NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-1317 (consolidated with Nos. 20-1318, 20-1431, & 21-1009)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, et al.,

Petitioners,

v.

U.S. DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

FINAL BRIEF OF PETITIONER, THE PUYALLUP TRIBE OF INDIANS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

Petitioner in Case Nos. 20-1431 and 21-1009 is the Puyallup Tribe of Indians, a sovereign Indian tribe whose government is recognized by the United States. Respondents are the Pipeline and Hazardous Materials Safety Administration; Tristan Brown, in his official capacity as Administrator of Pipeline and Hazardous Materials Safety Administration; the United States Department of Transportation; Pete Buttigieg, in his official capacity as Secretary of Transportation; and the United States of America.

B. RULINGS UNDER REVIEW

Petitioner seeks review of a final rule issued by the Pipeline and Hazardous Materials Safety Administration, 85 Fed. Reg. 44,994 (July 24, 2020) and of a ruling by that agency denying Petitioner's administrative appeal of this rule.

C. RELATED CASES

Petitioner has two petitions for review pending in this Court: Case Nos. 20-1431 and 21-1009. Petitioner is aware of three additional petitions challenging the same final rule, all of which were filed in this Court. *See Sierra Club v. DOT*, D.C. Cir. No. 20-1317; *Maryland v. DOT*, D.C. Cir. No. 20-1318; *Damascus v. DOT*, D.C. Cir. No. 20-1387. All the above cases were consolidated. Case No. 20-1387 has been dismissed.

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Authorities upon which we chiefly rely are marked with asterisks.

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OTHER AUTHORITIES

GLOSSARY

APA	Federal Administrative Procedures Act
DOT	Respondent United States Department of Transportation
DOT Order 5301.1	United States Department of Transportation Order 5301.1, "Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes," dated November 16, 1999
E.O. 13175	Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," signed November 6, 2000
LNG	Methane, refrigerated liquid, commonly known as liquefied natural gas
LNG Rule or Rule	PHMSA regulation entitled *Hazardous Materials: Liquefied Natural Gas by Rail*, Docket No. PHMSA-2018-0025 (HM–264), 85 Fed. Reg. 44,994, published July 24, 2020
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
PHMSA	Respondent Pipeline and Hazardous Materials Safety Administration
The Reservation	Puyallup Indian Reservation
The Tribe	Petitioner Puyallup Tribe of Indians

STATEMENT OF JURISDICTION

This matter challenges a final action taken under the regulatory authority granted to Respondent United States Department of Transportation ("DOT") by Chapter 51 of Title 49 U.S.C. The final rule on review was published on July 24, 2020. The Puyallup Tribe of Indians ("Tribe") timely filed a petition for review in the Ninth Circuit Court of Appeals on August 18, 2020. By 49 U.S.C. §§ 5127(a) and 20114(c) and 28 U.S.C. §§ 2342(7) and 2344, Congress vested this Court with authority to review the claims of any person aggrieved by a final action of the Secretary of Transportation.

INTRODUCTION

The Tribe challenges a final rule promulgated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") entitled *Hazardous Materials: Liquefied Natural Gas by Rail*, Docket No. PHMSA-2018-0025 (hm-264), 85 Fed. Reg. 44,994, published July 24, 2020 ("LNG Rule" or "Rule"). The Rule permits the bulk transport of methane, refrigerated liquid—commonly known as liquefied natural gas ("LNG")—by rail. LNG is a cryogenic flammable liquid and is so volatile that, in any rail accident involving it, authorities must evacuate a one-mile radius. 85 Fed. Reg. at 45,021.

Transport of LNG by rail poses an existential threat to the Tribe. Over 77% of the Puyallup Indian Reservation ("Reservation"), including many of the Tribe's cultural, natural, and religious resources, are within one mile of rail lines. Further, one of the Pacific Northwest's largest energy companies, Puget Sound Energy, recently built and is currently operating Tacoma LNG, a methane-liquefaction plant that produces LNG, on the Reservation's western border. The ubiquitous rail lines that crisscross the Reservation include a spur at the Tacoma LNG site, which Puget Sound Energy touts as a competitive advantage that will enable the loading of LNG onto railcars.

It was from this perspective that the Tribe implored PHMSA to consult with it regarding the impacts of permitting unlimited bulk transport of LNG along rail lines that already degrade the Reservation. The federal government's obligation to consult with Indian tribes has been repeatedly reaffirmed through statutes, treaties, settlements, executive orders, and agency policies. Because PHMSA failed to fulfill that obligation, it never considered how its new Rule would directly and uniquely impact the Tribe. PHMSA also failed to consider the Rule's disparate impacts on the Tribe, as required by statute and executive orders. The Rule should be vacated for these reasons and for those presented by the Tribe's co-Petitioners in this matter.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the addendum to the Tribe's brief.

STATEMENT OF ISSUES

1. Whether PHMSA promulgated the LNG Rule without engaging in meaningful, government-to-government consultation with the Tribe, as required by statute, case law, and binding government policies.

2. Whether PHMSA failed to take the required "hard look" under the National Environmental Policy Act at the LNG Rule's disparate impacts on the Tribe.

3. The Tribe adopts the issues raised in its co-Petitioners' briefs.

STATEMENT OF THE CASE

I. The Reservation

From time immemorial, members of the Puyallup Tribe have lived, fished, raised their children, and practiced their traditions on the lands spanning out from the mouth of the Puyallup River in what is now Washington State. Before the Medicine Creek Treaty of 1854 ("Treaty"), they enjoyed a vast homeland, consisting primarily of pristine wilderness that was essential to their cultural and spiritual traditions. Declaration of Bill Sterud ("Sterud Decl."), ¶6; Declaration of John Howard Bell ("Bell Decl.") ¶¶3-4. Tribal members still feel a close connection with many locations that are not within the exterior boundaries of the Reservation. *Id*., ¶3.

The Treaty, as confirmed by a subsequent Executive Order, was expressly intended to ensure that the Tribe had access to the waterways that had always been its homeland, central to its livelihood, and essential to its cultural and spiritual identity. *Id.*, ¶¶7-8. Accordingly, approximately 18,000 acres, flanking the Puyallup River from a point several miles upstream to where it empties into Commencement Bay, are included within the Reservation's boundaries. *Id.*, ¶8.

In 1873, announcing that it would build its western terminus near Commencement Bay, the Northern Pacific Railroad set its eyes on the Tribe's homeland. *Id.*, ¶11. In the succeeding years, the federal government converted the Reservation into "allotments" owned by individual Tribal members—and then pursued a devastatingly successful strategy of systematically removing land from Tribal members and into ownership by railroads and non-Indians. *Id.*, ¶¶12-13. This was yet another chapter in the familiar story about Native Americans losing their land through "fraud or otherwise" that Justice Gorsuch described as "the rule of the strong, not the rule of law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2474 (2020).

The industrialization that followed altered the Tribe's homeland dramatically. Sterud Decl., ¶6. As the United States Environmental Protection Agency ("EPA") explained, "in the late 1800s, the south end of Commencement Bay was composed largely of tideflats formed by the Puyallup River delta. Dredge and fill activities have significantly altered the estuarine nature of the bay since the 1920s. Intertidal

areas were covered and meandering streams and rivers were channelized." Declaration of Nicholas Thomas ("Thomas Decl."), Ex. A at 11. EPA illustrated these changes:

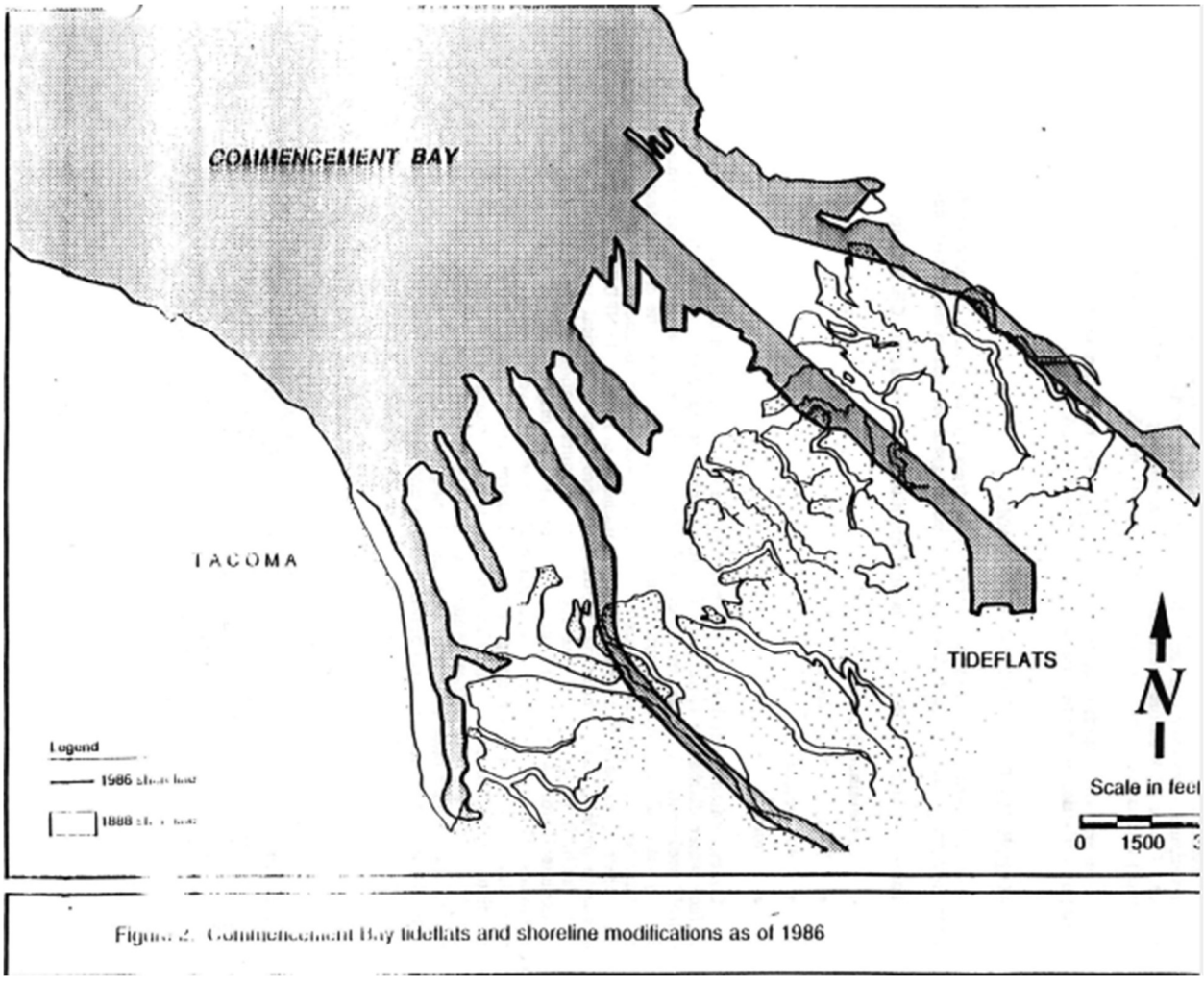


Figure 2. Commencement Bay tideflats and shoreline modifications as of 1986

Thomas Decl., Ex. A at 12.

The fill created new land, outside the Reservation's western boundary, which—contrary to the Treaty's intent—placed the Port of Tacoma between the Reservation and Commencement Bay. Bell Decl., ¶16. The industrial operations located on these filled areas included "shipbuilding, chemical manufacturing, ore

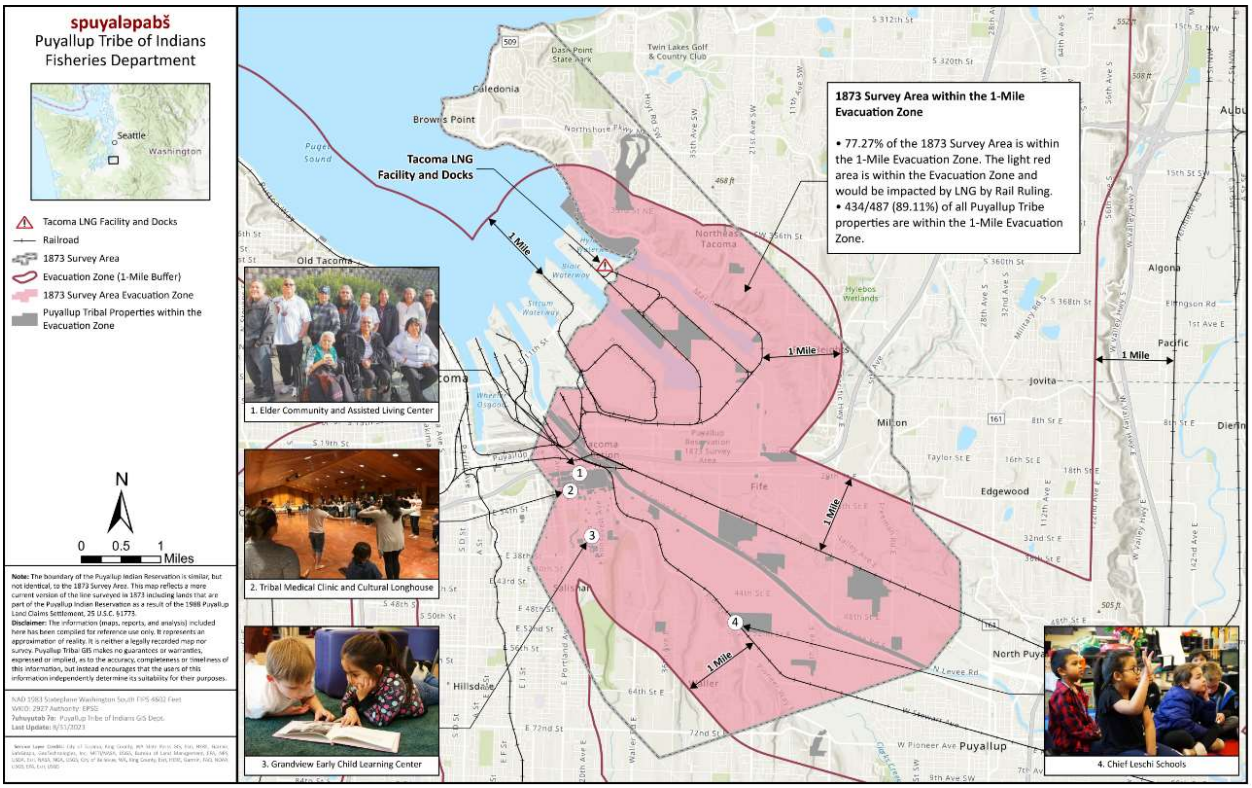
smelting, oil refining, food preserving, and transportation facilities." Thomas Decl., Ex. A at 11.

In 1988, the Tribe executed a Land Claims Settlement with federal, state, and local governments. *See* 25 U.S.C. § 1773 *et seq*. The parties recognized that the agreement could not "reverse or erase all of the injustices … that have occurred." Bell Decl., Ex. A at 2. They negotiated the agreement "to encourage a cooperative relationship which will reduce the danger of continued injustice and continuing conflicts in the future." *Id*.

The Land Claims Settlement came too late to avoid the devastation that decades of industrialization wreaked on the Tribe's homeland. As an example, in 1989, EPA issued its Record of Decision for the Commencement Bay Nearshore/Tideflats under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. "With industrialization," EPA explained, "the release of hazardous substances and waste materials into the environment has resulted in alterations to the chemical quality of waters and sediments in many areas of the bay." Thomas Decl., Ex. A at 11. In other words, industrialization transformed important parts of the Tribe's homeland into a Superfund site.

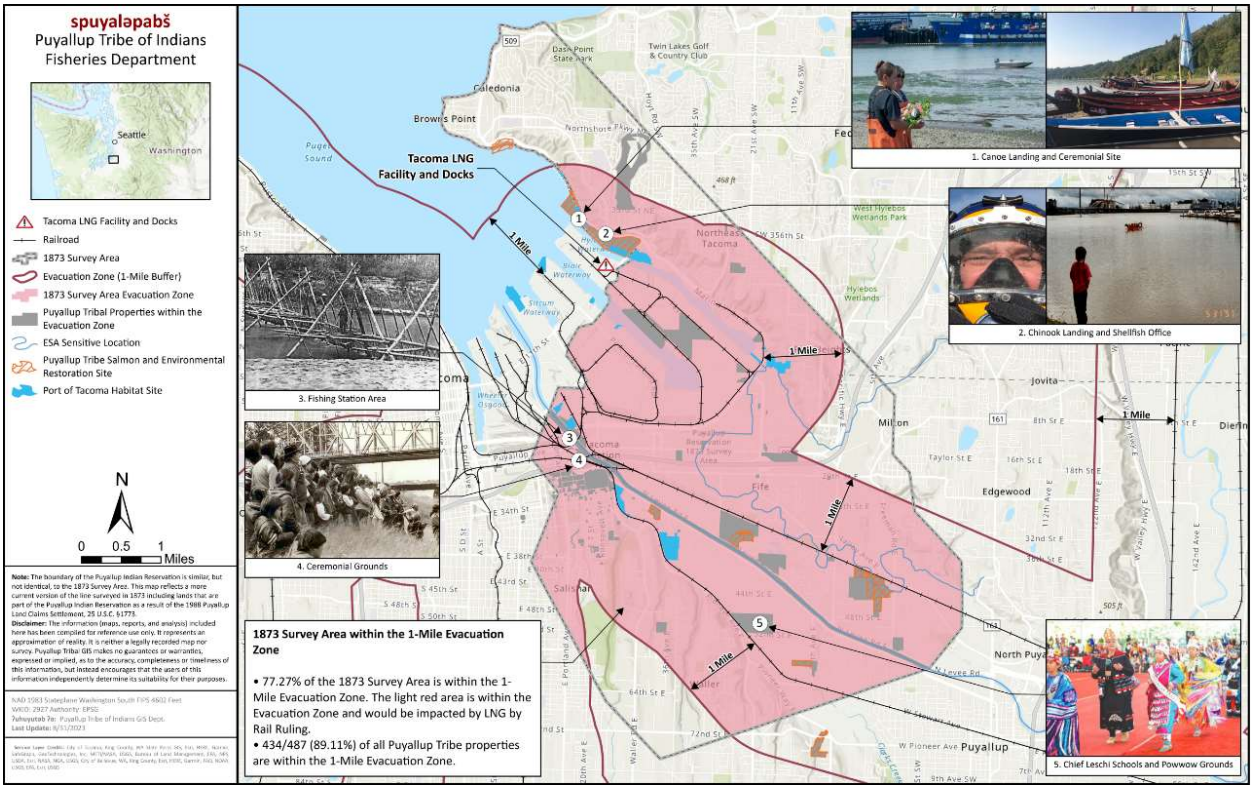
II. Rail Lines on the Reservation

The Tribe is now especially vulnerable to any hazard carried through its homeland by rail. Railroad tracks crisscross the Reservation, putting 77.27% of it within one mile of at least one rail line. Declaration of Max A. Seidita ("Seidita Decl.") ¶4. This includes many sites and properties that are highly important to the Tribe. Seidita Decl. ¶4; Sterud Decl., ¶8. For example, an elder community and assisted living center, a tribal medical clinic and cultural longhouse, and the largest tribal school in Washington State are Tribe-owned properties within one mile of rail lines:



Seidita Decl., Ex. B[1]; Bell Decl., ¶18.

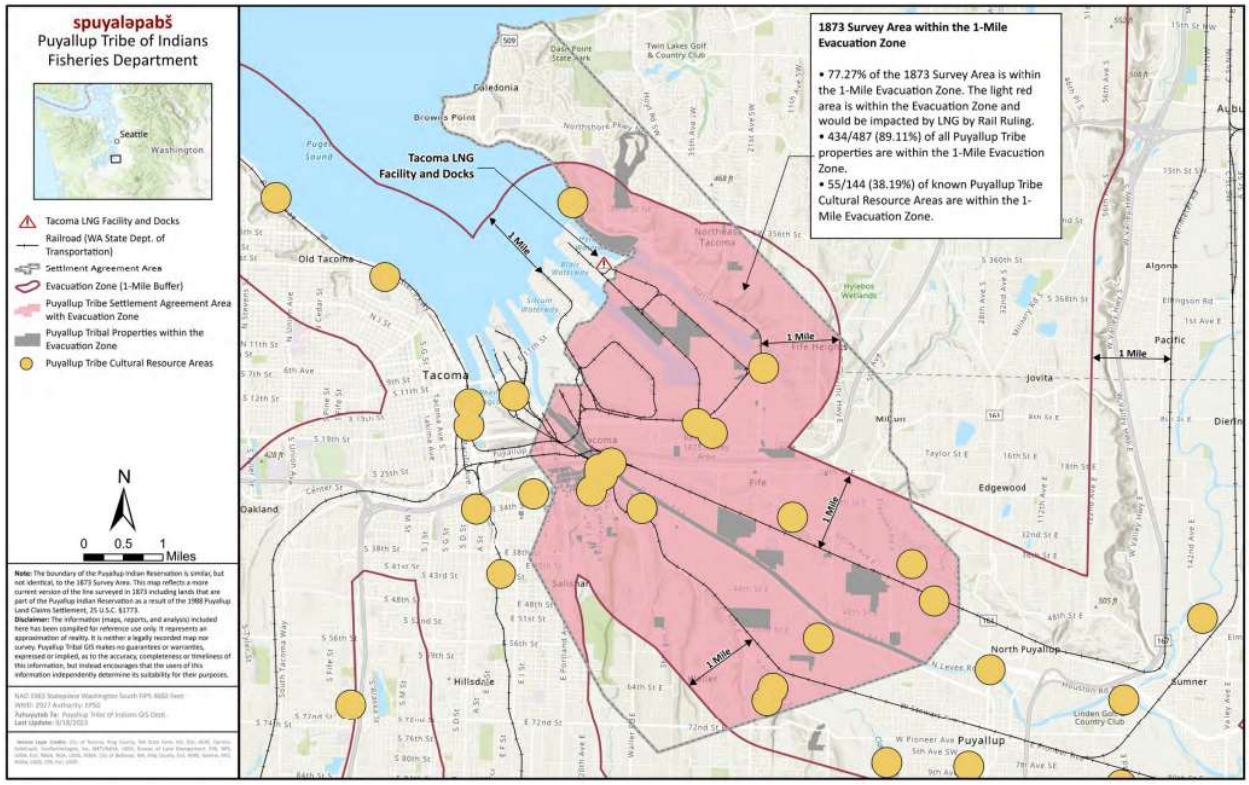
In addition, many of the Tribe's natural and cultural resources are located within one mile of rail lines, including traditional fishing and ceremonial sites:



Seidita Decl., Ex. C; Bell Decl., ¶19.

Many sites within one mile of rail lines have cultural and religious importance for the Tribe:

[1] The term "1873 Survey Area" in the maps provided here refers to a survey conducted in 1873 that has become the bellwether representation of the Reservation boundaries. Bell Decl., ¶10.



Seidita Decl., Ex. E; *see also* Seidita Decl., Ex. F; Sterud Decl., ¶8; Bell Decl., ¶19.

III. Tacoma LNG

Part of the placed fill that situated the Reservation between the Port of Tacoma and virtually the rest of the United States is a peninsula between the Blair and Hylebos Waterways. Bell Decl., ¶16. On this peninsula, directly adjacent to the Reservation's western border, is Puget Sound Energy's methane liquefaction plant, Tacoma LNG. *Id.*; JA_0131. This facility is marked with a red triangle on the maps above.

According to Puget Sound Energy, Tacoma LNG "is positioned to be the lead supplier of [LNG] in the Pacific Northwest." JA_0570. The facility "is located to efficiently provide LNG to transportation customers within the region" because of

its "easy access to the water, ***rail*** and roadways." *Id*. (emphasis added). Competitive advantages touted by Puget Sound Energy include a "[r]ail spur on site for future potential rail car loading." *Id*. The rail spur was used by a prior tenant at the same location, and Puget Sound Energy anticipates that rail service could be used "when LNG by rail became a viable way of transporting LNG." Thomas Decl., Ex. B.

IV. The LNG Rule

On October 18, 2019, PHMSA issued a notice of proposed rulemaking for a rule to authorize LNG transport by rail. JA_0102. The Tribe adopts the discussion about the rulemaking proceedings presented in the Environmental Petitioners' brief.

The notice specifically discussed Executive Order 13175 ("E.O. 13175"), entitled "Consultation and Coordination with Indian Tribal Governments." JA_0108. Because PHMSA did not "anticipate that this rulemaking will have substantial direct tribal implications," the "consultation requirements" of E.O. 13175 were "not expected to apply." *Id*. The notice, however, invited "Indian tribal governments to comment on any effect" that the rulemaking might cause. *Id*.

A few weeks after the notice was issued, personnel for the Tribe met with PHMSA government-affairs staff, at PHMSA's offices in Washington, D.C., to discuss Tacoma LNG. JA_1329. PHMSA did not inform the Tribe in this meeting that it had, just weeks earlier, proposed a rule that would allow LNG transportation by rail through the Reservation. *Id*. Instead, the Tribe learned about the proposed

rulemaking from the Washington State Utilities and Transportation Commission one week later. *Id*.

The Tribe submitted comments on the proposed rulemaking in December 2019. JA_0128. In its comments, the Tribe demanded government-to-government consultation. *Id*; JA_0147. Addressing PHMSA's passing treatment of E.O. 13175, the Tribe explained why the proposed rule had significant implications for the Tribe. JA_0130-33. The Tribe identified section 106 of the National Historic Preservation Act ("NHPA") and DOT Order 5301.1, "Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes," as additional sources of the Tribe's consultation right. JA_0130-33.

To illustrate its concerns, the Tribe discussed the 2013 derailment of a train carrying Bakken crude in Lac Mégantic, Quebec. JA_0138. That incident killed at least 42 people and destroyed more than thirty buildings. *Id*. The blast radius was estimated at 0.6 miles. *Id*.

The Tribe met with PHMSA staff again on February 12, 2020. JA_1327. The meeting was scheduled for 9:30am. *Id*. Although the Tribe's representatives arrived early, they were not escorted into the meeting room until after 9:30. *Id*. The meeting began with introductions and discussion about Tacoma LNG. *Id*. Then, at 9:58am, while the parties were still discussing Tacoma LNG, an individual interrupted, advising that the room was needed for another meeting. JA_1327-28. The Tribe's

representatives were allowed to finish their sentence and were then required to leave. JA_1328. The Tribe never had the opportunity to discuss the Rule substantively at the meeting. *Id*.

In subsequent communications, the Tribe clarified that no consultation on the Rule had yet occurred. JA_0592. Consistent with legal authority, the Tribe explained that effective consultation would require initial information-gathering at staff-level meetings, enabling staff to brief Tribal Council, followed by a leadership-level discussion between the Council and agency representatives with decision-making authority. JA_0589.

These email exchanges occurred in February and March 2020. Lisa Anderson, the Tribe's in-house environmental counsel and its primary contact with PHMSA, was on medical leave for six weeks, beginning February 27, 2020. JA_0585. In addition, COVID-19 was just beginning to spread throughout the nation.

PHMSA offered to arrange a one-hour teleconference with its Chief Counsel. JA_0586-87. Although PHMSA represented that this individual was a member of its leadership team, it did not claim that he had decision-making authority regarding the Rule. *See Id*. PHMSA made this offer on February 26, 2020, proposing that the meeting occur on February 28—the day after Ms. Anderson began medical leave. JA_0586-87. When the Tribe could not accommodate a meeting on two days'

notice, the parties attempted to schedule a meeting in March. JA_0586. With the Tribe's main contact on medical leave for the entire month, and with the "maneuvering" and "logistical concerns" associated with the pandemic, the parties did not identify a mutually acceptable date. JA_1033.

Ultimately, PHMSA never offered to let the Tribe consult with a decisionmaker; instead, while "working to finalize the final rule," it continued to offer a one-hour teleconference with its attorney. *Id*.

V. Procedural History

The Tribe adopts the procedural history presented in the Environmental Petitioners' brief.

SUMMARY OF ARGUMENT

The Tribe adopts the issues and arguments raised in its co-Petitioners' briefs and writes separately to address issues unique to the Tribe.

The Tribe's arguments herein relate primarily to PHMSA's failure to consult with the Tribe regarding the LNG Rule's potential impacts on the Tribe. PHMSA concedes that it has an obligation to consult with Indian tribes affected by its actions. 85 Fed. Reg. at 45,025. This obligation stems from various sources, including the NHPA, E.O. 13175, and DOT Order 5301.1. Case law and published government guidance establish that what PHMSA did here—a single perfunctory meeting terminated after less than thirty minutes and offering a one-hour teleconference with

an agency lawyer, while the Tribe's main contact is on medical leave and while the agency is already finalizing the rule—does not amount to the meaningful consultation required by law.

Additionally, PHMSA violated principles of environmental justice by failing to consider the LNG Rule's disparate impacts on the Tribe, as required by Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"[2] and related requirements under NEPA. PHMSA admitted that the rule could "facilitate the transportation of LNG through environmental justice communities." JA_0477. It dismissed this concern by way of *non sequitur* speculation that the rule might also reduce highway transportation of LNG. *Id*. But trains and trucks are not interchangeable, and PHMSA never grappled with the existence of environmental justice communities, like the Tribe, who face serious threats because of the LNG Rule. Instead, PHMSA dismissed the Tribe's concerns by surmising that Tacoma LNG might not use rail transport.

PHMSA's actions were arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, as prohibited by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). Accordingly, the LNG Rule should be vacated.

[2] See Addendum at 80.

STANDING

Standing requirements ensure that a litigant has a "sufficient stake in an otherwise justiciable controversy" to obtain judicial resolution. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). The Tribe has a "sufficient stake" in this challenge to the LNG Rule based on its interest in preventing harm to its people, its homeland, and its resources. Indeed, PHMSA recently acknowledged that suspending the Rule "could in fact reduce risks to Tribal communities, as it could avoid the release of hazardous materials (in particular, LNG) by railroad in the vicinity of Tribal communities." *Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail*, 88 Fed. Reg. 60,356, 60,368 (2023).

Indian tribes "are 'domestic dependent nations that exercise inherent sovereign authority over their members and territories' and the resources therein." *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032, 1044 (D.C. Cir. 2021) ("*Standing Rock III*") (quoting *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)). As such, "tribes, like states, are afforded 'special solicitude in our standing analysis.'" *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) (quoting *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007)).

"[S]tanding has three parts: injury in fact, causation, and redressability." *Eagle Cnty., Colorado v. Surface Transp. Bd.*, __ F.4th __, 2023 WL 5313815, at *5 (D.C. Cir. Aug. 18, 2023) (alteration in original) (quoting *Util. Workers Union of Am. Loc. 464 v. FERC*, 896 F.3d 573, 577 (D.C. Cir. 2018)). The Tribe alleges a procedural injury: that PHMSA should have consulted with it and that PHMSA should have adequately considered the LNG Rule's disparate impacts on the Tribe, in addition to the failures identified in the co-Petitioners' briefing.

The injury-in-fact requirement is met if PHMSA's "decision to disregard these procedural requirements" impaired "a separate concrete interest" of the Tribe. *Eagle*, *supra* at *6 (quoting *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007)). In this analysis, the Court assumes that the Tribe "will prevail on the merits" of its claims. *Id*. (quoting *City of Jersey City v. Consol. Rail Corp.*, 668 F.3d 741, 744 (D.C. Cir. 2012)). The procedural injury has two components: (1) that a "procedural right has been violated" and (2) that the violation invaded the party's "concrete and particularized interest." *Id*. (quoting *Ctr. For L. & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005)).

In *Eagle*, a county alleged several procedural injuries arising from a Surface Transportation Board ("Board") order authorizing the construction and operation of a rail line. *Id*. at *1. This Court held that the county met the first requirement of procedural injury with allegations that the Board failed to seriously consider

"numerous adverse effects of the Railway downline" caused by increased rail traffic and failed to consult with the county or otherwise consider "impacts on historic properties downline as required by the NHPA." *Id*. at *6. The second requirement was satisfied through allegations that property in the county could be destroyed in a wildfire caused by "an increased number of trains and highly flammable cargo." *Id*.

Under this reasoning, the Tribe unquestionably alleges an injury-in-fact. The Tribe alleges that PHMSA committed the procedural violations outlined above, resulting in a Rule that does not adequately account for the risks associated with rail transit of highly explosive cargo through the Reservation. The LNG Rule acknowledges that derailment of an LNG-carrying train would require evacuation of a one-mile radius (85 Fed. Reg. at 45,021), thus conceding that any person or property within one mile of a rail line on which LNG is carried is at risk. Again, 77.27% of the Reservation is within one mile of rail lines, and many of the Tribe's members live within that zone (where many of its cultural, religious, and economic resources are located as well). Seidita Decl., Ex. A; Sterud Decl., ¶3. Tacoma LNG is now operating on the Tribe's western border, and its owners have touted its access to rail lines as a competitive advantage. JA_0570.

More broadly, the Tribe's members are the descendants of a people who, for millennia, enjoyed a vast homeland. Sterud Decl., ¶6. That homeland was diminished through the Treaty and then diminished further in the ensuing decades

as governmental policies favored industrial and commercial interests over the Tribe's. Bell Decl., ¶¶3, 7-13. The result is a Reservation that the Tribe shares with the City of Tacoma, while industrial development has turned portions of the Tribe's homeland into a Superfund Site. Thomas Decl., Ex. A.

The Tribe indisputably has a concrete and particularized interest in preserving what remains of its heritage, its land, its people, and its resources, and the Rule directly threatens those interests. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 301 F. Supp. 3d 50, 61 (D.D.C. 2018) (Indian tribe established standing to challenge pipeline near areas where tribal members hunted, fished, and performed ceremonies).

Standing's second element, causation, is comprised of two causal links: "one connecting the omitted procedural step to some substantive government decision that may have been wrongly decided because of the lack of that procedural requirement and one connecting that substantive decision to the plaintiff's particularized injury." *Eagle*, *supra* at *7 (quoting *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Cir. 2017)). The first link is established if "the procedural step was connected to the substantive result." *Id.* (quoting *Ctr.*, 861 F.3d at 184). The second is established if "there is a 'substantial probability' that the agency's action will cause the injury." *Id.* (quoting *Ctr.*, 861 F.3d at 184).

In *Eagle*, the first link was established because the Board's failure to follow procedural requirements of statutes like NEPA and the NHPA was "plainly connected" to its substantive decision. *Id*. The second link was established through the allegation that the decision would increase rail traffic and that this would "increase the risk of train derailments, oil spills, wildfires, and the related adverse effects on resources and historic properties downline." *Id*.

The analysis here is identical. PHMSA's failure to follow procedural requirements in promulgating the Rule, including those of NEPA and the NHPA, is connected to its substantive decision to promulgate the Rule. And the Rule increases the likelihood that trains carrying LNG will travel through the Reservation—with the existential threat that a derailment involving such trains would pose to the Tribe. As the Lac Mégantic disaster (JA_0138) and the more recent rail accident in East Palestine, Ohio show, train derailments involving hazardous substances occur and can be catastrophic. Both causal links are established.

Finally, regarding redressability, the Tribe brings this action under 49 U.S.C. § 5127(a), which provides a procedural right to challenge PHMSA's actions. Under such statutes, a litigant "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n. 7 (1992)). Under this relaxed requirement,

procedural-rights litigants need only show that the agency "'could reach a different conclusion' if it revisited the order." *Eagle*, *supra* at *7 (quoting *Ctr.*, 861 F.3d at 185.). Even if there is a "serious possibility" that the challenged agency action will remain unchanged after the agency revisits its process, "there remains at least the possibility" that the agency "could reach a different conclusion—say, by modifying" its decision. *Id*. (quoting *Ctr.*, 861 F.3d at 185).

Here, there is at least a possibility that a remand for consideration under NEPA, the NHPA, and the other statutes raised in Petitioners' briefing could prompt PHMSA to reach a different conclusion, such as by modifying or repealing the Rule.

The Tribe therefore has standing. Further, the interests and facts outlined above support the Tribe's standing to assert the issues addressed in its co-Petitioners' briefing.

ARGUMENT

I. The Court should grant the Tribe's motion to supplement the record.

Per this Court's order of January 21, 2021 (Doc. #1881148), the Tribe reasserts here its motion to supplement.

A. Background

On June 18, 2020, the day before it issued the final rule, PHMSA supplemented the rulemaking record with a memorandum entitled "Notes from Puyallup Tribe 021220 meeting." JA_0431. PHMSA did not notify the Tribe that

it added this memorandum to the rulemaking docket, or even that the memorandum existed. Doc. #1869629 at 3. The Tribe's counsel discovered it after seeing a reference to it in the published final rule. *Id*.

Again, the February 12, 2020 meeting lasted less than thirty minutes, and PHMSA ended it before the parties could address the LNG Rule. JA_1327-28. PHMSA's memorandum misrepresents and omits important details about this meeting. It omits, for example, both the length of the meeting and the reason for its termination. *See* JA_0431. It also omits that the parties did not substantively discuss the Rule. Instead, it inaccurately claims that PHMSA "asked if the Puyallup Tribe had additional comments or input regarding the LNG by Rail Rulemaking" and that the Tribe "stated that it has no additional comments." *Id*. It then represents that the Tribe "stated its opposition to PHMSA's LNG by Rail rulemaking has submitted comments, and does not have additional comments to submit." *Id*. In the LNG Rule, PHMSA cited this self-serving memorandum to claim inaccurately that, during the February 2020 meeting, the parties discussed the Tribe's "written comments submitted in the docket for this rulemaking." 85 Fed. Reg. at 45,022.

In September 2020, in connection with its administrative appeal, the Tribe filed with PHMSA a version of the Anderson Declaration dated September 23, 2020 ("9/2020 Declaration"). JA_1327. In November 2020, shortly after its petition for review was transferred to this Court, the Tribe moved to supplement the record with

an updated version of Ms. Anderson's declaration, dated October 2020 ("10/2020 Declaration"), to correct the misleading information advanced by PHMSA's self-serving memorandum. Doc. #1869629. The motion panel referred the Tribe's motion to the merits panel. Doc. #1881148.

In August 2023, PHMSA revised its certified index to the record in Case No. 21-1009. Doc. #2012635. The revision includes the 9/2020 Declaration. JA_1327. As such, some of the information the Tribe sought to provide when it moved to supplement the record with the 10/2020 Declaration is now in the record via the 9/2020 Declaration. However, the additional details in the 10/2020 Declaration provide key information, including:

- When Tribal staff met with PHMSA staff in November 2019, the purpose was to discuss the Tacoma LNG facility. 10/2020 Declaration, p. 3.[3]
- In preparing the final rule, PHMSA significantly revised the draft rule, but did not consult with the Tribe about any of these revisions. *Id*. at 4.

B. Argument for Supplementation.

The APA "limits judicial review to the administrative record 'except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review.'" *Theodore Roosevelt*

[3] The 10/2020 Declaration is appended at the end of this brief.

Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C. Cir. 2010) (internal quotations omitted) (quoting *Commercial Drapery Contractors, Inc. v. United States,* 133 F.3d 1, 7 (D.C. Cir. 1998)). This Court has "recognized such circumstances in at least three instances." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (citing *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)). These arise: "(1) if the agency deliberately or negligently excluded documents that may have been adverse to its decision; (2) if background information was needed to determine whether the agency considered all the relevant factors, or (3) if the agency failed to explain administrative action so as to frustrate judicial review." *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2011) (internal quotations omitted).

At least two of these situations are presented here. First, PHMSA failed to accurately explain the administrative action it took in briefly meeting with the Tribe, and this Court's review of that action is frustrated without the additional details and corrections provided by the 10/2020 Declaration. Second, the information in the 10/2020 Declaration will help this Court determine whether PHMSA considered all factors relevant to its rulemaking, including the potential effects on the Tribe.

This "resort to extra-record information" is "particularly" appropriate in a challenge to "the procedural validity" of the agency's action. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). In contrast, the general rule against extra-record

evidence "exerts its maximum force" in challenges to the "substantive soundness of the agency's decision." *Id*. Here, the Tribe's consultation claims challenge the procedural validity of PHMSA's action, making the extra-record evidence at issue "particularly" appropriate.

This distinction—between procedural validity and substantive soundness—distinguishes many of the cases PHMSA cited to the motion panel,[4] including *Am. Wildlands*, 530 F.3d at 1002, *Cone v. Caldera*, 223 F.3d 789 (D.C. Cir. 2000), and *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275 (D.C. Cir. 1981). These cases all addressed expert evidence that was offered, for the first time on judicial review, to challenge the substantive soundness of the agencies' decisions. They are inapposite here.

Moreover, contrary to PHMSA's assertions,[5] the contention that *some* of the information found in the 10/2020 Declaration may already be in the record is not a basis for excluding the *entire* declaration. On this point, PHMSA cited *Kerr Contractors, Inc. v. United States*, 89 Fed. Cl. 312 (Fed. Cl. 2009). But there, the fact that some of the information was duplicative was just one reason for exclusion. *Id*. at 335. The Court did not find that the entire declaration could be excluded merely because some of the information was duplicative. *Id*.

[4] Doc. #1871024 at 10-12.
[5] Doc. #1871024 at 13.

In short, this Court should reject PHMSA's attempt to exclude information fully setting out the relevant interactions after it supplemented the record with self-serving information. *See Kent Cty., Delaware Levy Court v. E.P.A.*, 963 F.2d 391, 396 (D.C. Cir. 1992) (agency's self-serving selection of information to include in the record is arbitrary and capricious). The Court should admit the 10/2020 Declaration to provide a more accurate and complete account of the perfunctory and illusory actions taken by PHMSA under the guise of tribal consultation.

II. The LNG Rule should be vacated.

The APA requires this Court to "hold unlawful and set aside agency action, findings and conclusions found to be ...(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law...." 5 U.S.C. § 706(2). In assessing agency action, the Court must subject agency action to a "thorough, probing, in-depth review." *C&H Transp. Co., Inc. v. I.C.C.*, 589 F.2d 565, 571 (D.C. Cir. 1978) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)). In this analysis, "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). For the reasons set forth below, the Rule was unlawful and should be set aside.

A. PHMSA violated the APA by failing to engage in meaningful government-to-government consultation with the Tribe.

PHMSA has expressly acknowledged that it "has a government-to-government relationship with Indian tribal governments," which has been affirmed "in treaties, Supreme Court decisions, and executive orders."[6]

Consultation is thus a requirement with obligations that are imposed on the parties by law. In this section, the Tribe addresses two bases for that requirement: (A) the NHPA and (B) executive and departmental orders. Because PHMSA did not comply with that obligation before promulgating the Rule, vacatur is required.

1. PHMSA violated the NHPA's consultation requirements.

Congress enacted the NHPA to "foster conditions under which our modern society and our historic property can exist in productive harmony" and "contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means." 54 U.S.C. § 300101. As part of that mission, the NHPA requires federal agencies to consider the effects of their undertakings on any historic property. 54 U.S.C. § 306108. Such consideration must include consulting with Indian tribes that attach religious and cultural significance to potentially affected properties. 54 U.S.C. § 302706.

[6] *PHMSA Tribal Assistance Protocol*, Addendum at 99.

This Court affords no deference to PHMSA's interpretations of the NHPA. *See United Keetoowah Band of Cherokee Indians v. FCC*, 933 F.3d 728, 738 (D.C. Cir. 2019) (citing *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992)). As explained below, PHMSA violated the NHPA by failing to engage the Tribe in meaningful government-to-government consultation regarding the Rule.

a. The Rule is an "undertaking" subject to the NHPA consultation requirement.

The NHPA consultation requirement applies to any "undertaking" under 54 U.S.C. § 306108. An "undertaking" is any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency," including "those requiring a Federal permit, license, or approval." 54 U.S.C. § 300320.

Congress intended this definition "to include projects requiring a federal 'permit' or merely federal 'approval.'" *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 112-13 (D.C. Cir. 2006) (quoting *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995)). For example, a privately built communications tower is a federal undertaking because an environmental assessment must be submitted to and ruled on by the Federal Communications Commission before construction can begin. *Id*. at 114-15.

The LNG Rule is an exercise of PHMSA's authority to require federal approval for the transportation of hazardous materials. 49 U.S.C. § 5103. Before PHMSA issued the Rule, a railroad wanting to transport LNG needed to obtain a special permit for a specific route. 85 Fed. Reg. at 44,995. That permit process involved public comments, which could result in additional operational controls being imposed if the permit was approved. *See Id*.

The LNG Rule effectively hands all railroads a broad license to transport LNG along any route in the country. Concomitantly, it eliminates (1) the public's ability to comment on specific routes and (2) PHMSA's obligation to consult regarding historic properties along such routes. An agency action that exempts a broad category of undertakings from NHPA review is itself a federal undertaking requiring NHPA consultation. *See United Keetoowah*, 933 F.3d at 750-51 (analyzing whether agency properly consulted with Indian tribes before issuing an order exempting certain cell towers from NHPA review).

Finally, PHMSA admitted that it conducted an environmental assessment in connection with this rule because NEPA "requires Federal agencies to consider the consequences of major Federal actions…." 85 Fed. Reg. at 45,027. As a major federal action by which PHMSA granted an entire industry permission to engage in a regulated activity, the Rule is a federal undertaking under 54 U.S.C. § 300320.

b. PHMSA was required to consult with the Tribe about potential effects on its historic properties.

The purpose of NHPA consultation is to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. A "historic property" is "any prehistoric or historic district, site, building, structure, or object included in, ***or eligible for inclusion in***, the National Register of Historic Places…." 36 C.F.R. § 800.16(l)(1) (emphasis added). "Property of traditional religious and cultural importance to an Indian tribe … may be determined to be eligible for inclusion on the National Register." 54 U.S.C. § 302706(a). Accordingly, an agency must "consult with any Indian tribe … that attaches religious and cultural significance" to such property. 54 U.S.C. § 302706(b). The NHPA thus "requires federal agencies to consider the effect of their actions on certain historic or culturally significant sites and properties (expressly including those of Indian tribes) and to seek ways to mitigate those effects." *Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 10-11 (D.C. Cir. 2020) (quoting *City of Tacoma v. FERC*, 460 F.3d 53, 69 (D.C. Cir. 2006)).

The Tribe invoked NHPA consultation, in part, because it places religious and cultural importance on sites that are endangered by the Rule. *See*, *e.g.*, JA_0130-31; JA_0147. If an incident—of the type that necessitates a one-mile evacuation zone—occurred on the Reservation, these ancient sites of cultural significance could be lost forever. Meaningful consultation would have given the Tribe the opportunity to

provide more information about these sites and explore ways to mitigate the potential impacts. *See United Keetoowah*, 933 F.3d at 745 (appropriate consultation would give tribes the opportunity to identify historic sites). PHMSA was required to give the Tribe that opportunity. 54 U.S.C. § 302706(b).

c. PHMSA violated the NHPA by failing to consult with the Tribe.

Consultation under the NHPA "means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them…." 36 C.F.R. § 800.16(f). "The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a). Consultation "requires giving the interested Tribe 'a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, ... articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.'" *United Keetoowah*, 933 F.3d at 745 (alteration in original) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)). PHMSA did not meet this obligation.

Indeed, consultation efforts far more meaningful than PHMSA's have been found deficient. *See Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Department of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010). In *Pueblo*, for example, the United States

Forest Service ("Service") used form letters and meetings to request information about cultural activities conducted around a national forest. *Pueblo*, at 860. In these communications, the Service requested details from the tribes about traditional cultural properties and maps showing their locations. *Id*. The tribes did not provide the detailed information requested. *Id*. They explained, however, that the area was used for "a number of ceremonial, religious, and medicinal purposes." *Id*. Further, an anthropologist testified regarding tribes' "general unwillingness 'to divulge any information regarding their religious practices.'" *Id*. at 861.

The Service decided that, while there might be historic properties in the area, it did not have enough information to determine eligibility. *Id*. Although the Tenth Circuit agreed that information was lacking, it held that this triggered a duty to investigate further. *Id*. By not doing so, the Service failed to make a reasonable consultation effort. *Id*. at 862.

In *Quechan*, despite the Bureau of Land Management's lengthy list of letters, conversations, and invitations to meetings, the district court found that the tribe was likely to prevail on its NHPA claim. *Quechan*, 755 F. Supp. 2d at 1119-20. The agency never sent a letter initiating government-to-government consultation and "rebuffed" the tribe's request for a meeting with its tribal council. *Id*. at 1119. "While public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are

obviously a helpful and necessary part of the process," the court wrote, "they don't amount to the type of 'government-to-government' consultation contemplated by the regulations." *Id*.

Here, PHMSA failed to make a small fraction of the efforts held inadequate in *Pueblo* and *Quechan*. After the Tribe commented on the proposed rule, PHMSA granted the Tribe one meeting, which was scheduled to address both Tacoma LNG and the Rule. JA_0574. To the Tribe's knowledge, none of the PHMSA attendees had decision-making authority regarding the Rule. JA_1329. PHMSA terminated the meeting after less than half an hour and before the Rule could even be discussed. JA_1327-28. The Tribe requested further dialogue and advised PHMSA that it needed more information so that it could brief the Tribal Council. JA_0589. The Tribe also requested identification of a PHMSA decision-maker to enable a leadership-level discussion. *Id*.

PHMSA responded by offering a one-hour teleconference with its lawyer while the Tribe's main contact with PHMSA was on medical leave. JA_0586-87.

More importantly, by the time it offered this meeting, PHMSA was already "working to finalize the final rule." JA_1039. Under the NHPA regulations, consultation "should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties." 36 C.F.R. §

800.2(c)(2)(ii)(A). "Early consultation with tribes is encouraged by the regulations 'to ensure that all types of historic properties and all public interests in such properties are given due consideration....'" *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 609 (9th Cir. 2010) (quoting 16 U.S.C. § 470a(d)(1)(A), *later recodified as* 54 U.S.C. § 302701(b)(1)); *see also United Keetoowah*, 933 F.3d at 750-51 (stressing the lack of evidence that the agency had already determined an order's substance before consultation and noting that communications began before the notice of proposed rulemaking was issued). Offering to facilitate a one-hour conference with an attorney, during the final rulemaking stages, does not qualify as commencing consultation "early in the planning process." 36 C.F.R. § 800.2(c)(2)(ii)(A).

If the inadequate efforts in *Pueblo* and *Quechan* violated the NHPA, the complete lack of any semblance of consultation necessarily violated the NHPA here.

d. PHMSA's failure to consult with the Tribe mandates vacatur.

PHMSA's failure to comply with its NHPA obligations was unlawful under the APA. *See Pueblo*, 50 F.3d at 857 (reversing summary judgment in agency's favor because agency failed to make a reasonable and good faith effort to identify historic properties); *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Engineers*, 3:11-CV-03026-RAL, 2016 WL 5478428 (D.S.D. Sept. 29, 2016) (remanding for further agency action because agency's approach

may have "resulted not only in circumventing tribal consultation, but also overlooking legitimate historical site information that could only be provided by the Tribe"); *Quechan*, 755 F. Supp. 2d at 1122 (enjoining project that was approved without proper consultation). This Court should therefore vacate the LNG Rule. 5 U.S.C. § 706(2).

2. PHMSA's failure to consult violated official government policy.

For more than two decades, an executive order has required all federal agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." E.O. 13175(5).[7] This requirement is reinforced by an internal DOT policy: DOT Order 5301.1.[8]

The latter was issued to "ensure that programs, policies, and procedures administered by the [DOT] are responsive to the needs and concerns of American Indians, Alaska Natives, and tribes." DOT Order 5301.1(1). It recognizes that the Federal Government has both "a unique legal and political relationship with federally recognized tribes" and "a moral obligation of the highest responsibility and trust for resources held by the Federal Government on behalf of federally recognized tribes and their members." *Id.* at 4. In carrying out this responsibility, the

[7] See Addendum at 85.
[8] See Addendum at 89.

government "has the duty to act in good faith and loyalty to the best interests of American Indians, Alaska Natives, and tribes." *Id.* To this end, "all components within DOT must" consult "with Indian tribes before taking any actions that may significantly or uniquely affect them." *Id.* at 5(b). PHMSA's disregard of this mandate provides an additional ground for setting the Rule aside.

a. An agency's failure to follow binding internal policies violates the APA.

"It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated." *Massachusetts Fair Share v. Law Enf't Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) (citing *United States v. Nixon*, 418 U.S. 683, 694-96 (1974)). "This precept is rooted in the concept of fair play and in abhorrence of unjust discrimination, and its ambit is ***not limited to rules attaining the status of formal regulations***." *Id.* (emphasis added) (citing *International House v. NLRB*, 676 F.2d 906, 912 (2d Cir. 1982)).

Whether to hold an agency to internal government policies turns on whether the agency "issued a binding norm or merely a statement of policy." *The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006). This analysis has generally followed two lines of inquiry. *Id.* The first focuses on "the effects of the agency action," asking whether the agency has imposed "any rights and obligations" or genuinely left the agency "free to exercise discretion." *Id.* (quoting *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003)). The second focuses on "the agency's

expressed intentions" and looks to three factors: (1) the agency's characterization of the action; (2) whether the action was published; and (3) "whether the action has binding effects on private parties or on the agency." *Id*. (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)).

In practice, rules not promulgated as formal regulations have nonetheless been treated as binding norms in at least two situations: (1) in the case of "legislative rules," which have "present binding effect"; and (2) where the rule was "designed to protect either individual rights or wards of the federal government." *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 83 (D.D.C. 2011) (citations omitted); *see also Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 536 (D.C. Cir. 1988) (the line between binding rules and nonbinding policy statements is drawn in terms of the extent to which the statement fails to leave the agency free to exercise discretion, thereby having a binding effect or imposing rights or obligations). Both such situations exist here because the orders in question are legislative rules that were designed to protect individual rights or wards of the federal government.

b. DOT's consultation policy is a legislative rule.

DOT Order 5301.1 is a legislative rule with present binding effect. PHMSA will likely claim that it contains language rendering it nonbinding. PHMSA has noted, for example, that DOT Order 5301.1 "is 'intended to improve the internal management of the Department,'" "is not intended to create any right enforceable in

any cause of action," and "should not be construed to create any right to judicial review." Doc. #1871024 at 8 (quoting DOT Order 5301.1 at 10).[9]

This language is not dispositive. Agency compliance with executive orders and internal directives is reviewable under the APA, notwithstanding such disclaimers. *See Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 688-89 (D.C. Cir. 2004); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1, 9 (D.D.C. 2020) (*Standing Rock II*), *aff'd sub nom.*, 985 F.3d 1032 (D.C. Cir. 2021); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 338 (D.D.C. 2018). Here, DOT Order 5301.1 is a binding legislative rule, for three reasons.

First, the consultation obligation is set out using mandatory language. The "'language actually used by the agency' is often central to making such determinations." *The Wilderness Soc.*, 434 F.3d at 595 (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)). The agency's characterization of its order's legal effect is entitled only to "some, albeit 'not overwhelming,' deference." *Cmty. Nutrition*, 818 F.2d at 946 (quoting *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986)). Courts "are to give far greater weight to the language actually used by the agency." *Id.* This Court has, "found

[9] Similarly, E.O. 13175 states that it "is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." E.O. 13175(10).

decisive the choice between the words 'will' and 'may.'" *Id*. (citations omitted). Where a "statement is unequivocally 'couched in terms of command,'" its "'likely effect' is not simply to limit administrative discretion, but to abolish it." *Am. Bus Ass'n, v. U.S.*, 627 F.2d 525, 532 (D.C. Cir. 1980).

DOT Order 5301.1's consultation policy is unequivocally couched in terms of command:

> …all components within DOT ***must***, to the extent practicable and permitted by law:
>
> …
>
> b. Consult with Indian tribes before taking any actions that may significantly or uniquely affect them. …
>
> c. Work with federally recognized tribes and their designated representatives on a government-to-government basis respecting their rights to represent their respective interests.

DOT Order 5301.1(5) (emphasis added). This order implements E.O. 13175, which is likewise expressed with mandatory language: "Each agency ***shall*** have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." E.O. 13175(5) (emphasis added).

Second, DOT Order 5301.1 implements a congressional mandate. It acknowledges that, in 1975, Congress passed the Indian Self-Determination and Education Assistance Act (Public Law 93-638). DOT Order 5301.1(4)(e). This law

"recognized the ***obligation*** of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of Federal services." *Id*. (emphasis added); *see also* 25 U.S.C. § 5302(a). E.O. 13175 is similarly premised on the fundamental principle that "the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions," recognizes "the right of Indian tribes to self-government." E.O. 13175(2)(b).

These statutorily recognized obligations contrast with agency policies that this Court has found nonbinding. In *The Wilderness Soc.*, for example, this Court declared it "significant" that the appellant pointed "to no statutory provision requiring" the agency to develop the policies in question. *The Wilderness Soc.*, 434 F.3d at 596. The fact the policies did "not emanate from a congressional mandate" supported that they were "not meant to establish binding norms." *Id*. Here, in contrast, DOT Order 5301.1 expressly acknowledges that it emanates from a congressional mandate.

Finally, *PHMSA has repeatedly admitted that consultation is obligatory*. An agency's admissions about the binding nature of an internal policy are, on their own, sufficient to refute boilerplate disclaimer language. *See Damus*, 313 F. Supp. 3d at 338. In *Damus*, the agency's admission that the directive was binding was "determinative evidence" of the extent to which the agency "intended to be bound."

Id. Therefore, despite a boilerplate disclaimer like that used in DOT Order 5301.1, the directive was "binding agency policy." *Id*.

Here, as in *Damus*, PHMSA describes consultation as a requirement. *See* JA_0108. In the Rule, PHMSA represented that it "is *committed* to satisfying its *obligations* under E.O. 13175 and DOT Order 5301.1 related to Tribal outreach to ensure meaningful and timely engagement of Tribal governments in PHMSA rulemaking." 85 Fed. Reg. at 45,025 (emphasis added). In deciding the Tribe's administrative appeal, PHMSA represented that it "is committed to engaging in meaningful and timely consultation with Tribal communities and governments, and takes its *obligations* under E.O. 13175 and relevant DOT policies *seriously*." JA-_0042 (emphasis added). And in its recent rule suspending the LNG by Rail Rule, PHMSA conceded that E.O. 13175 and DOT Order 5301.1 "*require* DOT Operating Administrations to assure meaningful and timely input from Native American Tribal government representatives in the development of rules that significantly or uniquely affect Tribal communities…." 88 Fed. Reg. at 60,368 (emphasis added). These admissions are determinative evidence that the consultation requirement is binding agency policy.

c. The consultation requirement was designed to protect individual rights and wards of the federal government.

These orders are binding on PHMSA for the additional reason that they are designed to protect both "individual rights" and "wards of the federal government." *Nat'l Small Shipments Traffic Conference, Inc. v. I.C.C.*, 725 F.2d 1442, 1449 (D.C. Cir. 1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974)). These considerations are "the distinguishing factors that have moved courts in the past to overturn agency action based on aberrations from nonmandatory procedures…." *Id*.

In *Morton*, the Supreme Court addressed a "general assistance program" providing direct financial aid to "needy Indians." *Morton*, 415 U.S. at 208. The Bureau of Indian Affairs denied aid to the respondents based on a restriction that had never been published, despite an internal policy requiring publication of eligibility requirements. *Id*. at 235.

"Where the rights of individuals are affected," the Court explained, "it is incumbent upon agencies to follow their own procedures." *Id*. The "*overriding duty* of our Federal Government *to deal fairly with Indians wherever located* has been recognized by this Court on many occasions." *Id*. at 236 (emphasis added) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). The denial of benefits, based on an "unpublished ad hoc determination," when the agency's internal policy required eligibility requirements to be published, was thus "inconsistent with 'the

distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id*. (emphasis added) (quoting *Seminole*, 316 U.S. at 296); *see also Massachusetts Fair Share*, 758 F.2d at 711 ("federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated").

Here, the various authorities mandating consultation protect the rights of potentially affected individuals under the government's "overriding duty … to deal fairly with Indians wherever located" in carrying out the government's "distinctive obligation of trust." *Morton*, 415 U.S. at 236 (quoting *Seminole*, 316 U.S. at 296). Consultation with the Tribe was therefore a binding obligation.

d. PHMSA failed to fulfill its consultation duty.

As with the NHPA, consultation under agency policy requires much more than a perfunctory meeting with agency staff and offering a one-hour teleconference with an agency lawyer while a rule is being finalized. DOT Order 5301.1 defines "consultation" as "meaningful and timely discussion … with tribal governments *during the development of regulations*, policies, programs, plans or matters that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments." DOT Order 5301.1(3)(b) (emphasis added). It incorporates by reference the "specific guidelines and instructions for implementing the Unfunded Mandates Reform Act of 1995 found in OMB

Memorandum M-95-20." *Id.* This memorandum provides that "consultation should take place as early in the regulatory process as possible. Except where the need for immediate agency action precludes prior consultation, consultation should occur before publication of the notice of proposed rulemaking…." *Office of Management and Budget Memorandum M-95-20* (Sept. 21, 1995) at I.B.[10] Cost and benefit estimates derived from the initial consultation, "any additional viable suggestions received during the pre-notice consultations, and the agency plan to carry out intergovernmental consultation should be included in the preamble to the notice of proposed rulemaking." *Id*. at I.F.

DOT Order 5301.1(3)(b) likewise incorporates by reference the recommendations in the "Presidential Memorandum on Government-to-Government Consultation with Native American Tribal Governments dated April 29, 1994." This memorandum provides that each "agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered ***during the development*** of such plans, projects, programs, and activities," during consultations that are "open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." *Presidential Memorandum on*

[10] See Addendum at 101.

Government-to-Government Consultation with Native American Tribal Governments (April 29, 1994)[11] (emphasis added).

Courts have set aside agency action for failure to consult despite far greater efforts than what PHMSA did here. *See*, *e.g.*, *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Wyoming v. United States Dep't of the Interior*, 136 F. Supp. 3d 1317 (D. Wyo. 2015), *vacated and remanded on other grounds sub nom. Wyoming v. Sierra Club*, 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016). The Eighth Circuit, for example, rejected the notion that two meetings—held after the decision at issue had been made—complied with a policy requiring "meaningful consultation." *Oglala Sioux*, 603 F.2d at 720. "Permitting the submission of views after (an administrative decision has been made) is no substitute for the right of interested persons to make their views known to the agency in time to influence the (administrative) process in a meaningful way." *Id*. (quoting *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974)).

In *Wyoming*, the district court enjoined the Bureau of Land Management from enforcing a new regulation. The Court found that several meetings and information sessions and the distribution of draft rules did not meet the agency's duty of consulting with a tribe and instead reflected "little more than that offered to the public in general." *Wyoming*, 136 F. Supp. 3d at 1345-46; *see also California*

[11] See Addendum at 106.

Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1086 (9th Cir. 2011) (rejecting agency's argument that consultation requirement is satisfied by "notice-and-comment proceedings").

Here, PHMSA made no effort to engage the Tribe during development of the LNG Rule. After the Tribe learned about the proposed rulemaking by happenstance, PHMSA agreed to one meeting with agency staff, which it terminated abruptly before the LNG Rule was discussed. JA_1327-28. PHMSA then offered another meeting with an agency lawyer, while it knew the Tribe's main contact was unavailable for medical reasons and while PHMSA was already "working to finalize the final rule." JA_1039. Offering to hear the Tribe's views after the decision to promulgate the rule had already been made is no substitute for meaningful consultation. *Oglala Sioux*, 603 F.2d at 720.

e. The LNG Rule must be set aside.

In *Oglala Sioux*, the agency's failure to consult violated the APA as arbitrary, capricious, and otherwise not in accordance with law. *Oglala Sioux*, 603 F.2d at 714. In *Wyoming*, the failure to consult resulted in a meritorious claim of arbitrary and capricious action. *Wyoming*, 136 F. Supp. 3d at 1346. Likewise, here, PHMSA's failure to consult with the Tribe regarding the LNG Rule violated the APA, and the Rule must therefore be set aside under 5 U.S.C. § 706(2)(A).

B. Respondents violated the APA by failing to adequately consider the Rule's disparate impacts on the Tribe.

The Tribe incorporates the legal authorities and arguments presented by the State Petitioners concerning PHMSA's failure to take a "hard look" at the LNG Rule's environmental-justice implications.

This Circuit "has permitted challenges to environmental-justice analyses under NEPA and the APA." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 136 (D.D.C. 2017) ("*Standing Rock I*") (citing *Communities*, 355 F.3d at 689). In carrying out their environmental-justice analyses, agencies "'should … determine … whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes." *Id*. (quoting Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 10, 1997) at 1 (hereafter "Council Guidance"). Further, agencies "should recognize that the impacts within ... Indian tribes may be different from impacts on the general population due to a community's distinct cultural practices." *Id*. at 136-37 (alteration in original) (quoting Council Guidance at 9). "'Where environments of Indian tribes may be affected,' … 'agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.'" *Id*. at 137 (quoting Council Guidance at 14).

A superficial or conclusory environmental-justice analysis is arbitrary and capricious. *See Id*. at 140. In *Standing Rock I*, for example, the Army Corps of Engineers arbitrarily limited its environmental-justice analysis to an area of 0.5 miles around the Dakota Access Pipeline, thereby excluding the Standing Rock reservation and concluding that no minority populations were affected. *Id*. at 137-39.

The Corps also offered a separate analysis specific to the Standing Rock tribe but mainly discussed the effects of construction and addressed only minimally the potential impacts of an oil spill. *Id*. at 139-40. While acknowledging that the reservation was downstream from a potential spill location, it identified a non-tribal community that was closer and thus concluded that the tribe would not be disproportionately affected. *Id*. at 140. But this analysis was silent on the tribe's "distinct cultural practices" and "the social and economic factors that might amplify its experience of the environmental effects of an oil spill." *Id*. It did not address, for example, the fact that many of the tribe's members fish, hunt, and gather for subsistence or how losing "the ability to do so could seriously and disproportionately harm those individuals relative to nearby non-tribal communities." *Id*. The Corps "needed to offer more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill." *Id*.

Here, the environmental-justice analysis in PHMSA's Environmental Assessment is even more "bare-bones" than the inadequate analysis discussed in

Standing Rock I. PHMSA conceded that it is "possible" the "rulemaking will facilitate the transportation of LNG through environmental justice communities." JA_0477. Rather than identify or address that possibility's potential for harm, PHMSA's only counterpoint was a speculative *non sequitur* that LNG transportation by highway might be reduced. *Id*. PHMSA then noted that, in selecting routes, railroads should consider various factors but did not identify environmental justice among them. *Id*.

Regarding the Tribe specifically, PHMSA offered similarly glib responses. It dismissed the likelihood that LNG rail traffic will be heavier in the Reservation than in other areas because of Tacoma LNG. PHMSA deemed this concern "inapposite" because it "did not appear" that LNG was "authorized to be transported to or from the facility by rail." JA_0041.

PHMSA's cursory disposition of this issue was arbitrary and capricious. Until PHMSA issued the Rule, bulk LNG rail transport was unlawful. The lack of a finalized plan to transport LNG from Tacoma LNG, as of the date that transportation was legalized, could not reasonably be considered evidence that Tacoma LNG would make no such plans going forward. The contention is especially absurd considering

the railroad industry's statement, quoted in the LNG Rule, that authorizing rail transport "likely would stimulate more interest." 85 Fed. Reg. at 44,997.[12]

PHMSA's faulty analysis mirrors the Army Corps' failure to consider how an oil spill could impact the Standing Rock tribe's cultural practices. *See Standing Rock I*, 255 F. Supp. 3d at 140. Further, it fails to acknowledge that the Tribe is uniquely located between an LNG plant and virtually all of the continental United States.

As to safety (and air quality), the unique threat that *this rule* poses to *this tribe* is manifest—and the Tribe so informed PHMSA. JA_0131-32. And yet, PHMSA failed to consider how an accident involving an LNG train within the Tribe's homeland could profoundly and disproportionately harm the Tribe. PHMSA "needed to offer more than a bare-bones conclusion that [the Tribe] would not be disproportionately harmed" by a derailment. *Standing Rock I*, 255 F. Supp. 3d at 140. Its failure to conduct a proper environmental-justice analysis was arbitrary and capricious. *Id*.

[12] PHMSA also claimed to have reviewed the local railroad infrastructure and concluded that none existed or was contemplated at Tacoma LNG. 85 Fed. Reg. at 45,023. That superficial effort is belied by the Tacoma LNG proponent's own statements regarding the facility's contemplated end uses and the "[r]ail spur on site," which a reasonable examination would have revealed. JA_0570.

CONCLUSION

For the foregoing reasons, the Court should vacate the LNG Rule.

Dated this 11th day of April, 2024.

OGDEN MURPHY WALLACE, P.L.L.C.

By */s/ Nicholas G. Thomas*
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of the briefing order established in this case, and Federal Rule of Appellate Procedure 32(a)(7)(B), because this brief contains 10,320 words, Environmental Petitioners brief includes 8,985 words, and the State Petitioners' brief includes 6,540 words excluding the parts of the briefs exempted by Rule 32(f). Thus, petitioners briefs comprise a total of 25,845 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, version 2309 in 14-point Times New Roman type.

/s/ Nicholas G. Thomas

Attorney for Petitioner The Puyallup Tribe of Indians

Dated: April 11, 2024

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the District of Columbia Circuit by using the appellate CM/ECF system on the date stated below.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

DATED this 11th day of April, 2024.

/s/Nicholas G. Thomas
Nicholas G. Thomas

APPENDIX

DECLARATION OF LISA A. ANDERSON

I am now and at all times mentioned a citizen of the United States; I am over eighteen (18) years of age, competent to make this declaration, and make this declaration based on personal knowledge.

1. I am the Puyallup Tribe of Indians' (Tribe) in-house environmental counsel. I have been personally involved in the Tribe's interactions with the Pipeline and Hazardous Materials Safety Administration (PHMSA) regarding the LNG by Rail Final Rule (PHMSA-2018-0025 (HM-264)). The Tribe was not consulted early in the rulemaking process, was not being consulted when it provided comments on the draft rule and has been concerned about the lack of consultation since learning of the rulemaking.

2. On February 12, 2020, I attended a scheduled meeting with PHMSA in Washington D.C. The meeting was attended by Puyallup Tribal Council Members Annette Bryan and Anna Bean, the Tribe's Land Use Director, Andrew Strobel, and myself. The meeting was with the PHMSA government affairs director, Ben Kochman, and his staff including Tom Bukaweski, along with individuals who had worked on issues involving the State of Washington's review and regulation over the LNG plant construction - a matter that is related but separate from the LNG by rail rule.

3. The meeting was scheduled to begin at 9:30 a.m. EST, and the Tribal representatives arrived early to be screened by security. Tribal staff were instructed to then contact a PHMSA representative to be escorted to the conference room. While security screening was completed well-before the 9:30 a.m. meeting time, a PHMSA representative did not arrive to escort us to the meeting until after 9:30 a.m. EST.

4. Tribal representatives were then escorted to the conference room and we began with introductions and discussion of the LNG plant in Tacoma. At approximately 9:58 a.m. EST, while we were still discussing the LNG plant, an individual opened the conference room door to announce that there was another reservation for a meeting in that room at 10:00 a.m. EST, and we would need to leave the room. We, for the Tribe, were afforded a short opportunity to finish our sentence and the meeting concluded. The Tribe did not have the opportunity to substantively discuss the LNG by Rail rulemaking. At the meeting, we were not able to air our concerns and needs regarding the rulemaking (a fact that is reflected in PHMSA's own memo) or ask questions to provide information on the rulemaking to the full Council to prepare for any leadership discussion. No consultation between the Tribe and the PHMSA regarding the proposed LNG by Rail Rule took place during the February 12, 2020 meeting. Moreover, to my knowledge, no government to government discussions between the Tribe and PHMSA have taken place since the February 12, 2020 meeting to date. I serve as legal advisor to the Tribe on this matter and would have been involved or at least had knowledge of any consultation if any such consultation had taken place.

5. In spite of several Tribal requests to PHMSA to meet with the decisionmaker for the LNG by Rail Rule as a leadership-level consultation, the PHMSA leadership – the decisionmaker – was never identified for the Tribe.

6. The memo prepared by the PHMSA concerning the February 12, 2020 meeting does accurately state that the LNG facility being constructed in Tacoma, Washington was discussed during the February 12 meeting. PHMSA's memo concerning the February 12, 2020 meeting also states that the LNG by Rail Rule would be discussed at a subsequent time, but no

substantive subsequent discussions between PHMSA and the Tribe occurred after the February 12, 2020 meeting.

7. The Final Federal LNG by Rail Rule states that consultation was completed with the Puyallup Tribe with regard to that rulemaking. The assertion by PHMSA that consultation took place is not true. PHMSA's statement in the Final LNG by Rail Rule that the Tribe is only concerned about LNG by rail from the LNG facility being constructed on the Tacoma Tideflats is also not correct. Respectfully, PHMSA is not in a position to speak for the Tribe - the Tribe can speak for itself as to what its concerns are.

8. Unfortunately, PHMSA has misled the Tribe and withheld key information from the very beginning of this rulemaking process. Consultation with the Tribe did not commence (or even occur) early in the rule's planning process. The Notice of Proposed Rulemaking (NPRM) was published on October 24, 2019. Yet, the Tribe learned of the proposed rule by happenstance on November 19, 2019, from the Washington State Utilities and Transportation Commission staff. Even though the Tribe had met, in person after traveling to Washington D.C., with government affairs staff from PHMSA one week prior regarding a liquefaction facility being constructed adjacent to its Reservation, the Tribe was not informed of the proposed rule by PHMSA staff.

9. The Tribe immediately commenced its review of the NPRM after learning of its existence and drafted extensive public comments describing its legal and technical concerns regarding the rushed nature of the rulemaking and the proposed rule's potential disparate impacts on the Tribe. These comments were submitted to PHMSA as part of the public comment process for the NPRM on or about December 20, 2019; those comments are part of the Administrative Record before the Court.

10. The Tribe initiated the request for the February 12, 2020 meeting during the time Tribal representatives would be in Washington, D.C., for a yearly gathering of Tribal Nations in Washington, D.C. Representatives for the Tribe reached out to PHMSA to discuss the ongoing review of the LNG Plant in Tacoma by the Washington Utility and Transportation Commission. The Tribe notified PHMSA it would also like to discuss the LNG by Rail Rule. At no time did the Tribe consider the February 12, 2020 meeting to be consultation as only two Tribal Council members were in attendance, and at no time did PHMSA representatives include decisionmakers for the proposed rule.

11. To my knowledge, the Tribe had never met with the PHMSA or U.S. Department of Transportation officials designated to ensure compliance with consultation requirements for the federal agencies in connection with the LNG By Rail Rule. On this, in its comments on the draft rule, the Tribe expressed concern that no consultation had occurred and that the apparent fast tracking of the rule did not allow time for adequate or meaningful consultation. Likewise, the Tribe was not being consulted when it provided comments on the draft rule and was concerned about the lack of consultation.

12. As the Final Rule itself makes clear, PHMSA significantly revised the draft rule, and then issued the Final Rule on June 19, 2020; many of these changes are relevant to the issues raised in the Tribe's comments on the NPRM. For example, the Tribe noted that PHMSA had not established that the proposed tank car specification in the NPRM was protective of public safety, highlighting the fact that PHMSA had not demonstrated that the ASTM A240/240M, 304, or 304L steel specified for use in LNG tank cars would ensure safe transport of LNG. PHMSA did not consult with the Tribe between February 12 and June 19, 2020, regarding any of the revisions that it made.

13. The Puyallup Tribe's Reservation is particularly vulnerable to the impacts of the LNG By Rail Rule, PHMSA-2018-0025 (HM-264), because the Reservation is crisscrossed by a variety of rail lines where rail cars travel both north and south along the coast, and east to west. Thus, trains coming from anywhere in the country (with the exception of Hawaii) are capable of traversing the Tribe's Reservation. The rail lines that are located within the Tribe's reservation carry coal, oil, Bakken crude and a variety of other freight. The Tribe's current understanding is that LNG by rail may now travel through its Reservation as a result of the LNG By Rail Rule; this remains true even if the current facility in Tacoma is not yet permitted to transport LNG by rail.

14. The Tribe's members live near and adjacent to the rail lines where LNG by rail may travel, and the Tribe's historical sites, cultural resources and natural resources upon which it relies are located along rail lines that would carry LNG railcars. In its comments on the draft rule, the Tribe also expressed the concern that, if the final rule ultimately went into effect in spite of the presence of the Tribe's cultural resources, the quick schedule would not allow enough time for PHMSA to consult with the tribe to develop a plan to protect (or avoid harming) the sites and resources. Had full government to government consultation occurred, the Tribe could have provided PHMSA with its concerns and needs regarding the rulemaking.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to very best of my knowledge and belief.

Executed on October 29, 2020, at Maple Valley, Washington.

Lisa A.H. Anderson

LISA A.H. ANDERSON