Nos. 22-15092 and 22-15093

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FALLON PAIUTE-SHOSHONE TRIBE and the CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs-Appellees,
v.
U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, and JAKE VIALPANDO in his official capacity as Field Office Manager of the Bureau of Land Management Stillwater Field Office, Defendants
and
ORMAT NEVADA INC.,
Intervenor-Defendant-Appellant.

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

APPELLEES' PRINCIPAL AND RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs/Cross-Appellees, the Fallon Paiute Shoshone Tribe and the Center for Biological Diversity, state that:

- The Fallon Paiute-Shoshone Tribe is a sovereign, federally-recognized Indian Tribe, and thus has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
- The Center for Biological Diversity is a nonprofit organization that has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This appeal concerns the federal Bureau of Land Management's ("BLM") unlawful approval of Defendant-Intervenor-Appellant Ormat Nevada, Inc.'s ("Ormat") Dixie Meadows Geothermal Utilization Project ("Project") on federal public lands. The Project entails construction and operation of two major power plants and extensive associated infrastructure, for an overall permit term of approximately 90 years. BLM approved the Project—which would destroy the Fallon Paiute-Shoshone Tribe's ("Tribe") ability to exercise their traditional religious practices, and threatens extinction of the highly imperiled Dixie Valley toad—without following the environmental analysis and public disclosure requirements of the National Environmental Policy Act ("NEPA"), without considering relevant departmental policies in violation of the NEPA and the Administrative Procedure Act ("APA"), and without considering or mitigating the Project's burdens on the Tribe's religious practices in violation of the Religious Freedom Restoration Act ("RFRA").

Appellees, the Tribe and the Center for Biological Diversity (the "Center") filed a Complaint with the Federal District Court for the District of Nevada ("District Court") and moved for a preliminary injunction in December 2022. The District Court granted Appellees' request to enjoin the Project, but limited the duration of the injunction to a 90-day period ending on April 4, 2022. This Court subsequently granted Ormat's request to stay the District Court's decision, lifting the injunction and allowing Ormat to begin building the Project.

As explained herein, Appellees clearly meet this Court's criteria for issuance of a preliminary injunction. Appellees therefore request an order from this Court reversing the District Court and enjoining the Project for the duration of the case to prevent continued substantial and irreparable harm from Ormat's unlawfully authorized construction activities.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear Appellees' claims under 28 U.S.C. § 1331, the Administrative Procedure Act, 5 U.S.C. § 702, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(c). This Court has appellate jurisdiction over this cross-appeal pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

(1) Did this Court's February 4, 2022, Order granting Ormat's Motion to Stay render Ormat's appeal moot, and deprive Ormat of standing, by staying the District Court's 90-day preliminary injunction and setting a briefing schedule that extends beyond the preliminary injunction's expiration date?

(2) Did the District Court abuse its discretion by holding that Appellees must show a "likelihood of success on the merits" in all cases, and not applying this Court's "sliding scale" test?

(3) Did the District Court abuse its discretion by limiting its preliminary injunction to 90 days, even though Appellees showed that: they will suffer irreparable harm in the absence of an injunction; they are likely to succeed on the merits of their claims under NEPA, the APA, and RFRA; and the balance of equities favors an injunction for the duration of the case?

STATEMENT OF THE CASE

I. Factual Background

Dixie Meadows consists of spring-fed wetlands and associated high-desert uplands at the base of the Stillwater mountain range in north-central Nevada. The hot springs, wetlands, and natural landscape at Dixie Meadows are integral to the Tribe's religious beliefs, and also create the only known habitat for the imperiled Dixie Valley toad (*Anaxyrus williamsi*).

The sacred and ecologically unique landscape at Dixie Meadows is in imminent danger of severe and permanent harm. Ormat has begun constructing the first of two massive powerplants in close proximity to the springs and within the Tribal sacred site. Construction of these plants will forever destroy the sacred character of the site, making the Tribe's religious observances impossible. Once operational, the powerplants will extract thermal energy from the same geothermal system that heats the springs, diminishing the sacred power of the springs and threatening the Dixie Valley toad with extinction. Ormat intends to complete construction and bring at least one powerplant online before the end of the year, and possibly before the District Court can rule on the merits. Because of this timeline and the severity of impacts from the Project, a decision to deny Appellees a preliminary injunction could have the practical effect of foreclosing any opportunity for meaningful relief.

A. Dixie Meadows (*Paumu*)

Dixie Meadows is sacred to the Tribe and its members, who know the area as *Paumu* in their native language and have utilized the area for cultural and religious

practices for more than 10,000 years. 1-SER-122, 125–27 (First Downs Decl. ¶¶ 7, 20-31); 1-SER-185–86 (Tribe's Comments on RDEA at 2-3). The sacred *Paumu* site consists of the surface water at the Dixie Meadows hot springs as well as the directly surrounding landscape, where Tribal members camp, perform ceremonies, and observe their creation site, Fox Peak. 1-SER-124 (First Downs Decl. ¶ 15).

Paumu was first documented as a significant site by a Euro-American as part of a wagon train exploration in 1859. 3-SER-610 (Second Downs Decl. ¶ 4). According to a seminal ethnographic text concerning the Fallon Paiute-Shoshone Tribe published by the U.S. government in 2002:

> Hot springs occurring in various areas of [the Tribe's] territory were all considered to be sacred places. Due to White settlement and development, however, most were rendered inaccessible to Indian people by the early 1900s. The exception was the large hot springs in Dixie Valley (*paumagwaitu*), toward the north end. . . . [M]any . . . people from the Stillwater area visit[] this spring on a regular basis, taking baths in the hot mud and water.

1-SER-186 (Tribe's Comments on RDEA at 3).

The Tribe's spiritual beliefs are centered in the understanding of the Earth as a living being that holds spiritual significance in its undisturbed state. 1-SER-123–24 (First Downs Decl. ¶¶ 12-14). Because the Tribe considers *Paumu* sacred, the ongoing disturbance and degradation of the site from the Project substantially and irreparably burden Tribal members' cultural and spiritual practices, as well as their religious expression. 1-SER-127–31 (First Downs Decl. ¶¶ 29, 33-42).

Dixie Meadows also provides habitat for a wide variety of wildlife species, including the Dixie Valley toad, which is found nowhere else on Earth. 3-ER-321–41 (EA at 3-68 to 3-88); 1-SER-262 (Dixie Valley Toad Petition at 8).

B. The Dixie Valley Toad

The Dixie Valley toad is a small species of Western toad. 3-ER-330–32 (EA at 3-77 to 3-79). It spends the vast majority of its life cycle in and around the thermal waters at Dixie Meadows, and also spends some amount of time in the surrounding uplands. 3-ER-330–32, 344 (EA at 3-77 to 3-79, 3-91).

The Dixie Valley toad is threatened by a variety of factors, 1-SER-263–80 (Dixie Valley Toad Petition at 9-26), but the most immediate threat to the toad's survival is the Project, which, without judicial intervention, could kill or injure toads using terrestrial habitat, and over the long term is likely to reduce, alter, or even eliminate the flow of warm water from the underground geothermal reservoir to the springs. 1-SER-263–75 (Dixie Valley Toad Petition) at 9-21; 2-SER-292–97 (FWS 90-Day Petition Review at 2-5); 3-ER-331, 344 (EA at 3-78, 3-91); 4-ER-571–72 (ARMMP at 28-29).

Dixie Valley toads are specifically adapted to the unique environment at Dixie Meadows, and are particularly sensitive to changes in water temperature. 1-SER-270–71 (Dixie Valley Toad Petition at 16-17); 2-SER-296–97 (FWS 90-Day Petition Review at 4-5). Decreases in water temperature at Dixie Meadows caused by geothermal energy production could reduce or eliminate suitable habitat conditions for the toad, risking the extinction of the species. 1-SER-270–71 (Dixie Valley Toad Petition at 16-17).

Because of the risk that the Project could cause the springs in Dixie Meadows to stop flowing and drive the toad to extinction, the Center in September 2017 petitioned the U.S. Fish and Wildlife Service ("FWS") to list the Dixie Valley toad under the Endangered Species Act ("ESA"). *See generally* 1-SER-254–85 (Dixie

Valley Toad Petition). In June 2018, FWS found that the Center's petition presented "substantial scientific or commercial information indicating" that listing the Dixie Valley toad under the ESA "may be warranted." 1-SER-289 (FWS 90-Day Finding at 30093). FWS acknowledged that "[t]he toad's life cycle is entirely reliant on dependable flows from the springs at Dixie Meadows, and . . . if geothermal energy production occurs at Dixie Meadows," the toad's habitat "could be reduced or eliminated." 2-SER-295 (FWS 90-Day Petition Review at 3). FWS also acknowledged "the difficulty of detecting negative impacts" from geothermal energy production, and the difficulty of "mitigat[ing] for these impacts." [1] 2-SER-296-97 (FWS 90-Day Petition Review at 4-5).

C. The Project

The Project would convert 126 acres of relatively pristine high desert—an area the size of 95 football fields—into a major, private industrial site with two 30-megawatt geothermal powerplants and associated infrastructure, including 18 or more well pads (each 1.5 acres in size) pipelines, access roads, offices, electrical facilities, a control room, various auxiliary buildings, a microwave communication tower, two electrical substations, and transmission lines, all directly adjacent to the Dixie Meadows wetlands, and partly within the sacred *Paumu* site. *See* 3-ER-222–46 (EA at 2-1 to 2-25); 1-SER-158–59 (Tribe Comments on Draft EA at 6-7).

Ormat is currently bulldozing, grading, and removing vegetation from the site. *See* 2-ER-120 (Second Thomsen Decl. ¶ 4). Over the course of the next ten months,

[1] FWS has agreed to issue a final determination as to whether the Dixie Valley toad is warranted for ESA listing by April 4, 2022.

the company plans to pour a concrete foundation and build at least one 35-foot tall powerplant, as well as a transmission line, water pipelines, and other associated infrastructure. *Id.* Construction will introduce constant noise, bright light, and dust to a site that depends for its sacred character on its relatively undisturbed state and connection to the natural world. 2-SER-128–31 (First Downs Decl. ¶¶ 33-42). The powerplants and associated infrastructure will occupy the Tribe's sacred site and obscure spiritually significant views of Fox Peak and the night sky. 1-SER-158–59 (Tribe Comments on Draft EA at 6-7).

Once operational, the facility could extract and reinject up to 12.8 million pounds of geothermal water per hour (28,000 gallons per minute) from the same underground geothermal reservoir that feeds the hot springs. 3-ER-238 (EA at 2-17). Operation of a similar Ormat project in nearby Jersey Valley likely caused associated hot springs to run dry. 1-SER-158 (Tribe Comments on Draft EA at 6); 1-SER-237–39 (Center Comments on Draft EA) at 4-6.

D. BLM's NEPA Process

On May 9, 2017, BLM released a draft environmental assessment ("EA") and offered the first of two public comment periods for the Project. 1-SER-141 (Donnelly Decl. ¶ 20). The Draft EA revealed that BLM had failed to collect or analyze a great deal of information necessary for understanding the Project's likely environmental impacts. 1-SER-142 (Donnelly Decl. ¶ 22). The Draft EA asserted that potentially significant impacts to nearly every resource analyzed—including water, wetlands, wildlife, and Tribal cultural and spiritual values—would be mitigated through an "Aquatic Resources Monitoring and Mitigation Plan"

("ARMMP"). *Id.* However, BLM did not provide the ARMMP for public review. *Id.* In fact, BLM had not even developed the ARMMP when the agency released the Draft EA. *Id.*

Appellees submitted detailed comments responding to the draft EA, explaining that many of the Project's likely impacts to springs, wetlands, wildlife, and the Tribal sacred site were not analyzed or effectively mitigated. *See generally* 1-SER-152–66 (Tribe Comments on Draft EA); 1-SER-233–53 (Center Comments on Draft EA). The Tribe also detailed the cultural, religious, and spiritual significance of the springs and surrounding landscape, and how construction and operation of the Project would destroy the Tribe's ability to carry out its religious practices. 1-SER-153–54, 158–59 (Tribe Comments on Draft EA at 1-2, 6-7). Appellees' comment letters further informed BLM that several other geothermal energy facilities, including Ormat's Jersey Valley facility, have caused catastrophic impacts to nearby springs, and requested that BLM prepare an EIS to fully evaluate the Project's impacts and a range of alternatives. *See* 1-SER-238–40 (Center Comments on Draft EA at 5-6, 17-20); 1-SER-156–58 (Tribe Comments on Draft EA at 4-6).

BLM failed to meaningfully respond to these comments. Over three years later, on January 13, 2021, BLM issued a Revised Draft EA ("RDEA") for the Project. 1-SER-145 (Donnelly Decl. ¶ 34). BLM included with the RDEA a draft version of the ARMMP but once again omitted key information about the affected environment and the proposed mitigation measures. *See generally* 2-SER-310–36 (Center Comments on RDEA); 1-SER-183–221 (Tribe Comments on RDEA); 2-

SER-351–65 (FWS Comments); 2-SER-366–70 (NDOW Comments); 2-SER-371–75 (Navy Comments). As FWS commented, the ARMMP was not a fully developed mitigation protocol but rather a "plan describing the development of a plan." 2-SER-362 (FWS Comments at 11). BLM largely ignored the Tribe's earlier comments regarding the Project's impacts on the uplands surrounding the springs, and failed to assess or mitigate those impacts.

The RDEA and draft ARMMP further admitted that neither BLM nor Ormat had collected important baseline data about the Dixie Valley Toad, or the wetlands and geothermal hydrology of Dixie Meadows. *See, e.g.*, 5-ER-897 (RDEA at 3-72); 2-SER-437 (Draft ARMMP at 53). Both documents reflected a lack of understanding of both the geothermal system and the habitat requirements of the toad. 5-ER-897 (RDEA at 3-72); 2-SER-433, 447 (Draft ARMMP at 49, 57). And the draft ARMMP disclosed that collection of baseline data would be "begin . . . upon the signing of the Record of Decision" for the Project, not before Project approval as generally required under NEPA. 2-SER-421 (Draft ARMMP at 37). Neither draft ARMMP nor the RDEA committed BLM or Ormat to collecting and analyzing this data before Project construction, before the beginning of Project operations, or by a date certain.

BLM provided a brief public comment period following the release of the RDEA. 1-SER-145 (Donnelly Decl. ¶ 34). This was the final public comment opportunity before BLM approved the Project.

The Tribe and the Center again submitted detailed comments discussing the many omissions from the RDEA and ARMMP. *See generally* 1-SER-183–221 (Tribe Comments on RDEA); 2-SER-310–36 (Center Comments on RDEA). The

Tribe's comments described in detail the Tribe's historical use of the Dixie Meadows area, and its spiritual, religious, and cultural importance to Tribal members. 1-SER-185–90 (Tribe Comments on RDEA) at 2-7. The Tribe explained that the Project would destroy the site's sacred character. *Id.*

Several government agencies also submitted critical comments on the RDEA and draft ARMMP, including FWS, the Nevada Department of Wildlife ("NDOW"), the U.S. Geological Survey ("USGS"), and the Navy. *See generally* 2-SER-352–65 (FWS Comments); 2-SER-366–70 (NDOW Comments); 2-SER-376–77 (Working Group Meeting Notes); 2-SER-371–75 (Navy Comments); 4-ER-455–538 (EA Appendix G). These agencies' comments discussed the lack of baseline data supporting the RDEA and draft ARMMP, the high degree of uncertainty regarding the Project's impacts to the hot springs and the Dixie Valley toad, and the inadequacy of the ARMMP's proposed mitigation measures.

E. The National Historic Preservation Act "Section 106" Memorandum of Agreement ("MOA")

Concurrent with the NEPA process, BLM developed a proposed memorandum of agreement ("MOA") between BLM, Ormat, the Navy, the Advisory Council on Historic Preservation, and the Nevada State Historic Preservation Office pursuant to the National Historic Preservation Act, 54 U.S.C. § 306108 (commonly known as "Section 106").

The MOA appropriately recognizes Dixie Meadows as a sacred site, and expressly acknowledges that the Project will "have an adverse effect to historic properties." 4-ER-708 (MOA at 1). However, the MOA fails to address the spiritual significance of the surrounding landscape, and relies almost entirely on the ARMMP

to mitigate impacts to the sacred site. 4-ER-708–20 (MOA). If any harm to the waters occurs, the MOA assumes without basis that it could be reversed and leaves any response to BLM's discretion. *Id*. The Tribe negotiated in good faith and sought to include meaningful requirements to ensure an adequate response to impacts, but BLM rejected the Tribe's proposals. 2-ER-143–44 (Mori Decl. ¶ 6).

The Tribe declined to sign the MOA, explaining that the MOA improperly relied on the assumption that all impacts could be mitigated, failed to include discrete actions to mitigate impacts, and wholly failed to account for the noise, light, and visual impacts of construction and powerplant operations. 1-SER-223–24 (Tribe Letter re: MOA).

F. New Federal Direction Regarding the Protection of Tribal Sacred Sites

Prior to Project approval, the Department of the Interior adopted two significant new directives pertaining to protection of Tribal sacred sites such as *Paumu*. On November 9, 2021—14 days before BLM approved the Project—the Department of the Interior and other federal agencies entered into a memorandum of understanding ("MOU") concerning the protection of indigenous sacred sites. 1-SER-42–55 (MOU). The MOU recognizes that "[t]he connection to place is essential to the spiritual practice and existence of Indian Tribes" and notes that indigenous peoples "share an essential truth of the interconnectedness to nature and all life." 1-SER-42 (MOU at 1). One consequence of this "essential truth" is that "[d]esecration of sacred places" has had "enduring" and "traumatic" impacts on the "social, cultural, spiritual, mental, and physical wellbeing of Indian Tribes." *Id.*

The MOU further acknowledges that "sites sacred to Indian tribes . . . often occur within a larger landform or are connected through physical features or ceremonies to other sites or a larger sacred landscape." 1-SER-43 (MOU at 2). It directs federal agencies to "consider these broader areas and connections to better understand the context and significance of sacred sites." *Id.*

On November 15, 2021, the Secretary of the Interior and the Secretary of Agriculture issued Joint Secretarial Order 3403 ("Order"), which seeks to "ensure that the Department of Agriculture and the Department of the Interior . . . and their component Bureaus and Offices are managing Federal lands and waters in a manner" that protects "the treaty, religious, subsistence, and cultural interest of federally recognized Indian Tribes." 1-SER-36–40 (JSO 3403).

The Order directs each Department to "[e]nsure that all decisions . . . relating to Federal stewardship of Federal lands, waters, and wildlife under their jurisdiction include consideration of how to safeguard the interests of any Indian Tribes such decisions may affect." 1-SER-37 (JSO 3403 at 2). Through the Order, the Departments commit to consultation and collaboration with Indian Tribes "to ensure that Tribal governments play an integral role in decision making related to the management of federal lands and waters," and to give "due consideration" to "Tribal recommendations on public lands management." 1-SER-38 (JSO 3403 at 3).

Even though the MOU and Order specifically address issues raised by the Tribe with respect to the Project, Federal Defendants below do not dispute that they wholly ignored them in their environmental review and decisionmaking. 2-SER-

586–87 (Compl. ¶¶ 179-86); 3-SER-596 – 607 (Vialpando Decl. describing approval process).

G. Defendants' Approval of the Project

On October 26, 2021, BLM officials informed Tribal leaders at a Tribal Council meeting that the Project would not be approved pending FWS's ESA listing determination for the Dixie Valley toad and further evaluation of the Project's impacts. 2-ER-143 (Mori Decl. ¶ 4). In an abrupt and unexplained reversal—and without informing the Tribe, soliciting additional public comment, or resolving the issues identified by NDOW, FWS, the Navy, the Tribe, and the Center—BLM approved the Project on November 23, 2021. 2-ER-143 (Mori Decl. ¶ 5); *see also* 2-ER-156–186 (Decision Record).

The final EA that accompanied BLM's approval is substantially the same as the RDEA. It briefly acknowledges that the Tribe bears a disproportionate burden from the Project, 3-ER-378–80, 389 (EA at 3-125 to 3-127, 3-136), but asserts that all impacts will be appropriately mitigated through the ARMMP and MOA, even though those documents only attempt to mitigate impacts to surface waters. 3-ER-379 (EA at 3-126). There is no acknowledgement of—or proposed mitigation for—the harm that will occur to Tribal values when the Dixie Meadows sacred site is de-vegetated, bulldozed, and industrialized during Project construction. Even though the Tribe's repeatedly expressed its concerns that the construction and operation of 32 acres of 35-foot-tall power plants (which include a 75-foot microwave tower), as well as extensive piping and infrastructure, would destroy the traditional cultural

landscape and sacred site, BLM provided no visual depiction of the proposal or meaningful evaluation of aesthetic, visual, and auditory impacts.

The final ARMMP's mitigation scheme for the wetlands and springs, moreover, remained largely undeveloped, and characterized by substantial uncertainty. Neither BLM nor Ormat collected additional baseline data between the issuance of the draft ARMMP in January 2021 and BLM's approval of the Project in November 2021. *See* 4-ER-546, 553–54, 615–18 (ARMMP at 3, 10-11, 77-80 (Table 17)). Instead, the final ARMMP states that baseline data collection will begin after the Project is approved. 4-ER-553–54 (ARMMP at 10-11). The final ARMMP contains a "general list" of potential mitigation measures, but neither the final ARMMP nor the final EA analyzes the measures' likely effectiveness, or even describes how the measures are intended to mitigate the Project's specific impacts. *See* 4-ER-577–79 (ARMMP at 34-36). Several "thresholds" and "triggers"—key components of the ARMMP's "adaptive management" scheme—remained undefined in the final ARMMP, including all relevant thresholds pertaining to the Dixie Valley toad. 4-ER-615–18 (ARMMP at 77-80 (Table 17)). Perhaps most critically, the final ARMMP provides BLM and Ormat with broad discretion as to when and how mitigation is undertaken, and permits action only if damaging impacts are observed for three or more consecutive weeks. 4-ER-577, 615–18 (ARMMP at 34, 77-80 (Table 17)). The final ARMMP assumes without basis, and contrary to recent experience at other nearby springs, that all impacts to springs can be reversed and mitigated.

BLM's Decision Record and finding of no significant impact ("FONSI") rely on the final ARMMP, and the representations made therein, to conclude that the Project will not have significant environmental impacts. 2-SER-173 (Decision Record at 18). The FONSI acknowledges that the Project will have an "adverse impact" on a Tribal sacred site, but claims that the ARMMP and MOA will fully resolve these impacts. 2-ER-191 (FONSI at 5).

II. Procedural Background

Shortly after BLM approved the Project, on December 15, 2021, Appellees filed their Complaint, alleging violations of NEPA, the APA, the Federal Land Policy and Management Act ("FLPMA"), RFRA, and the United States' trust responsibilities to the Tribe. 2-SER-540–90 (Complaint).

Appellees then conferred with Federal Defendants and Ormat in an attempt to expedite the District Court proceedings and avoid the need for preliminary injunctive relief. 1-SER-117–18 (Lake Decl. ¶¶ 3-6). On December 20, 2022, however, Ormat informed Appellees that it would begin construction on January 6, 2022. 1-SER-117 (Lake Decl. ¶ 4). Appellees therefore filed a motion for Temporary Restraining Order or Preliminary Injunction on December 22, 2021, seeking to preserve the environmental status quo until the merits of the case could be heard and resolved. 1-SER-90–114 (TRO/PI Motion). The District Court held a hearing on Appellees' motion on January 4, 2022.

At the hearing, the District Court expressed concern about the adequacy of BLM's NEPA analysis and acknowledged that Appellees would suffer irreparable harm from Project construction. The District Court stated that Appellees had raised

"substantial concerns" going to the merits, because, due to a lack of a detailed environmental analysis, "[t]here really is no way for BLM or Ormat to tell us whether [the Project will] kill the springs or not." 1-ER-100 (Tr. at 80). The District Court also noted that the ARMMP was "not a mitigation plan in the normal respect," because instead of explaining how it will prevent significant environmental impacts, "it says, [w]e'll decide that after the fact, after the first phase of the plant is [built] and after the damage to the surrounding upland areas has occurred." *Id.*

Regarding irreparable harm and the balance of equities, the District Court found that Appellees' harm was both irreparable and "much more serious that the harm to be suffered by . . . Ormat," 1-ER-103 (Tr. at 83), even though Ormat argued at the time that *any* delay in construction would cost the company $30 million in lost revenue and potentially kill the Project. *See* 1-SER-85 (Ormat's Response to Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction at 22).

The District Court stated on the record that it would grant Appellees a preliminary injunction, but added that it would issue a subsequent written order "denying a preliminary injunction beyond 90 days," and requested that Ormat provide a "draft proposed order" discussing "the justification for" limiting the term of the injunction. 1-ER-103 (Tr. at 83). Ormat filed its proposed order on January 11, 2022, *see* 1-SER-3–15 (Proposed Order), and the District Court issued its written order on January 14, 2022. 1-ER-2–16 (Order on PI). The District Court's written order substantially adopts Ormat's proposed findings and conclusions, except with respect to Appellees' irreparable harm. *Compare* 1-SER-3–15 (Proposed Order) *with*

1-ER-2–16 (Order on PI). The District Court ordered a $1,000 bond, which Appellees timely provided. 5-ER-989 (Dkt. Entry 32).[2]

On January 20, 2022, Ormat filed a Notice of Appeal with the District Court, arguing that the District Court's 90-day injunction was improperly granted. *See* Case No. 22-15092, ECF 17 (Ormat's Op. Br.). Appellees cross-appealed on January 21, 2022, seeking review of the District Court's January 14 Order and its decision to limit injunction to 90 days. 3-SER-592–93 (Notice of Cross-Appeal).

Ormat moved this Court to stay the District Court's preliminary injunction pending appeal. Case No. 22-15092, ECF 4-1. On February 4, 2022, a two-judge panel of this Court granted Ormat' motion to stay the preliminary injunction, without reasoning provided. Case No. 22-15092, ECF 20.

SUMMARY OF THE ARGUMENT

A court's decision to grant a preliminary injunction is based on four factors: (1) likelihood of success on the merits; (2) irreparable harm; (3) the balance of harms; and (4) the public interest. Under this Court's precedent, serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction if the irreparable injury and public interest elements are satisfied.

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[2] Appellees agree that this nominal bond was appropriate given the public interest in compliance with environmental and religious freedom laws, and suggest direction to the District Court to retain the bond as adequate for a preliminary injunction until resolution of the case on the merits. *Friends of Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975); *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999).

The District Court found that the Tribe and the Center would suffer irreparable harm without an injunction, and that—at least in the near term—the harm to the Tribe and the Center outweighed the harm to Ormat. With respect to the "success on the merits" prong, however, the District Court made a number of legal errors. First, the District Court applied the wrong legal standard, stating that success on the merits must be "likely" in all cases and refusing to apply this Court's "sliding scale" test. The District Court also erred in evaluating Appellees' claims under NEPA, the APA, and RFRA.

Regarding the NEPA claims, the District Court adopted the government's position that the ARMMP was adequate to mitigate any significant environmental impacts from the Project, despite the fact that the final EA and ARMMP omit important baseline data, delay a careful study of the Project's impacts until after approval, fail to rationally evaluate the likely effectiveness of the proposed mitigation measures, completely ignore the possibility—raised by multiple private and government experts—that the Project could dewater the Dixie Meadows hot springs, and fail to analyze the impacts of the Project on the Tribe's religious practices. NEPA requires government agencies to "look before they leap"—to study the impacts of a proposal and disclose those impacts to the public before approval. But here, BLM leapt before it looked—it concluded that post-hoc studies and yet-to-be-developed mitigation protocols would protect all of the highly unique and sensitive resources impacted by the Project.

The District Court erred in evaluating Appellees' related APA and NEPA claims concerning the directly applicable recent agency direction on protection of

sacred sites, because it misconstrued Appellees' position. Appellees did not, as the District Court claimed, attempt to independently enforce the directives. Rather, Appellees argue that BLM's decision to approve the Project was arbitrary and capricious because BLM both failed to consider and deviated from the Order and MOU, two recently enacted executive-branch policies that speak directly to the issues involved here—the delineation of Tribal sacred sites and the role of Tribes in agency decisionmaking processes. Accordingly, BLM's action was arbitrary and capricious under this Court's well-established precedent, which holds that an agency must—at minimum—provide a reasoned explanation for deviating from relevant policies.

The District Court erred in evaluating Appellees' RFRA claims because it failed to acknowledge the undisputed fact that construction of the Project will make the Tribe's traditional religious observances impossible, and thus substantially burden the Tribe's religious exercise. The District Court's narrow reading of *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), fails to consider that a greater restriction—making a religious practice impossible—necessarily includes the lesser restriction of "substantially burdening" the practice. The Project here would deprive the Tribe of their place of worship and substantially burden their religious practices by making them impossible. Consequently, the District Court erred in concluding that Appellees were not likely to succeed on their RFRA claims.

The District Court also erred in balancing the equities. Appellees showed through multiple uncontested declarations that the Project would permanently alter and degrade the natural environment at Dixie Meadows, thus irreparably harming

Appellees' religious, spiritual, aesthetic, recreational, and scientific interests. Against this uncontested harm—which included the permanent loss of the Tribe's sacred site and the potential extinction of an entire species—Ormat claimed only pecuniary losses, namely the potential loss of $30 million in future revenues over the lifetime of its muti-decade power-purchase agreement. Ormat suggested throughout the litigation below that any delay in construction could force it to abandon the Project, but this was, and remains a speculative outcome, and even if Ormat suffers additional harm from failing to bring the Project online by December of this year, that harm will have been largely self-inflicted. While Ormat first sought BLM approval for the Project in 2015, it did not produce even a draft mitigation plan until early 2021, leaving it less than two years to complete the NEPA process, obtain federal approval, and construct the Project. Ormat's economic losses also fail to overcome the strong public interests in environmental protection, the protection of Tribal sacred sites, and observance of proper statutory procedures. The record does not support the District Court's conclusion that the equities shift to Ormat at some point in the future; rather, the harm to Appellees will only increase as construction proceeds, while Ormat concedes in its opening brief that it will suffer the same degree of economic harm regardless of the injunction's duration. For all of these reasons, the balance of equities favors the Tribe and the Center, not Ormat.

Finally, Ormat's cross-appeal is now moot, and Ormat lacks standing to appeal the District Court's decision because this Court stayed the District Court's 90-day preliminary injunction. As consequence of this Court's stay decision, the

injunction will have expired before arguments in these appeals can be held and a final decision can issue.

ARGUMENT

I. Standard Of Review

This Court reviews a district court's decision on a motion for preliminary injunction for abuse of discretion. *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir 2008) (en banc)). An abuse of discretion will be found if the district court based its decision on "an erroneous legal standard," *id.*, an application of the law to the facts that was "illogical, implausible, or without support in inferences that may be drawn from the record," *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc), or a "clearly erroneous finding of fact," *All. For the Wild Rockies*, 632 F.3d at 1131 (quoting *Lands Council*, 537 F.3d at 986).

A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of preliminary relief, (3) that the balance of equities favors relief, and (4) that an injunction is in the public interest. *Id.* (quoting *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Under this Court's post-*Winter* "sliding-scale" approach, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction" if the irreparable injury and public interest elements are satisfied. *Id.* at 1135 (internal quotation marks omitted).

II. Ormat's Appeal Is Moot and Ormat Lacks Standing on Appeal

An appeal is moot "[i]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party[.]" *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001); *see also Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016-17 (9th Cir. 2012). And, to sustain an appeal, the appellant must have standing, *Emp'rs-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 923 (9th Cir. 2007), which requires concrete injury, caused by the appealed order, that is likely to be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). If the appeal is moot or the appellant lacks standing to pursue its appeal, the appeal must be dismissed. *See Grand Canyon Trust*, 691 F.3d at 1017.

Here, Ormat seeks to vacate the District Court's temporary restraining order and 90-day injunction, which began on January 4, 2022. That relief is no longer available for two reasons. First, this Court granted a stay of the 90-day injunction. Dkt. No. 20. This stay of the injunction was a functional invalidation of the temporary restraining order and preliminary injunction entered below, and provided Ormat all the relief it sought. Construction commenced shortly thereafter. Second, based on the docket schedule for this case, a hearing would not be scheduled until June 2022 at the earliest, at which point the 90-day injunction will have been expired. *See* 1-ER-5-6 (Order at 15); *Nken v. Holder*, 556 U.S. 418, 428 (2009) (explaining that a stay halts the effect of a judicial proceeding but unlike an injunction does not bind a party's actions). There is no longer any order in place from the District Court which causes harm to Ormat, and there is accordingly no relief available to Ormat.

Thus, Ormat's appeal is moot, Ormat lacks standing, and its appeal must be dismissed.[3]

To the extent the Court considers the arguments raised in Ormat's principal brief, Appellees' arguments set forth below in its principal brief are also responsive.

III. The District Court Applied an Incorrect Legal Standard

Both the District Court and Ormat appear to ignore this Court's "sliding scale" standard regarding the "success on the merits" factor. The District Court's Order expressly states that success on the merits must be "likely" in all cases, 1-ER-5–6 (Order at 4-5), and Ormat states that "[a] finding that Appellees are likely to succeed on the merits . . . is mandatory for an injunction of any length of time." Ormat Op. Br. at 29. However, this Court should apply the correct standard and ignore Ormat's invitation to disregard its own precedent. The U.S. Supreme Court's *Winter* decision clarified that irreparable harm must be "likely," not merely "possible," but otherwise did not disturb this Court's "sliding scale" analysis. *All. for the Wild Rockies*, 632 F.3d at 1134-35. As this Court reiterated in *Alliance for the Wild Rockies*:

> It would be most unfortunate if the Supreme Court or the Ninth Circuit had eliminated the longstanding discretion of a district judge to preserve the *status quo* with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least "serious questions" going to the merits are raised[.]

[3] Because of the overlapping, but differing, procedural postures and standards applicable to consideration of a stay and a preliminary injunction, and because the order issuing the stay lacked any reasoning, the Court's decision to grant the stay has no persuasive value on the pending appeals. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021).

Id. at 1134 (quoting *Save Strawberry Canyon v. Dep't of Energy*, 2009 U.S. Dist. LEXIS 38180, at *8-9 (N.D. Cal. Apr. 22, 2009)).

Here, Appellees are likely to succeed on the merits of their claims, as explained below. But Appellees have also shown that the balance of harms tips "sharply" in their favor, because against the permanent destruction of a Tribal sacred site and the potential extinction of an entire wildlife species, Ormat presents only its private, pecuniary interest in charging above-market rates for geothermal power. Accordingly, this court should reverse the District Court and order an injunction for the duration of the case if it finds that Appellees have raised "substantial questions" going to the merits.

IV. Appellees are Likely to Succeed on the Merits of their NEPA, APA, and RFRA Claims

A. BLM Violated NEPA

NEPA requires all federal agencies to prepare an EIS for "every . . . major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). In assessing the significance of potential impacts, NEPA "requires Federal agencies to assess the environmental consequences of their actions before those actions are taken." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (quoting *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 992 (9th Cir. 2004) (modification normalized). In other words, an agency must take a "'hard look' at a decision's environmental consequences[.]" *Id*. (internal quotation omitted).

According to NEPA's implementing regulations,[4] an action may "significantly," affect the human environment, and thus require an EIS, based on one or more of the following factors:

> a. Unique characteristics of the [affected] geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> b. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> c. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> d. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

40 C.F.R. § 1508.27. Any one factor individually or multiple factors cumulatively may require an EIS. *Anderson v. Evans*, 371 F.3d 475, 493 (9th Cir. 2002).

This Court has held that an agency must prepare an EIS if "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (internal quotation omitted) (modification normalized). To trigger this requirement a "plaintiff need not show that significant effects *will in fact occur*[.]" *Id*. (emphasis in original). Raising "substantial questions whether a project

[4] 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).

may have a significant effect" is sufficient. *Id.* An agency's decision not to prepare an EIS will be considered arbitrary and capricious if the agency fails to "'supply a convincing statement of reasons why potential effects are insignificant.'" *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)).

Here, BLM did not prepare an EIS, even though, as discussed below, the Project will impact the Dixie Valley hot springs—an "ecologically critical area[]" eligible for listing on the National Register of Historic Places—and even though the Project's effects on the environment are both highly uncertain and highly controversial. 40 C.F.R. § 1508.27. BLM also failed to supply a "convincing statement of reasons" why the Project's potential impacts are insignificant because: it did not collect necessary baseline data on the Dixie Valley toad and other important resources before approving the Project; it did not sufficiently develop, or analyze the effectiveness of, the ARMMP's proposed mitigation measures; it did not take a "hard look" at the Project's potential impacts, especially the possibility that the Project might dewater the springs; and it did not consider the Project's visual impacts in the context of the Tribe's religious and spiritual practices.

1. BLM Failed to Establish the Environmental Baseline Before Approving the Project

A "critical" part of the "hard look" required under NEPA involves "[e]stablishing appropriate baseline conditions[.]" *Great Basin Res. Watch*, 844 F.3d at 1101. "Without establishing the baseline conditions . . . before a project begins, there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA." *Id.* (quoting *Half*

Moon Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)) (modifications normalized); *see also Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016).

Here, the final ARMMP reveals that baseline conditions are currently "unknown" for several categories of data essential to understanding and mitigating the Project's impacts on the Dixie Meadows hot springs and the Dixie Valley toad. These include: springflow rates at four out of six locations, "hydraulic head" (*i.e.*, groundwater pressure) at all locations, water chemistry characteristics at all locations, "geothermal indicator values" (*i.e.*, chemical characteristics that indicate the presence of geothermal fluid) at all locations, Dixie Valley toad population distribution, Dixie Valley toad abundance, vegetation cover, and aquatic habitat extent. 4-ER-615–18 (ARMMP Table 17). The final EA, meanwhile, states that "little is known regarding dispersal and non-breeding behavior of the Dixie Valley toad," total population estimates for the toad are unavailable, and the species' "population structure" is unknown. 3-ER-331 (Final EA at 3-78).

Ormat argues that these omissions are immaterial because BLM is permitted to use habitat as a "proxy" for population. Ormat's Op. Br. at 37 (citing *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 (9th Cir. 2006)). But only a few of these data gaps pertain directly to population abundance and, according to the ARMMP, the quality and extent of the toad's habitat is also unknown. The ARMMP admits that there is a "paucity" of habitat preference data for the toad, and while the ARMMP states that it will utilize existing research to use occupied habitat "as a metric of population heath," it also discloses that no "baseline" or "appropriate

thresholds" have yet been developed for this "metric." 4-ER-565–67. The ARMMP also lacks baseline data on "thermal preferences and tolerances" for the toad, as well as "hydrological parameters of importance," such as salinity. 4-ER-566–67, 573 (ARMMP at 22-23, 29). These habitat characteristics are critically important to understanding and mitigating the Project's impacts on the toad, which is uniquely adapted to its habitat at Dixie Meadows. *See* 1-SER-270–71 (Dixie Valley Toad Petition at 16-17); *see also* 2-SER-296 (FWS 90-Day Petition Review at 4).

Ormat also claims the EA contains a "comprehensive," baseline discussion, citing portions of the EA and ARMMP that discuss Ormat's exploration activities and the company's hydrogeologic conceptual model. Ormat's Op. Br. at 37. But these studies were designed to assess the area's potential for commercially viable geothermal energy development, not collect baseline data on the Dixie Valley toad, its habitat at Dixie Meadows, the probable impacts of geothermal development on the Dixie Meadows hot springs, or the Tribe's traditional religious use of Dixie Meadows and the surrounding landscape. *See* 3-ER-269–71 (Final EA at 3-16 to 3-18). Even after Ormat's exploration activities, BLM still lacks "a clear understanding of the local hydrogeology, including areas of groundwater discharge and recharge and their potential relationships with surface water bodies." 4-ER-572 (ARMMP at 32). Without this basic information, BLM could not possibly assess the environmental impacts of the Project.

Rather than collecting the baseline data necessary to understanding and mitigating the Project's impacts, BLM relies on "mitigation measures" that call for additional, post-approval data collection on the toad, its habitat, and the geothermal

system. *See, e.g.*, 4-ER-578–79 (ARMMP at 35-36). This Court has held, however, that using mitigation measures in this manner—as a "proxy" for baseline data—frustrates NEPA's twin aims of (1) "ensur[ing] that agencies carefully consider information about significant environmental impacts" and (2) "guarantee[ing] [that] relevant information is available to the public." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011).

Baseline data collected after Project approval will not and cannot inform BLM's decision whether or not to prepare an EIS, or even whether or not to approve the Project, because those decisions have already been made. At the same time, the public, including affected parties like the Tribe and the Center, have been deprived of a meaningful opportunity to participate in the decisionmaking process because the data informing the development and implementation of the ARMMP's mitigation measures have not been collected or publicly disclosed. Put simply, in failing to collect baseline data before Project approval, BLM violated NEPA's fundamental mandate that agencies "'look before you leap[.]'" *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1158 (9th Cir. 2010) (J. Fletcher, dissenting) (citing *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008)).

2. BLM Failed to Sufficiently Develop, and Appropriately Analyze the Proposed Mitigation Measures

The "hard look" required under NEPA also entails a "sufficientl[y] detail[ed]" examination of any proposed mitigation measures to "ensure that environmental consequences have been fairly evaluated." *City of Carmel-by-the-Sea v. U.S. DOT*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson v. Methow Valley Citizens*

Council, 490 U.S. 332, 353 (1989)). An agency's NEPA analysis should focus on the effectiveness of any proposed mitigation measures. *Western Watersheds Project v. Salazar*, 993 F. Supp. 2d 1126, 1139 (C.D. Cal. 2012), *aff'd*, 601 Fed. Appx. 586 (9th Cir. 2015). Where an agency produces a 'mitigated FONSI,' as BLM has done here, the key questions for the Court are whether the proposed mitigation measures "constitute an adequate buffer against [any] negative impacts[,]" and whether "the mitigation measures will render such impacts so minor as to not warrant an EIS." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001); *see also League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002) (finding mitigation measures insufficient to support a FONSI due to "lack of any analysis" regarding effectiveness and "unanswered concerns of a sister agency").

Here, BLM has not adequately developed or analyzed the effectiveness of the proposed mitigation measures, and thus cannot supply a "convincing statement of reasons" why the Project's potential impacts are insignificant. *Blackwood*, 161 F.3d at 1211. The ARMMP admits that specific "procedures" and "options" for mitigation will be developed, and their relative effectiveness evaluated, at a later date. *See* 4-ER-572–73 (ARMMP at 29-30). The ARMMP includes a "general list of proposed mitigation measures," which "may be triggered" if certain "monitoring thresholds" are exceeded, but even this general framework is "subject to modification[] at any time." 4-ER-577 (ARMMP at 34). While the ARMMP contains a great deal of background discussion, including a description of Ormat's exploration activities and the regional geology, it never establishes or explains how this information relates to

the list of mitigation measures presented. *See* 4-ER-577–79. Consequently, and despite its length, the substantive part of the ARMMP remains a "mere list[]" of potential mitigation measures that may be implemented at some future date, subject to BLM's discretion. *See Nat'l Parks & Conservation Ass'n*, 241 F.3d at 734.

The ARMMP is also incomplete—in addition to lacking key baseline data needed to develop and support an effective mitigation plan, it acknowledges that it has not identified specific benchmarks and thresholds associated with "objectives" for the Dixie Valley toad. 4-ER-576 (ARMMP at 33). This lack of specific information makes it impossible for decisionmakers and the public to evaluate the effectiveness of the mitigation plan, and undercuts BLM's conclusory assertions that all of the Project's impacts can be mitigated.

Even where the final EA and ARMMP define proposed mitigation measures, they fail to analyze their effectiveness. For example, BLM presents no analysis or data supporting the selected "thresholds" for surface water flow, water temperature, or water quality, or establishing how these "thresholds" relate to protecting the sensitive resources and wildlife species at Dixie Meadows. *See* 5-ER-575–77 (ARMMP at 32-34). Nor does the agency analyze the effectiveness of specific response actions. BLM simply asserts, without explanation or supporting data, and without discussing specific proposed mitigation measures, that implementation of the ARMMP would be effective. *See, e.g.*, 3-ER-283, 345 (Final EA at 3-30, 3-92).

The problems with the EA and ARMMP may be clearly illustrated by comparison with the two cases cited favorably by Ormat, *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-77 (9th Cir. 2000), and *Wetlands Action*

Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1121 (9th Cir. 2000). In *Okanogan Highlands Alliance*, the agency prepared an EIS, meaning it did not conclude, as BLM did here, that there would be no significant environmental impacts. 236 F.3d at 471. The agency also "separately" evaluated the probable effectiveness of each mitigation measure, ranked each mitigation measure in terms of effectiveness, and provided a detailed process for responding to the project's likely environmental impacts. *See id.* at 476-77. Here, BLM did not separately, or even collectively, evaluate the effectiveness of the proposed mitigation measures, and did not provide protocols for responding to specific impacts, such as decreases in spring flow or changes in water temperature. *See* 5-ER-577–79 (ARMMP at 34-36). Under the ARMMP, moreover, a quantified evaluation of the mitigation measures' effectiveness will occur—if at all—in the future, after the project has been approved; not before approval, as was done in *Okanogan Highlands Alliance*. *See* 4-ER-572-73 (ARMMP at 29-30).

In *Wetlands Action Network*, meanwhile, this Court upheld a mitigation plan because the agency "could determine the precise nature of many of the mitigation measures at the time it made the permitting decision." 222 F.3d at 1121. That is not the case here, where the nature of future mitigation action depends on the results of studies that have not taken place, and remains subject to BLM's unfettered discretion. *See* 4-ER-572–73, 577–79 (ARMMP at 29-30, 34-36). The *Wetlands Action Network Court* also noted that the impacted wetlands in that case were "of a highly degraded quality[,]" thus reducing the Project's environmental significance and the need for mitigation. 222 F.3d at 1122. The Dixie Meadows wetlands, in

contrast, are relatively undisturbed, uniquely sacred to the Tribe, and harbor a highly imperiled species that exists nowhere else on Earth.

Finally, in considering the effectiveness of BLM's mitigation plan or the likelihood of significant environmental impacts, this Court should not be misled by Ormat's statements suggesting that geothermal development will have no impacts on the springs, or that the geothermal resource is somehow separate from the underground source of the springs. The geothermal reservoir Ormat intends to exploit contributes a substantial amount of heat and geothermal water to the springs, as BLM, FWS, and NDOW have all acknowledged. 3-ER-264–78 (EA at 3-11 to 3-25); 4-ER-558, 570–75 (ARMMP at 15, 27-32); 4-ER-493 (EA at G-37); 4-ER-522–23, 2-SER-366–69 (FWS Comments). Ormat claims a short (42-day) pumping and injection test had "no apparent influence" on the springs, but this statement applies to only two cold-water springs, 5A and 5B. *See* 3-ER-288 (EA at 3-35). A response to pumping was observed at Spring NDOWSS-1, suggesting a connection between this spring and Ormat's pumping and reinjection wells. *See* 4-ER-493 (EA at G-37 (NDOW Comment and Response)).

Contrary to Ormat's representations, the EA concedes the connection between the geothermal aquifer and the hot springs, as does the ARMMP. In fact, the both the EA and the ARMMP clearly state that geothermal water is present in the springs, and that there is a "direct connection" between the underground geothermal reservoir and the shallow "alluvial" aquifer that serves as the immediate source of the springs. *See* 3-ER-264–78 (EA at 3-11 to 3-25); 3-ER-558, 570–75 (ARMMP at 15, 27-32). Because of this "direct connection," moreover, both documents acknowledge

potential impacts to springflow and temperature from geothermal energy development. *See* 3-ER-345 (EA at 3-92); 4-ER-570 (ARMMP at 27).

In other words, BLM concedes a direct connection between the springs and the geothermal aquifer, and the Project would remove significant thermal energy from the geothermal aquifer. Taking a step back, it makes abundant sense that extracting and reinjecting millions of gallons of geothermal fluids, and removing the thermal energy from those fluids, will also impact the springs. Yet BLM and Ormat implausibly deny the potential for any such impacts, based entirely on the incomplete and toothless ARMMP.

BLM based its FONSI on the ARMMP, not the results Ormat's flow test, or the alleged lack of connection between the springs and the geothermal reservoir. *See* 2-ER-173 (DR at 18); 2-ER-188–92 (FONSI at 2-6). And because the ARMMP defers until after Project approval key decisions about how and when impacts will be mitigated, it cannot be relied upon to support a FONSI. While the ARMMP might contain more factual detail and background discussion than the mitigation plans at issue in *National Parks and Conservation Association*, 241 F.3d 722, and *Western Land Exchange Project v. BLM*, 315 F. Supp. 2d 1068, 1091-92 (D. Nev. 2004), the fundamental issue remains the same—decisionmakers and the public have been presented with a "general list" of potential mitigation measures that, due to the incomplete nature of the ARMMP and its inherent "flexibility," may or may not be implemented. This, along with a significant lack of baseline data, makes it impossible to evaluate the effectiveness of the proposed mitigation plan, and consequently renders BLM's FONSI arbitrary and unlawful.

3. Uncertainty and Controversy Regarding the Project's Environmental Impacts Require an EIS

BLM developed the ARMMP "in conjunction" with other agencies, including FWS and NDOW, *See* Ormat's Op. Br. at 39, and nearly all of these agencies expressed substantial, unanswered concerns about the ARMMP's effectiveness. Under the law of this Circuit, such criticism calls into question a proposal's environmental significance and thus warrants additional analysis.

A proposal's impacts may be "significant[]" if: (1) "the effects on the quality of the human environment are likely to be highly controversial," or (2) the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27. A proposal is highly controversial when "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor," *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997) (internal quotation marks omitted) (internal modification normalized), or there is a "substantial dispute about the size, nature, or effect of the major Federal action," *Blackwood*, 161 F.3d at 1212 (internal quotation marks omitted) (internal modification normalized). "A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI … casts serious doubt upon the reasonableness of an agency's conclusions." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 736 (citation omitted); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1030-31 (9th Cir. 2007).

NEPA then places the burden on the agency to come forward with a "well-reasoned explanation" demonstrating why those responses disputing the EA's conclusions "do not suffice to create a public controversy based on potential

environmental consequences." *LaFlamme v. FERC*, 852 F.2d 389, 401 (9th Cir. 1988) (citing *Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986)). Where research is necessary to determine the extent of an unknown and possibly significant environmental risk, an EIS should be prepared so that the research can be done and the decision made in reliance on that information, rather than the other way around. *Nat'l Parks & Conservation Ass'n*, 241 F.3d. at 732-33; *see also Forsgren*, 309 F.3d at 1192 (invalidating EA due in part to "unanswered concern of a sister agency"); *Bosworth*, 510 F.3d at 1032 (finding that critical comments from federal and state agencies demonstrated "precisely the type of 'controvers[y]' . . . for which an EIS must be prepared").

Here, several government agencies submitted critical comments on the RDEA and draft ARMMP, including FWS, NDOW, the U.S. Geological Survey ("USGS"), and the Navy. *See generally* 2-SER-351–65 (FWS Comments); 2-SER-366–70 (NDOW Comments); 2-SER-376–77 (Working Group Meeting Notes); 2-SER-371–75 (Navy Comments); 4-ER-455–537 (EA Appendix G).

NDOW, for example, discussed the response of Spring NDOWSS-1 to Ormat's pumping and reinjection test, writing that "this [response] suggests that simple flow testing negatively influenced the two most vital attributes of one of the main sources of water utilized by Dixie Valley Toad . . . which is very concerning." 4-ER-493 (EA at G-37). NDOW also expressed concern about the "uncertainty" surrounding the "hydraulic connections" between the geothermal reservoir and the springs. 4-ER-496 (EA at G-40).

FWS, meanwhile, offered extensive and withering criticism of Ormat's hydrogeologic conceptual model and the proposed mitigation plan. FWS stated that "effective mitigation" is "not possible," and that even with the ARMMP, the project "could spell doom for the Dixie Valley toad." 4-ER-461 (FWS Comment). FWS also noted "current uncertainty" in the ARMMP's "thresholds" could "lead to adverse impacts" if geothermal utilization were to affect the springs. 4-ER-489 (EA at G-33). These deep concerns expressed by the expert wildlife agency about the extinction of an endemic species, standing alone, justified preparation of an EIS.

Yet, apart from conclusory statements asserting that the ARMMP would be effective, BLM did not address or respond to these and other critical comments from state and federal agencies. *See generally* 4-ER-455–537 (EA Appendix G). Consequently, BLM has not met its burden in this case to convincingly explain why the impacts of the project are not uncertain or controversial. *See LaFlamme*, 852 F.2d at 401; *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 736. The unaddressed concerns from multiple "sister agenc[ies]," and as well as admitted need for further study, show that BLM's FONSI is arbitrary, capricious, and unlawful. *Forsgren*, 309 F.3d at 1192.

4. BLM Failed to Evaluate Potential Severe Impacts of Spring Dewatering or Permanent Alteration

BLM also failed to address, or take the necessary "hard look" at, the risk that the Project may dewater or otherwise irreparably harm the springs.

NEPA requires an agency to "describe the consequences of a remote, but potentially severe [environmental] impact" of a proposed action. *Robertson*, 490 U.S. at 355 (quoting 50 Fed. Reg. 32237 (1985)). NEPA regulations make clear that

"reasonably foreseeable significant adverse effects" include "impacts which have catastrophic consequences, even if their probability of occurrence is low[.]" 40 C.F.R. § 1502.21.

For example, an EA for a BLM livestock grazing program was held unlawful where the "EA acknowledge[d] that serious environmental consequences might result from program abuse, but expresse[d] the view that such abuse is 'highly unlikely.'" *Nat. Res. Def. Council, Inc. v. Hodel*, 618 F. Supp. 848, 852, 872 (E.D. Cal. 1985); *see also Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, 2016 U.S. Dist. LEXIS 192573, at *298 (C.D. Cal. Feb. 1, 2016) (holding that, while an NEPA process "need not disclose every uncertainty[,]" an agency violated NEPA by failing to perform the required analyses regarding "key uncertainties" (emphases removed)).

Similarly, this Court held that an EA was "inadequate and fail[ed] to comply with NEPA[]" where an agency refused to evaluate possible impacts based on the erroneous assumption that such impacts were "too far removed from the natural or expected consequences of agency action." *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035, 1029 (9th Cir. 2006). In *San Luis*, the agency's NEPA analysis did not consider the environmental impacts of a terrorist attack on a nuclear energy facility. *Id.* at 1024. The Court concluded that "it was unreasonable for the [agency] to categorically dismiss the possibility" of such impacts. *Id.* at 1030. Specifically, the Court "found it difficult to reconcile" that the agency was "attempting, as a matter of policy, to insist on its preparedness . . . while concluding,

as a matter of law, that [the potential impact was] 'remote and speculative' for NEPA purposes." *Id.* at 1031.

Here, it is manifestly unreasonable for BLM and Ormat to knowingly ignore the risk of dewatering or otherwise irreparably damaging the springs given that such an impact would not only be severe but is also reasonably foreseeable. In nearby Jersey Valley, a hot spring was dewatered after the same company—Ormat—constructed a similar geothermal powerplant that utilized a geothermal reservoir beneath the spring. *See* 1-SER-187–88, 1-SER-168, 1-SER-172–73 (Tribe Comments); 1-SER-237–39 (Center Comments) at 4-6; 2-SER-337–50 (technical memorandum from Dr. Tom Myers explaining risk of permanent alteration of springs).

BLM and Ormat, however, have made no attempt to describe or quantify the potential for the Project to inadvertently dewater the springs so that harm can be weighed and balanced against the risk of it coming to pass. (EA at 3-32 to 3-34). BLM simply assumed—contrary to compelling evidence from numerous experts and the recent experience at Jersey Valley hot springs—that any harm that occurred would be reversible. Though permanent harm to the springs may be difficult to determine with precision, it is a key uncertainty that BLM must recognize and address, because the Project is fundamentally based on extracting large amounts of water from one of the springs' sources. Dewatering or otherwise degrading the Dixie Meadows springs and wetlands would be a severe environmental impact and would cause grievous injury to the Tribe's culture and religion, and under the NEPA

implementing regulations BLM has a duty to describe and evaluate the likelihood and consequences of that harm. *Robertson*, 490 U.S. at 355.

Moreover, as in *San Luis*, BLM and Ormat are trying to have it both ways in a manner that is difficult to reconcile. On one hand, they refuse to evaluate the risk of dewatering the spring, leaving the public in the dark about the probability and magnitude of that reasonably foreseeable impact. On the other hand, they insist on the Project's preparedness *vis a vis* the ARMMP, claiming the ARMMP will "ensure mitigation is appropriate to reduce impacts to hydrologic resources[.]" 2-ER-188 (FONSI at 2); 2-ER-160 (Decision Record at 5). However, an alleged mitigation plan that refuses to analyze the very impacts it purports to mitigate should not be accepted as the basis of a finding of no significant impact.

Because BLM failed to take a "hard look" at a potentially catastrophic and reasonably foreseeable impact, BLM violated NEPA.

5. BLM Failed to Analyze or Mitigate Visual and Aesthetic Impacts to the Tribe's Use of the Site

BLM's NEPA analysis is further deficient because it wholly fails to consider or address visual and aesthetic impacts from the Project on the Tribe's religious and spiritual use of Dixie Meadows and the surrounding landscape. An agency violates NEPA when it "ignores an important aspect of the problem before it." *Montana Wilderness Association v. McAllister*, 666 F.3d 549, 560 (9th Cir. 2011). Here, BLM failed to consider how the Project would fundamentally change the Tribe's experience of the *Paumu* sacred site and thus ignored an important aspect of the problem.

The EA briefly addresses environmental justice impacts and acknowledges that the Project disproportionately burdens the Tribe, but concludes that the ARMMP will mitigate all of these impacts and that "no short-term construction related effects are anticipated." 3-ER-380–81 (Final EA at 3-127 to 3-128); *see also* 2-ER-190 (FONSI at 4). BLM wholly ignored the Tribe's repeated and eminently reasonable explanation that construction of a major industrial power plant covering 126 acres of pristine high desert on and around a treasured sacred site will significantly impact the Tribe's unique, longstanding use of the area.

Context is a critical aspect of the significance determination. *See* 40 C.F.R. § 1508.27. Yet 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. *See* 1-SER-16–34 (EA Appendix E). BLM never generated a visual depiction or representation of the facilities, never considered the obstruction of spiritually and culturally significant views, and never even provided a picture of what a geothermal facility looks like. BLM likewise never meaningfully evaluates the noise, traffic, and light impacts to Tribal users, but rather summarily asserts that generic mitigation measures that apply irrespective of the cultural context will render such impacts non-significant.

Ormat, in its opening brief, argues that the Tribe's concerns are unfounded because the company's two powerplants will be painted "consistent with BLM's visual color guidelines" and employ "best available technologies." Ormat Op. Br. at 43. Ormat also curiously asserts that the "mere presence" of two large powerplants directly adjacent to the springs and within the Tribe's sacred site will not have

"significant" impacts on the Tribe's religious practices. But none of this is responsive to common sense or the Tribe's concerns. Clearly, the impact from the presence and operation of two major powerplants in an otherwise natural setting extends beyond the color of the paint.

The Tribe took the commenting process seriously, based on the belief that its federal trustee would give its concerns sincere consideration. The Tribe repeatedly explained in its comment letters to BLM that Tribal members' traditional religious practices depend on an unimpaired view of the night sky, an unobstructed view of Fox Peak—the Tribe's origin site—and a connection with the natural world. For years the Tribe informed BLM that:

- "The project would not only potentially damage water quality in the springs, it would assuredly cause devastating impacts to the Tribe's use of the springs. The noise, light, aesthetic, and environmental impacts of the project are certain to occur and further significantly impact the cultural and spiritual value of the springs. The Tribe derives cultural and spiritual value from the springs and their surroundings in their intact state, with the native ecosystem in place." 1-SER-158 (Tribe's June 30, 2017 Comments on Draft EA).
- "It is important to recognize that tribal members do not experience the Dixie Meadows hot springs as an isolated element of the landscape. Instead, tribal members value the springs in part for the solitude and reflection found there. The ability to view sacred landmarks from the springs is fundamental to the religious experience. Viewing Fox Peak

during the day and constellations at night is an integral part of a religious experience." 1-SER-178–79 (Tribe's Oct. 11, 2017 Letter to Ken Collum).

- "[F]rom the Tribe's perspective, Ormat's proposal is to build power plants on and around very sacred, spiritual land built by the Creator at the beginning of time . . . The proposed geothermal development would impose significant burdens on the Fallon Paiute-Shoshone Tribe's religious expression at the Dixie Hot Springs. As set forth above, the associated construction would deeply mar the surrounding environment and impose noise and visual pollution on users of the hot springs." 1-SER-186–87 (Tribe's Feb. 12, 2021 Comments on RDEA).

There is no question that construction and operation of Ormat's facilities will substantially and permanently impair the Tribe's religious and spiritual practices, regardless of what color the buildings are painted or what technology is employed within the facilities. Instead of praying to Fox Peak, Tribal members who attempt to visit the springs could only pray to a geothermal plant. 3-SER-611–13 (Second Downs Decl. ¶¶ 6-20).

"An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *S. Fork Band Council of W. Shoshone v. DOI*, 588 F.3d 718, 727 (9th Cir. 2009). Because BLM's "visual impacts" analysis here fails to consider an important aspect of the problem and contains virtually no assessment of how the ARRMP or other mitigation measures can effectively mitigate impacts to the Tribe's religious and

spiritual practices, and instead states in a conclusory fashion that the ARMMP can mitigate all adverse impacts—even those unrelated to the springs—Appellees are likely to succeed on their NEPA claims.

B. BLM Violated the APA and NEPA by Deviating from Recent Agency Direction on Protection of Sacred Sites

The APA prohibits "arbitrary" and "capricious" agency action, and requires an agency to consider relevant factors and articulate a rational connection between the facts found and the choices made. 5 U.S.C. § 706(2)(A); *see Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 675 (9th Cir. 2016).

Violation of binding direction renders an agency decision arbitrary and capricious. *See Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1069-70 (9th Cir. 2005) (arbitrary and capricious to ignore a standard when final EIS discusses it as if it is binding), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) (en banc). Where internal direction is non-binding, the agency may deviate under appropriate circumstances so long as it provides an adequate explanation for doing so. Deviation from applicable guidance "without a reasoned explanation" constitutes arbitrary and capricious action. *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1208 (9th Cir. 2010); *see also Davis v. Mineta*, 302 F.3d 1104, 1117 (10th Cir. 2002) ("If [the agency] arbitrarily and capriciously failed to follow its own [non-mandatory] regulation, its decision must be reversed.").

Departure from agency guidance in a FONSI or other NEPA determination likewise violates NEPA, because failure to consider environmental impacts in light of agency directives does not provide the requisite "hard look" and reasoned explanation for the agency's conclusion. *See Kraayenbrink*, 620 F.3d at 1208

(holding that BLM violated the APA and NEPA because it "changed course from current policy without a reasoned explanation").

The directives at issue—the November 15, 2021 Order and the November 16, 2021 MOU—are most recent and applicable direction on how to evaluate the Project's impacts on Tribal values under NEPA and other applicable statutes, providing new and enhanced direction to agencies within Interior. 1-SER-35–40 (Order); 1-SER-41–55 (MOU). The Order "establishes how the Departments will fulfill their obligations to Federally recognized Indian Tribes," with a primary purpose of ensuring that BLM and other agencies manage "Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes." 1-SER-37 (Order § 1). The MOU, meanwhile, "acknowledge[s] the critical role of Tribes . . . in defining the term 'sacred sites,'" and further "acknowledge[s] that sites sacred to Indian tribes . . . often occur within a larger landform or are connected through physical features or ceremonies to other sites or a larger sacred landscape." 1-SER-43.

Together, the Order and MOU provide for robust and enhanced consideration and protection of sacred sites. The Order and MOU directly address the specific issue repeatedly raised by the Tribe here—the scope of the sacred site based on the Tribe's religious and cultural beliefs, and how BLM must engage with the Tribe to protect the sacred site and fulfill its statutory and trust duties.

The Order sets forth principles of implementation which apply "[w]hen making management decisions for Federal lands and waters, or for wildlife and their

habitat that impacts the treaty or religious rights of Indian Tribes." 1-SER-39 (Order § 4). There are eight principles, three of which at issue here:

> b. The Departments will collaborate with Indian Tribes to ensure that Tribal governments play an integral role in decision making related to the management of Federal lands and waters through consultation, capacity building, and other means consistent with applicable authority.
>
> c. The Departments will engage affected Indian Tribes in meaningful consultation at the earliest phases of planning and decision-making relating to the management of Federal lands to ensure that Tribes can shape the direction of management. This will include agencies giving due consideration to Tribal recommendations on public lands management.
>
> …
>
> f. The Departments will consider Tribal expertise and/or Indigenous knowledge as part of Federal decision making relating to Federal lands, particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.

1-SER-38–39 (Order § 3).

BLM violated these principles by ignoring the Tribe's input in its decision to approve Project. As detailed in the Tribal Vice Chairman's uncontested declaration, after the Tribe had informed BLM for years of its concern with the Project and its myriad impacts on the Tribe's sacred site, Defendant Jake Vialpando met with the Tribal Council on October 26, 2021. 2-ER-143 (Mori Decl. ¶ 4) Mr. Vialpando informed the Council that BLM would not approve the Project pending FWS's ESA listing determination for the Dixie Valley toad, and further evaluation of the Project's impacts. *Id.*

Then, without further notification or explanation to the Tribe, BLM approved the project less than a month later. 2-ER-143 (Mori Decl. ¶ 5); *see also* 2-ER-177

(Decision Record). BLM met with the Tribe after the reversal but provided no explanation for the sudden change in position.

BLM's unexplained reversal did not "ensure that Tribal governments play an integral role in decision making related to the management of Federal lands," as required by the Order. *See* 1-SER-38 (Order § 3). Nor did BLM's actions "ensure that Tribes can shape the direction of management." *Id.* Substantively, BLM also failed to give "due consideration to Tribal recommendations" and to "consider Tribal expertise and/or Indigenous knowledge" in its decision to approve the Project. *Id*.

Rather, BLM entirely ignored critical aspects of the Tribe's input. Neither the FONSI nor the Decision Record acknowledge the two major concerns expressed by the Tribe: first, that the Project would impose certain, significant impacts on the Tribe's ability to carry out spiritual practices by converting the natural landscape to a noisy, bright, and loud industrial landscape; and two, that the Project threatened permanent damage to the water in the springs that cannot be fixed by a monitoring and mitigation plan. *See generally* 1-SER-152–66 (Tribe Comments on Draft EA); 1-SER-176–82 (Tribe Letter to Ken Collum); 1-SER-183–221 (Tribe Comments on RDEA); 1-SER-222–24 (Tribe Letter re: MOA). BLM's complete failure to address impacts to the spiritually significant Dixie Meadows uplands, and its failure to consider the Project's potential to permanently ruin a millennia-old sacred site ignored the Tribe's input and did not consider the Tribe's special expertise and relationship to the springs.

Similar issues arise under the MOU. The MOU "acknowledge[s] that sites sacred to Indian tribes . . . often occur within a larger landform or are connected

through physical features or ceremonies to other sites or a larger sacred landscape," and directs the signatories to "consider these broader areas and connections to better understand the context and significance of sacred sites." 1-SER-43 (MOU at 2). This text addresses a core concern of the Tribe, repeatedly raised in comments—that the Dixie Meadows sacred site includes not just the wetlands and surface water, but the surrounding uplands, where the Tribe carries out ceremonies and camps while visiting the springs. *See, e.g.*, 1-SER-178–79. BLM, however, summarily concluded that all impacts to the sacred site would be mitigated by a monitoring and mitigation plan that only pertains to surface water, and ignored the Tribe's repeated explanation that the sacred site extends beyond the wetlands themselves.

BLM's failure to even mention the Order and MOU, or explain its decision to deviated from them, renders the decision to approve the Project arbitrary, capricious and contrary to NEPA, whether or not the Order and MOU are legally binding. *See, e.g., W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2011 U.S. Dist. LEXIS 111728, at *39 (D. Idaho Sep. 28, 2011) ("At the very least, NEPA requires the BLM to discuss its own official policies that on their face apply directly to the review at issue.").[5]

[5] While Secretarial Order 3403 likely meets the criteria for enforceability set forth in *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902 (9th Cir. 1996), the Tribe has not addressed this point in the briefing on the preliminary injunction, and likewise has not conceded it is unenforceable.

The Federal Defendants suggested in briefing below that the Order and MOU merely confirm existing requirements and thus Defendants followed them without considering them. This is a forbidden post-hoc rationale, *see Crickon v. Thomas*, 579 F.3d 978, 989 (9th Cir. 2009), and ignores the fact that the Order and MOU expressly enhance prior policies.

C. BLM Violated RFRA

Congress enacted the Religious Freedom Restoration Act "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). Concerned that "'neutral'" laws might nonetheless inhibit religious exercise, 42 U.S.C. § 2000bb(a)(2), Congress commanded that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]" 42 U.S.C. § 2000bb-1(a).

While Congress clearly stated an intent to implement a specific "compelling interest" test, it did not define the term "substantially burden." *See* 42 U.S.C. § 2000bb-1. The term has since been repeatedly litigated, and is currently the subject of an appeal before this Court. *See Apache Stronghold v. United States*, No. 21-15295 (9th Cir. 2021).

In *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069-70 (9th Cir. 2008), this Court ruled that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit" (*Sherbert* [*v. Verner*, 374 U.S. 398 (1963)]) or "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." ([*Wis. v.*] *Yoder*, 406 U.S. 205 (1972)])." *See also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442-43 (1988) (applying similar standard in pre-RFRA context).

The coercion prong may include "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Guru Nanak Sikh Soc'y v. Cty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981); *see also Lyng*, 485 U.S. at 450-51).

"The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014). A substantial burden exists when the government "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief[.]" *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

Likewise, "[d]estruction of religious property" can constitute a "RFRA violation[]." *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020). In *Comanche Nation v. United States*, the Army planned to build a warehouse on federal land near Medicine Bluffs, a sacred site. No. CIV-08-849-D, 2008 LEXIS 73282, at *3 (W.D. Okla. Sept. 23, 2008). But the warehouse would have occupied "the precise location" where Native Americans stood for worship near the Bluffs—making their traditional religious practices impossible. *Id.* at *23. The court held that this physical interference with plaintiffs' religious exercise "amply demonstrate[d]" a "substantial burden." *Id* at *51-52.

Here, the Tribe has demonstrated that construction and operation of the Project on its sacred site constitutes a "substantial burden" on Tribal members' religious exercise, and BLM cannot demonstrate that the Project is narrowly tailored to minimize those burdens. There is no question that the springs and the surrounding landscape are a sacred site, and no question as to the sincerity or veracity of the Tribe's beliefs and religious practices. 2-ER-708 (MOA); 1-ER-70 ("Federal Defendants certainly do not question or second guess the sincerity or extent of the Tribe's religious practices.").

As such, the questions at issue on appeal are: 1) the extent to which the Project will harm the sacred site and the Tribe's religious exercise, and 2) whether such harm constitutes a substantial burden under RFRA.

As to the extent of harm, the construction and operation of the Project would permanently ruin the sacred site. 1-SER-125–33 (First Downs Decl. ¶¶ 20-55); 3-SER-611–13 (Second Downs. Decl. ¶¶ 6-20). Construction of the Project will prevent Tribal members from carrying out ceremonies and spiritual activities by physically occupying substantial portions of the site, creating noise and light pollution, and blocking the view of the Tribe's origin site, Fox Peak, which is an integral component of the Tribe's religious activity at the site. *Id.* In short, construction of the Project would make the Tribe's traditional religious practices impossible. *Id.* (First Downs Decl. ¶ 32-45).

Operation of the Project will also cause a substantial burden. The site's sacred power for the Tribe derives from its natural and undisturbed state. 1-SER-194–200 (Interview with Tribal elder Ashley George). As depicted in the EA, the Project would place wells and powerplants right next to the sacred springs, and on the surrounding uplands which in the Tribe's beliefs constitute part of the site. 3-ER-224 (EA at 2-3). The physical occupation, disturbance, light, and noise inherent in powerplant operations would prevent the Tribe from carrying out its traditional religious practices, which involve quiet reflection, prayer, and connection with the natural world.1-SER-125–33 (First Downs Decl. ¶¶ 20-55); 3-SER-611–13 (Second Downs. Decl. ¶¶ 6-20).

Project operations would also ruin the site by altering the natural conditions that formed the springs, which Tribal members have visited for at least 10,000 years. In the Tribe's beliefs, the Earth is a living, sentient being, and the springs reflect the health and well-being of the Earth. Extracting huge amounts of geothermal fluid, extracting the fluid's thermal energy, and reinjecting those fluids under pressure would fundamentally alter the undisturbed and sacred qualities of the springs, and deprive the springs of their spiritual power. 1-SER-194–200 (Interview with Ashley George).

The legal question presented is thus whether this complete destruction of the site's sacred qualities constitutes a "substantial burden" under RFRA, and Tribe's uncontested testimony that the Project will destroy the site for purposes of Tribal religious practices is dispositive. This Court has acknowledged that "a place of worship" that is "consistent with . . . theological requirements" is "at the very core of the free exercise of religion." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1069-70 (9th Cir. 2011) (internal quotation omitted). Disturbing, destroying, and physically barring access to the Tribe's place of religious practice clearly satisfies the "substantial burden" test—it fully prevents the exercise of the Tribe's religious practices. *See Tanzin*, 141 S. Ct. at 492; *Yellowbear*, 741 F.3d at 55. Further, *Comanche Nation*, 2008 U.S. Dist. LEXIS 73283, while not binding here, presents closely analogous facts. Here, as in that case, blocking access to the site and associated practices "amply demonstrates" a substantial burden on the Tribe, and a preliminary injunction is required. *Id.* at *52.

While it has not been addressed in the court below, once past the threshold substantial burden question, BLM will likely be unable to satisfy strict scrutiny under RFRA, which the U.S. Supreme Court has called "the most demanding test known to constitutional law." *Boerne v. Flores*, 521 U.S. 507, 534 (1997). Given the flexibility inherent in Defendants' "multiple use" mandate under federal law, *see* 43 U.S.C. § 1732(a), BLM will be unable to show a compelling governmental interest in authorizing geothermal energy development at this particular site. Further, the Ninth Circuit has held that "revenue generation is not a compelling state interest sufficient to justify" extinguishing religious land use. *Int'l Church of Foursquare Gospel*, 673 F.3d at 1071 (citing *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002)). Because the Project will make Tribal religious observance at Dixie Meadows impossible, and because BLM cannot satisfy strict scrutiny, Appellees are likely to prevail on their RFRA claim.

V. The Three Remaining Factors Support Issuance of a Preliminary Injunction for the Remainder of the Case

The remaining *Winter* factors support Appellees' request for a preliminary injunction. *See* 555 U.S. at 20. First, the District Court acknowledged, and Ormat does not contest, that Appellees are being presently and irreparably harmed by Ormat's construction activities. *See* 1-ER-14 (Order at 13). While the Project's operation, and its potentially catastrophic impacts to the springs, are of greater concern for Appellees over the long-term, construction also "irreparably harm[s] [Appellees]" by impairing Appellees' members' ability to "view, experience, and

utilize" the Dixie Meadows area in its undisturbed state. *All. for the Wild Rockies*, 632 F.3d at 1135 (internal quotation marks omitted).

The irreparable harm to Appellees will only increase as this case proceeds. Over the next few months, Ormat will clear the land of vegetation, cut roads through it, and operate major construction machinery upon it for 10 hours each business day. *See* 1-SER-118 (Lake Decl. ¶¶ 7-8). Construction will generate noise and visual impacts, for which there is no proposed mitigation. 1-SER-131 (Downs Decl. ¶ 40). And, as the EA and ARMMP both acknowledge, construction could crush or bury Dixie Valley toads using upland burrows or moving through terrestrial habitat. 2-ER-344 (EA at 3-91); 4-ER-571–72 (ARMMP at 28-29).

Next, the public interest, and the balance of equities generally, favor Appellees, not Ormat. The Court should not misconstrue Ormat's private interests in charging above-market rates for geothermal power as public interests, because the only representatives of the public interest in this case—the Federal Defendants below—have chosen not to appeal the District Court's decision. Moreover, the public's substantial interests in statutory compliance, environmental protection, and the protection of Tribal sacred values far outweigh the private financial benefits Ormat will obtain if it is able to construct the project by the end of the year. This is particularly true given that Ormat's above-market rates will likely be paid by public ratepayers.

This Court recognizes "the public interest in careful consideration of environmental impacts before major federal projects go forward, and . . . [has] held that suspending such projects until that consideration occurs comports with the

public interest." *All. For the Wild Rockies*, 632 F.3d at 1138 (internal quotation omitted). Consequently, in the case of irreparable harm to the environment, courts will withhold or limit injunctive relief only in "unusual circumstances." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 738 n.18 (internal quotation omitted); *see also League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (noting that if irreparable environmental harm is sufficiently likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment") (internal quotation omitted).

There is also a strong public interest in the protection of Tribal sacred sites. *See* Executive Order 13007—Indian Sacred Sites, 61 Fed. Reg. 26771-72 (May 24, 1996); *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) ("Protecting religious liberty and conscience is obviously in the public interest."). Finally, there is a well-recognized public interest in the government abiding by its own laws, regulations, and policies. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018); *Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011).

Here, against Appellees' undisputed irreparable harm, and the substantial public interests in protection of the environment and Tribal sacred sites, Ormat claims only pecuniary losses. Specifically Ormat argues that if the Project is temporarily enjoined, it will lose up to $30 million in future revenues. Ormat also claims that it will suffer harm in the form of $68 million in sunk costs. But neither of these alleged harms tip the balance of equities in Ormat's favor.

This Court has held that "more than pecuniary harm must be demonstrated" to prevent issuance of injunctive relief. *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986)). And Ormat's $68 million in sunk costs are largely a problem of Ormat's own making. This Court has observed that when parties "anticipate[] a pro forma result in permitting applications, they become largely responsible for their own harm." *Drakes Bay Oyster Co. v. Jewell*, 729 F.3d 967, 987 (9th Cir. 2013) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011)).

That appears to be the case here. Even though Ormat knew for years about the substantial cultural and environmental conflicts inherent in its plans for the Project, it first produced a "draft" version of the ARMMP in early 2021, leaving it only two years to solicit public comment, respond to those comments, coordinate with other government agencies, obtain BLM approval, and construct the Project. Given the complexity of the issues involved, the number of interested parties, and the amount that remained unknown about the Project's potential impacts at the time, a two-year approval timeline would be unrealistic in any scenario except for a "pro forma" approval. Ormat should not be permitted to weigh its own delay in permitting and compliance against the substantial and permanent harm that Appellees will suffer if the Project is allowed to proceed.

Ormat attempts to dismiss or minimize the harm to Appellees from the Project by claiming that the destruction of the Tribe's sacred site that the permanent elimination of the area's predominantly natural character are mere "inconvenience[s]," and that the site is "already disturbed" due to Ormat's

geothermal exploration activities. Ormat's Op. Br. at 2, 6. Ormat also attempts to imply that Appellees forfeited their rights to injunctive relief by not filing legal challenges against Ormat's exploration permits over ten years ago. Ormat's Op. Br. at 10. Neither of these positions has merit. This Court has "never made a rule that a plaintiff must challenge all related harms to maintain an ability to challenge the harm it views as the most serious," *Connaughton*, 752 F.3d at 765, and courts have found irreparable environmental harm even in areas that have been previously disturbed. *See Se. Alaska Conservation Council v. U.S. Forest Serv.*, 413 F. Supp. 3d 973, 980-81 (D. Alaska 2019).

Here, Appellees were in fact harmed by Ormat's exploration activities, even if they were unable to mount a legal challenge. *See* 1-SER-127 (Downs Decl. ¶ 29). However, Ormat's exploration permits did not have the same level of environmental impact as the proposed construction of two 30-megawatt powerplants and associated infrastructure, did not threaten permanent impacts to the Dixie Meadows hot springs or the Dixie Valley toad, and did not threaten to eliminate the Tribe's ability to conduct traditional religious ceremonies at the site. Accordingly, this Court should give little weight to Ormat's suggestion that the previous disturbance at the site somehow lessens the degree of harm to Appellees from the Project, or tips the balance of equities towards Ormat.

The fact remains that, despite Appellees' decision not to challenge permits that issued over a decade ago, Ormat has, throughout the planning process for the Project, insisted on constructing two massive powerplants "in this precise location and configuration," without regard to the potential environmental impacts or burdens

on the Tribe's spiritual and religious practices. Ormat Op. Br. at 49. The harm inflicted on Appellees from this course of action is both severe and irreparable, as the District Court acknowledged. 1-ER-14 (Order at 13). Consequently, and because Ormat complains only of monetary losses, the balance of the equities favors Appellees, and the Court should grant a preliminary injunction for the duration of the case.

CONCLUSION

The Tribe and the Center meet this Court's standard for preliminary injunctive relief—they will be irreparably harmed if Ormat is allowed to continue building the project; are likely to succeed on the merits of their NEPA, APA, and RFRA claims; and the equities favor preserving the environmental status quo and ensuring compliance with federal law before the Project is permitted to go forward. This Court should therefore vacate the District Court's incorrect decision, and remand with instructions for the District Court to immediately enter a preliminary injunction for the duration of the case.

Dated March 4, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[X] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Apache Stronghold v. United States of America, et al., Case No. 21-15295.

Apache Stronghold and these cross-appeals raise a closely related issue under the Religious Freedom Restoration Act ("RFRA")—whether physical destruction or physical occupation of a Native American sacred site, which makes the exercise of Native American religious practices impossible, constitutes a "substantial burden" on religious exercise.

Signature */s/ Scott Lake* **Date: March 4, 2020**

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 15,725 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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