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 REPLY BRIEF OF PETITIONER, THE PUYALLUP TRIBE OF INDIANS

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# TABLE OF CONTENTS

*Page*

# TABLE OF AUTHORITIES

*Page*

Tables of Cases



*Authorities upon which we chiefly rely are marked with asterisks.

## Statutes



## Regulations and Rules



## 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 | PHMSA regulation entitled *Hazardous Materials: Liquefied Natural Gas by Rail*, Docket No. PHMSA–2018–0025 (HM–264), 85 Fed. Reg. 44994, published July 24, 2020 |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| PHMSA | Respondent Pipeline and Hazardous Materials Safety Administration |
| Tacoma LNG | Liquefaction facility operating on the Tribe's Reservation border |
| The Reservation | Puyallup Indian Reservation |
| The Tribe | Petitioner Puyallup Tribe of Indians |

## INTRODUCTION

Tribal consultation is not a check-the-box exercise. It requires agencies to engage in meaningful discussion with tribes, early in planning and during the development of regulations. 36 C.F.R. § 800.2(c)(2)(ii)(A)); DOT Order 5301.1(3)(b). This Court has found the requirement satisfied where consultation began before issuance of the notice of proposed rulemaking and involved "extensive meetings" and "other communications" spanning three years before the final agency action. *United Keetoowah Band of Cherokee Indians v. F.C.C.*, 933 F.3d 728, 750 (D.C. Cir. 2019). The requirement is not satisfied where an agency determines a rule's substance before consultation. *Id*. at 750-51 (citing *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 710 (8th Cir. 1979)).

Respondent Pipeline and Hazardous Materials Safety Administration ("PHMSA") failed to meet these standards when it promulgated the rule at issue ("LNG Rule"). PHMSA's actions—holding a less-than-half-hour meeting that focused on other topics and offering a one-hour teleconference with an agency lawyer who had no pertinent decision-making authority—fell short.

PHMSA seeks to escape this failure by: (1) claiming that the Tribe did not preserve its claim concerning § 106 of the National Historic Preservation Act ("NHPA"); and (2) arguing that it is not legally bound to follow E.O. 13175 or DOT

Order 5301.1 (together the "Orders"). But the Tribe preserved its NHPA § 106 claim by expressly raising that statute in support of a consultation demand asserted in its comments on the LNG Rule. Moreover, the consultation policies embodied in the Orders are enforceable as actions necessary for the federal government to meet its legal obligations to Indian tribes.

Finally, PHMSA cannot maintain that it seriously considered the LNG Rule's disparate impacts on the Tribe. PHMSA dismissed the Tribe's concerns as "inapposite," after claiming to have examined the LNG-production facility on the Tribe's reservation border ("Tacoma LNG"). But that claim is belied by both the record and PHMSA's lack of knowledge about the facility. PHMSA violated the National Environmental Policy Act ("NEPA").

## ARGUMENT

### I. The Tribe preserved its NHPA claim.

PHMSA does not dispute that the LNG Rule is an undertaking requiring tribal consultation under NHPA § 106. Rather, PHMSA argues that the Tribe "failed to exhaust" the § 106 consultation issue administratively.[1] Although PHMSA concedes that the Tribe raised § 106 in its public comments, PHMSA contends that this was insufficient because: (a) the Tribe cited this statute in a footnote; and (b) PHMSA believes the Tribe did not discuss the statute argumentatively enough. Failing to cite

[1] PHMSA Brief at 80.

a single case holding a rulemaking challenge deficient on either ground, PHMSA asks this Court to create a new rule so holding. The Court should decline that invitation.

**A. The exhaustion rule does not apply.**

This Court should reject PHMSA's exhaustion argument at the outset because the exhaustion doctrine does not apply, for two reasons.

First, the doctrine is inapposite because whether the LNG Rule is an undertaking requiring NHPA consultation is a statutory question arising from a non-adversarial proceeding. *See Sandoz Inc. v. Becerra*, 57 F.4th 272 (D.C. Cir. 2023). In *Sandoz*, this Court refused to apply the exhaustion requirement to a statutory argument not raised before the agency, where the proceedings lacked the "'analogy to judicial proceedings' that undergirds judicially created issue-exhaustion requirements." *Id*. at 279 (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)). The Court also noted that the argument could be resolved as a matter of law and required no development of an evidentiary record. *Id*. These same circumstances are presented here and require rejection of PHMSA's argument.

Second, the doctrine "applies only if its underlying purposes 'support such a bar.'" *Elec. Privacy Info. Ctr. v. I.R.S.*, 910 F.3d 1232, 1239 (D.C. Cir. 2018) (quoting *Wilbur v. C.I.A.*, 355 F.3d 675, 677 (D.C. Cir. 2004)). These purposes include preventing premature interference with agency processes, affording the

parties and the courts the benefit of the agency's experience and expertise, and compiling an adequate record for judicial review. *Id*. (quoting *Hidalgo v. F.B.I.*, 344 F.3d 1256, 1259 (D.C. Cir. 2003)).

None of these purposes are implicated here because the Tribe clearly sought consultation, and PHMSA does not claim that it would have acted any differently if it had recognized a different legal source of the consultation obligation. Rather, it claims that it "repeatedly attempted in good faith to consult with the Tribe in a manner that also comports with the NHPA."[2] Thus, PHMSA fails to identify any error it would have corrected, any additional record it would have compiled, or any additional processes it would have provided if the Tribe had raised § 106 some other way.

### B. The Tribe notified PHMSA that consultation was required and that NHPA § 106 was a basis for that obligation.

The Tribe raised § 106 expressly, in a section of its comments following a demand for government-to-government consultation. JA_0128-33. In a paragraph-long footnote on the first page of that section, the Tribe expressly argued that PHMSA should "consider NHPA Section 106 and most notably whether there is an undertaking that could potentially affect historic properties and thus require meaningful consultation with affected Tribes." JA_0130. The Tribe then cited three

[2] PHMSA Brief at 91.

cases in which federal courts rejected agency action because of failure to comply with § 106. The Tribe then stated its concerns about risks to its reservation and cultural resources—precisely the inquiry raised by § 106. *See* 54 U.S.C. § 302706(a). JA_0131-32.

Arguments "not expressly made to an agency … may still be raised on appeal if the agency 'reasonably should have understood the full extent of [the petitioner's] argument.'" *Haselwander v. McHugh*, 774 F.3d 990, 997 (D.C. Cir. 2014) (alteration in original) (quoting *Customs and Border Prot. v. Fed. Labor Relations Auth.*, 751 F.3d 665, 669-70 (D.C. Cir. 2014)). Here, the Tribe's notice exceeded this standard.

1. This Court has rejected PHMSA's argument about footnotes.

PHMSA provides no competent authority supporting the notion that an issue cannot be properly preserved through citation in a footnote. Instead, PHMSA relies on *CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014), which is inapposite because it discussed footnotes in legal briefs.[3]

The controlling case is *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 971 F.3d 340 (D.C. Cir. 2020). There, a party claimed an issue was not preserved because the plaintiff's "clearest articulation" of it "came in a footnote in the 'legal background' of its administrative complaint." *Id*. at 349. Explaining there is no "bright-line exhaustion rule focused on where precisely an

[3] PHMSA Brief at 82.

issue is raised in the papers before an agency," this Court held that the issue was properly preserved. *Id*. at 350.

None of the cases cited by PHMSA contradict that result. PHMSA cites cases in which it was undisputed that the issues in question were not raised at all. *See W. Watersheds Project v. U.S.B.L.M.*, 76 F.4th 1286, 1294 (10th Cir. 2023); *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013); *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005); *State of Ohio v. U.S.E.P.A.*, 997 F.2d 1520, 1528 (D.C. Cir. 1993). PHMSA also cites cases concerning whether an issue could have been extrapolated from vague statements about the same general topic. *See All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 484 (9th Cir. 2023); *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 601-02 (D.C. Cir. 2015); *Nat'l Ass'n of Mfrs. v. U.S.D.O.I.*, 134 F.3d 1095, 1111 (D.C. Cir. 1998). And PHMSA cites cases that are inapposite because of differences in procedural posture. *See Appalachian Power Co. v. E.P.A.*, 249 F.3d 1032, 1059 (D.C. Cir. 2001) (portion cited by PHMSA addressed timeliness of comments); *Ctr. for Biological Diversity v. F.E.R.C.*, 67 F.4th 1176, 1181 (D.C. Cir. 2023) (addressing whether a party properly raised issue in adversarial proceedings).

Unlike PHMSA's cited cases, the Tribe explicitly raised NHPA § 106 in timely comments submitted in a non-adversarial proceeding.

2. PHMSA cites no authority requiring a party to phrase an issue argumentatively in comments.

PHMSA also argues that the Tribe did not state the footnote in question argumentatively enough.[4] The Tribe urged PHMSA to "consider NHPA Section 106" and cited cases where agency action was overturned for failure to adequately consult under that statute. JA_0130. Raising matters for agency consideration is the purpose of public comments, and PHMSA cites no authority stating that a party cannot raise an issue for agency consideration by asking the agency to consider it.

A rulemaking objection is preserved if it was "raised with reasonable specificity during the period for public comment." *Am. Fuel & Petrochemical Manufacturers v. E.P.A.*, 937 F.3d 559, 596 (D.C. Cir. 2019) (quoting 42 U.S.C. § 7607(d)(7)(B)). "An objection is reasonably specific if it provides 'adequate notification of the general substance of the complaint.'" *Id*. (quoting *Nat. Res. Def. Council v. E.P.A.*, 571 F.3d 1245, 1259 (D.C. Cir. 2009)). The Tribe accomplished this in its comments.

## II. PHMSA's failure to abide by its own procedures, in dealing with an Indian tribe, was invalid.

It is undisputed that DOT's internal procedures required PHMSA to consult "with Indian tribes before taking any actions that may significantly or uniquely affect them." DOT Order 5301.1, §5(b). E.O. 13175 imposed a similar obligation. PHMSA

[4] PHMSA Brief at 82.

claims that this language is not actionable because of boilerplate disclaimers in each Order.[5] This Court should reject that argument.

### A. When dealing with Indian tribes, agency action taken in violation of departmental policies is invalid.

Relying on *California v. E.P.A.*, 72 F.4th 308 (D.C. Cir. 2023), PHMSA contends that the Tribe's claim is foreclosed by the Orders' disclaimer language. PHMSA's reliance on *California* is misplaced, for two reasons.

First, *California* concerned executive orders, not agencies' official internal policies, like DOT Order 5301.1. As discussed in the Tribe's opening brief,[6] federal courts have long-required agencies to adhere to their official internal policies when regulating the interests of others.

Second, *California* did not involve "the effect of the fiduciary duty of the Government to its Indian wards." *Seminole Nation v. United States*, 316 U.S. 286, 295 (1942). This Court has observed that a policy "designed to protect *either* individual rights *or* wards of the federal government" is a distinguishing factor that has "moved courts in the past to overturn agency action based on aberrations from nonmandatory procedures." *Nat'l Small Shipments Traffic Conference v. I.C.C.*, 725 F.2d 1442, 1449 (D.C. Cir. 1984) (emphasis added) (citing *Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974)).

[5] PHMSA Brief at 86-87.
[6] Tribe's Brief at 35-36.

In response, PHMSA argues that "'rights of individuals' are *not* affected by the Orders because they grant no private rights and merely govern the agency's own activities."[7] As an initial matter, PHMSA's analysis misconstrues the standard. Being "designed to protect" rights and granting rights are two different concepts.

More importantly, PHMSA ignores that the Orders are indisputably designed to protect "wards of the federal government." *Nat'l Small Shipments*, 725 F.2d at 1449 (citing *Morton*, 415 U.S. at 235-36). In setting aside agency action transgressing agency procedures, *Morton* observed that the "overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton*, 415 U.S. at 236 (citing *Seminole*, 316 U.S. at 296).

In *Seminole*, the Court explained that this duty derives from obligations that the Government undertook in its treaties with Indian tribes. These "moral obligations" are "of the highest responsibility and trust" and require that the Government's conduct "be judged by the most exacting fiduciary standards." *Seminole*, 316 U.S. at 296-97. Based on these principles, an agency's "failure to abide by its own procedures," in its dealings with Indian tribes, renders its action "invalid." *Lincoln v. Vigil*, 508 U.S. 182, 199 (1993) (citing *Morton*, 415 U.S. at

[7] PHMSA Brief at 89.

236). DOT Order 5301.1's Background Section reflects these same principles. DOT Order 5301.1 at 5-6.

In short, the consultation requirement squarely implicates the "overriding duty of our Federal Government to deal fairly with Indians wherever located…." *Morton*, 415 U.S. at 236. Under these circumstances, PHMSA's publication of a rule "not promulgated in accordance with its own procedures, … is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id*. (quoting *Seminole*, 316 U.S. at 296).

PHMSA's trust obligations distinguish this case from *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1986). There, before the holding cited by PHMSA, the Ninth Circuit had already determined that the case did not implicate the Government's trust obligations because of circumstances not present here. *Id*. at 1102. *Morton* controls and requires the Court to vacate PHMSA's action if it did not comply with DOT procedures.

### B. E.O. 13175 and DOT Order 5301.1 are legislative rules.

The Orders are also enforceable against PHMSA because they are "legislative rules" with "present binding effect." *United Space All. v. Solis*, 824 F. Supp. 2d 68, 83 (D.D.C. 2011). PHMSA urges the Court to discount the "imperative language" in the Orders because the boilerplate disclaimers give "needed context" to that

language.[8] As discussed above, DOT Order 5301.1's Background language, clarifying that the Order represents DOT's attempt to comply with its legal obligations, likewise gives needed context. Further, PHMSA's argument contradicts this Court's analysis in *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015 (D.C. Cir. 2000). There, the Court held agency "guidance" to be binding, despite a similar boilerplate disclaimer, largely because of the imperative tone used throughout the rest of the document. *Id*. at 1023.

PHMSA also asks the Court to disregard DOT Order 5301.1's invocation of the Indian Self-Determination and Education Assistance Act because it is "not focused on consultation."[9] Even if PHMSA were correct, the Order still cites the Act as a basis for requiring consultation with Indian tribes (DOT Order 5301.1 at 6-7) and is just one of the sources of authority for that requirement. As explained above, DOT Order 5301.1 stresses that it implements the federal government's trust obligations owed to Indian tribes. Thus, it emanates from legal obligations imposed on DOT, not merely from DOT's internal policies.

Finally, PHMSA seeks to diminish its own admissions about the binding nature of these Orders.[10] But PHMSA fails to distinguish *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018). *Damus* did not turn on an admission that the directive

[8] PHMSA Brief at 88.
[9] PHMSA Brief at 89.
[10] PHMSA Brief at 89.

in question was a legislative rule or created judicially enforceable rights. It turned on the Government's admission, similar to those repeatedly made by PHMSA, that the directive was binding. *Id*. at 338.

Because it failed to comply with its own required procedures, PHMSA's action was "invalid." *Lincoln*, 508 U.S. at 199 (citing *Morton*, 415 U.S. at 236).

## III. PHMSA failed to fulfill its consultation obligations.

While claiming to have made "extensive efforts"[11] at consultation, PHMSA identifies only two acts of any substance:

(1) accepting the Tribe's request for a meeting and then abruptly expelling the Tribe's representatives from the meeting room after less than half-an-hour; and

(2) offering a one-hour teleconference with PHMSA's lawyer.

The Tribe addresses these points below but begins with the most glaring flaw in PHMSA's "efforts": they were untimely.

### A. PHMSA's "efforts" were tardy.

NHPA regulations require consultation to "commence *early in the planning process*." 36 C.F.R. § 800.2(c)(2)(ii)(A) (emphasis added). DOT Order 5301.1 defines "consultation" as "meaningful and timely discussion … with tribal governments *during the development of regulations*…." DOT Order 5301.1(3)(b)

[11] PHMSA Brief at 92.

(emphasis added). Section 5301.1(3)(b) incorporates by reference guidelines stating that "consultation should take place as early in the regulatory process as possible" and "before publication of the notice of proposed rulemaking…."[12]

Case law is in accord. In *United Keetoowah*, finding an agency's efforts adequate, this Court stressed the absence of evidence suggesting that the agency "had *already determined the Order's substance* before meeting with Tribes" and that communications and meetings "commenced even *before the Commission issued the Notice of Proposed Rulemaking*." *United Keetoowah*, 933 F.3d at 750-51 (emphasis added). This Court distinguished *Oglala* (where an agency's consultation efforts were held inadequate) on the ground that, in *Oglala*, "the contested decision 'had already been made prior to' the first meeting between Tribal members and agency officials discussing the decision." *United Keetoowah*, 933 F.3d at 750 (quoting *Oglala*, 603 F.2d at 710).

Rulemaking proceedings for the LNG Rule began in January 2017. 84 Fed. Reg. 56,964, 56,966 (Oct. 24, 2019). PHMSA made none of the "efforts" that it describes as "extensive" until three-plus years into these proceedings and four months after the notice of proposed rulemaking was issued.

[12] https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/legislation-and-regulations/implementing-section-204-as-related-to-faca.

Contrary to PHMSA's argument, this case is not the "opposite" of *Oglala.*[13] Like here, the meeting that the agency tried to characterize as consultation in *Oglala* happened *before* the agency issued the disputed decision. *Oglala*, 603 F.2d at 710 (meeting occurred on May 10, letter with decision issued on June 15). The question was not whether consultation occurred before the final order was issued, but rather, as this Court explained, whether the agency failed to consult before it "determined the Order's substance." *United Keetoowah*, 933 F.3d at 750-51. Nowhere does PHMSA deny that it had already determined the LNG Rule's substance—i.e., a rule allowing the mass transport of LNG throughout the country while eliminating the need for a special permit—before February 2020.

Further, PHMSA does not claim that it made any effort to initiate consultation early in the rulemaking process. By eliminating the special permit, PHMSA extinguished the rights of citizens to offer public comments and tribes to be consulted whenever a railroad decides to open a new route for LNG transport. Yet, there is no record of any efforts that PHMSA made to assess potential impacts to tribes. The notice of proposed rulemaking merely stated that "PHMSA does not anticipate that this rulemaking will have substantial direct tribal implications," 84 Fed. Reg. at 56,970.

[13] PHMSA Brief at 98 (emphasis in original).

By not contacting Indian tribes before making this conclusory statement, PHMSA put the onus on tribes to contact it just months before it issued the final rule. By then, PHMSA had already "determined the [LNG Rule]'s substance." *United Keetoowah*, 933 F.3d at 750-51. It was therefore too late for meaningful consultation. *See* 36 C.F.R. § 800.2(c)(2)(ii)(A); *Oglala*, 603 F.2d at 720. In its comments, the Tribe suggested that PHMSA rescind the notice of proposed rulemaking (JA_0130-31), a solution that would have enabled meaningful consultation. PHMSA chose instead to continue finalizing the LNG Rule.

### B. The less-than-half-hour meeting, focused on other topics, was not consultation.

Regardless of whether the record is supplemented, PHMSA acknowledges that a version of the Anderson Declaration is in the administrative record.[14] That version establishes several facts that PHMSA does not refute, including that the February 2020 meeting between the Tribe and PHMSA lasted less than half an hour. JA_1327-30. Moreover, PHMSA admits that the meeting "focused on other topics."[15] PHMSA cannot legitimately contend that a less-than-half-hour meeting, focused on other topics, constituted meaningful consultation.

[14] PHMSA Brief at 99.
[15] PHMSA Brief at 93.

### C. A one-hour teleconference with an agency lawyer does not constitute government-to-government consultation.

What the Court is left with, then, are emails following the February 2020 meeting. PHMSA claims that it emailed the Tribe the day after the meeting and "invited the Tribe to submit its concerns in writing and offered to provide a written response."[16] But that is not consultation; it is nothing more than what is offered to the general public in the public-comment phase. *See California Wilderness Coal. v. U.S.D.O.E.*, 631 F.3d 1072, 1086 (9th Cir. 2011) (rejecting agency's argument that consultation is satisfied by "notice-and-comment proceedings").

PHMSA next touts an email exchange beginning on February 26, 2020, with an email from Ms. Anderson, stating that the Tribe was "still seeking meaningful consultation, with the decision maker, on this matter." JA_0592. She also advised that she would be taking a six-week medical leave beginning the next day and that her team was in a series of meetings on February 26 and 27. *Id.*

PHMSA responded by offering a one-hour meeting on February 28. PHMSA knew that Ms. Anderson was beginning medical leave on February 27, and that her team was occupied on February 26 and 27. It was not reasonable to expect Ms. Anderson to prepare a replacement on two days' notice. Further, the meeting being offered was with an agency lawyer. While PHMSA claims this lawyer "was a

[16] PHMSA Brief at 94.

member of PHMSA's senior leadership team,"[17] that does not mean (and PHMSA does not claim) that he had any decision-making authority regarding whether to authorize transportation of LNG by rail.

Finally, PHMSA highlights an email exchange beginning March 26, 2020, in which Ms. Anderson responded that the Tribe needed to gather "as much information as possible at a staff level to inform" Tribal Council and that a "leadership level discussion" would then be required. JA_0594. PHMSA responded by indicating that it was already "working to finalize the rule." JA_0593. PHMSA assumed the Tribe would "be making efforts to have [its] senior leadership available," because PHMSA would "be having [the agency lawyer] at this meeting." *Id*. In short, PHMSA was talking at cross-purposes with the Tribe. The Tribe was requesting an information-gathering session so that staff could prepare Tribal Council for a leadership-level meeting with agency decisionmakers. But PHMSA was offering only a one-hour meeting with an agency lawyer as the purported leadership-level meeting.

Thus, even if PHMSA's proposed meeting had occurred, the problem would remain: the meeting fell short of what meaningful government-to-government consultation requires. As explained in the Tribe's opening brief,[18] consultation

[17] PHMSA Brief at 95.
[18] Tribe's Brief at 44-45.

efforts far more extensive than what occurred here have been held insufficient. *See*, *e.g.*, *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995).

PHMSA attempts to distinguish *Pueblo* by claiming that, there, "the Ninth [sic] Circuit found a lack of good faith consultation efforts when the agency 'withheld relevant information' during the consultation process."[19] PHMSA misreads the opinion. The Tenth Circuit divided its analysis into two parts: "A. Reasonable Effort"; and "B. Good Faith Effort." *Pueblo*, 50 F.3d at 860, 862. The "withholding information" sentence quoted by PHMSA appears only in section B. *Id*. at 862. It was not mentioned in the earlier section, where the Court determined that the agency's efforts did not amount to a reasonable effort. *Id.*; *see also United Keetoowah*, 933 F.3d at 750 (consultation obligation satisfied where agency documented "extensive meetings" spanning a three-year period before final order).

PHMSA's efforts fell short of what the regulations and case law require.

## IV. Respondents violated NEPA and the APA by failing to adequately consider disparate impacts on the Tribe.

PHMSA does not dispute that Tacoma LNG cannot ship the LNG that it produces by rail without traversing the Tribe's Reservation. But PHMSA asks the

[19] PHMSA Brief at 98.

Court to disregard the Tribe's concerns because PHMSA decided that shipment of LNG by rail, to[20] or from Tacoma LNG, is not "contemplated."

PHMSA cites no evidence to support its claim that "it examined schematics for the Tacoma facility and determined that 'rail structure neither exists nor is contemplated at the site.'"[21] The LNG Rule does not indicate that PHMSA either "examined" schematics or made any "determination" about the presence of rail infrastructure. It merely offers a conclusory assertion that schematics "suggest" a lack of rail infrastructure. 85 Fed. Reg. at 45,023.

This "suggestion" adds nothing because the "schematics" in question were not intended to depict transportation infrastructure. The LNG Rule cites "the Tacoma LNG FSEIS," from the "Puget Sound Air Agency [sic] docket." *Id*. This appears to be a reference to a Supplemental Environmental Impact Statement ("FSEIS") prepared by the Puget Sound Clean Air Agency. The FSEIS focused on greenhouse gas impacts and expressly did not address other elements of the environment, such as "environmental health/public safety." JA_1063.

Although the LNG Rule seemingly cites the FSEIS's Figures 1-1 and 1-2 as the schematics supporting PHMSA's conclusion, these neither "suggest" nor

[20] PHMSA's discussion about how LNG will supposedly be transported "to" Tacoma LNG is irrelevant and evinces a fundamental lack of understanding of the facility. Tacoma LNG *produces* LNG.

[21] PHMSA Brief at 75 (quoting 85 Fed. Reg. at 45,023).

establish a lack of rail infrastructure. Figure 1-1 is a satellite photograph depicting the location of the facility and lacks sufficient resolution to show railroad tracks. JA_1065. Figure 1-2 depicts the "Proposed LNG Facility Layout." JA_1066. The figure purports only to show structures that Puget Sound Energy planned to build. Nothing in the figure suggests that it also depicts existing infrastructure.

More importantly, PHMSA fails to address information in the record establishing that (1) there is a rail spur at Tacoma LNG and (2) Tacoma LNG's owner touted this rail infrastructure as a competitive advantage for the facility. JA_0570. As such, it was arbitrary and capricious for PHMSA to deride the Tribe's concerns as speculative, and PHMSA's reliance on *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 802 (D.C. Cir. 2022), is misplaced.[22] That case addressed how much information about one agency's impending rulemaking could be imputed to another agency preparing an environmental impact statement. It presented nothing like the circumstances here: an LNG facility on the Tribe's doorstep, which has touted its rail infrastructure as a competitive advantage. The likelihood that the LNG Rule will result in LNG being transported by rail through the Tribe's Reservation is neither remote nor speculative.

The LNG Rule is not limited in time. It does not limit its authorization to entities that had finalized plans to transport LNG by rail before the LNG Rule

[22] PHMSA Brief at 75.

legalized this activity in July 2020. PHMSA therefore erred in dismissing the Tribe's concerns as "inapposite."

## CONCLUSION

This 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 Fed. R. App. P. 32(a)(7)(B), because it contains 4,329 words excluding the parts exempted by Rule 32(f).

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 for Microsoft 365 MSO 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 this 11th day of April, 2024.

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