¶ 17). Appellees presented no contrary information to demonstrate the Ormat can construct the Project in less than nine months or otherwise avoid the $30 million loss.

The District Court denied Ormat's Motion to Modify or Stay without addressing this new information regarding the Project schedule. 1-ER-0018 (Order, January 19, 2022, at 2). This Court has held that "the presence of some clearly erroneous factual findings requires reversal if they constituted the basis for the district court's decision whether to issue the injunction." *United States v. BNS, Inc.*, 858 F.2d 456, 460, 464 (9th Cir. 1988) (concluding that "the district court's order was overbroad under the circumstances and, to that extent, constituted an abuse of

discretion"). Here, the District Court's arbitrary choice of 90 days for the preliminary injunction, and refusal to consider the record evidence demonstrating that the harm "tips sharply to Ormat" after February 28, 2022, was an abuse of discretion and should be corrected by this Court.

CONCLUSION

Because the District Court (1) erred as a matter of law in granting a preliminary injunction where Appellees failed to demonstrate a likelihood of success on the merits and (2) abused its discretion in granting a 90-day injunction without any basis in the record for its duration, and contrary to the evidence demonstrating irreparable harm to Ormat after 45 days, Ormat respectfully requests that the Court vacate the District Court's 90-day injunction or modify the injunction to shorten it to 45 days.

DATED February 1, 2022.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Ormat is not aware of any related cases filed in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

/s/ Hadassah M. Reimer
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief is in compliance with Federal Rule of Appellate Procedure 27(d)(2)(A). The total word count is 11,627, excluding those portions excepted by FRAP 32(f), and in compliance with the limitations of Circuit Rule 32-1. The undersigned relied on the word count of the word processing system used to prepare this document.

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