Tohono O'odham Nation, et al. v. United States Department of the Interior, et al.

24-3659

US Court of Appeals for the Ninth Circuit

October 28, 2024, Filed

Reporter
2024 U.S. 9th Cir. Briefs LEXIS 5107

State: US-CA

Type: Reply

Title

REPLY BRIEF submitted for filing by Appellant Archaeology Southwest, Appellant Center for Biological Diversity.--[Court entered filing, original filed with motion at DE 30] [Entered: 10/28/2024 01:39 PM]

Text

No. 24-3659

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ACHP Advisory Council on Historic Preservation APA Administrative Procedure Act BLM Bureau of Land Management MMPA Marine Mammal Protection Act NEPA National Environmental Policy Act NHPA National Historic Preservation Act PA Programmatic Agreement ROD Record of Decision ROW Right-of-way TCP Traditional Cultural PropertyCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 8 of 50

INTRODUCTION

Plaintiffs timely filed their Complaint challenging the Bureau of Land Management's ("BLM") failure to comply with the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101-307108, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, when it authorized partial construction of the SunZia Southwest Transmission Project ("the Project") through the heart of the San Pedro Valley ("the Valley"). Indeed, Plaintiffs' Complaint was timely, whether dated from Plaintiffs' injury, or from BLM's final agency action that is legally and practically relevant to Plaintiffs' NHPA claims.

Plaintiffs filed their lawsuit weeks after BLM issued Limited Notices to Proceed ("LNTPs"), which authorized construction that could not lawfully occur until BLM concluded the Section 106 process, and which constituted BLM's final decision that its NHPA obligations had been met. Rather than demonstrate, as a matter of law, that BLM satisfied its NHPA obligations before issuing the LNTPs, BLM and Intervenor (collectively, "Defendants") argue that BLM's NHPA compliance is unreviewable because BLM delayed more than six years in "completing" that task.

Despite detailed allegations that plausibly alleged facts showing that Plaintiffs' challenge was timely and that BLM failed to comply with the NHPA and Programmatic Agreement ("PA"), the district court erroneously relied upon an incomplete record, applied a heightened probability requirement to Plaintiffs' Complaint, and misconstrued the facts and relevant law, ultimately concluding thatCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 9 of 50 Plaintiffs' claims were time-barred and failed to state a plausible claim for relief.

Plaintiffs' opening brief explained that the ruling below is inconsistent with binding precedent and leads to absurd results whereby: (1) to avoid a statute of limitations defense, plaintiffs must challenge an agency's NHPA compliance upon the issuance of a Record of Decision ("ROD") under the National Environmental Policy Act ("NEPA"), irrespective of whether the agency has begun, completed, or breached its obligations under the NHPA; and (2) agencies can insulate their NHPA compliance from judicial review by entering into a PA and deferring the NHPA process for more than six years.

Defendants' responses fail to persuasively attack the timeliness of Plaintiffs' claims. As an overarching flaw, Defendants fail to apply the plausibility standard to Plaintiffs' allegations. Additionally, although Defendants draw every inference against Plaintiffs, they conspicuously do not dispute that the 2015 ROD, issued under NEPA, did not attempt to identify, historic properties (including traditional cultural properties ("TCPs")) along the Project route, or consider measures to avoid, minimize, or mitigate adverse effects to those properties, as required under the NHPA.

Moreover, Defendants wrongly assert that BLM satisfies its NHPA obligations merely by executing a PA, even though this flouts the plain language of the NHPA's implementing regulations, the PA, and the ROD, and contravenes relevant precedent.

Likewise, Defendants erroneously assert that Plaintiffs' NHPA challenge is time- barred because the requested relief may indirectly impact the final route decisionCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 10 of 50 embodied by the ROD and right-of-way ("ROW"), even though this flies in the face of this Court's precedents (and subverts the explicit purposes of the NHPA). Indeed, BLM is not relieved of its duty to comply with its distinct obligations under the NHPA merely because such compliance may implicate earlier decisions under other laws, particularly where BLM voluntarily elected to conduct its decisionmaking processes under NEPA and the NHPA sequentially.

Finally, Defendants insist that Plaintiffs fail to state a claim because Plaintiffs have not identified a specific provision of the PA that BLM violated, and because BLM complied with the PA's provisions. However, Defendants ignore controlling authority, misapprehend the applicable statutory and regulatory scheme, and impermissibly invoke extrinsic materials to downplay Plaintiffs' well-pled factual allegations. This Court should reject Defendants' attempts to shield BLM's highly consequential historic preservation decisions from judicial review.

ARGUMENT

I. DISMISSAL WAS IMPROPER BECAUSE DEFENDANTS RELY ON

DISPUTED QUESTIONS OF FACT

A. Defendants' Responses Rely On Facts Beyond The Scope Of A

Motion To Dismiss

Construing the Complaint's factual allegations in their favor, Plaintiffs alleged a plausible "set of facts" establishing the Complaint was timely filed. Supermail Cargo, Inc.

v. *United States, 68 F.3d 1204, 1207 (9th Cir. 1995)*. Because there is no "obvious bar toCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 11 of 50 securing relief on the face of the complaint," dismissal is inappropriate. *ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1009-10 (9th Cir. 2014)* (citation omitted).

BLM urges that "Plaintiffs have not shown that the district court erred" by relying on an incomplete factual record, "and, even if the district court did rely on documents outside of the complaint, any error was harmless." Federal Defendants' Brief ("Fed.Br.") at 58. Neither assertion has merit.

Dismissal under Rule 12(b)(6) is inappropriate where, as here, "an asserted defense raises disputed issues of fact." *ASARCO, 765 F.3d at 1004* (citation omitted).

Defendants' arguments rest largely on factual challenges. See *Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001)* (reversing dismissal where "it appears the [district] court considered [defendants' proffered] extrinsic evidence").

Indeed, even as BLM asserts that Plaintiffs have "not point[ed] to any particular documents that the district court improperly relied on" in its dismissal order, Fed.Br.58, BLM paradoxically relies upon key factual findings in the district court's preliminary injunction order and invokes materials from that record. These include declarations from BLM employees post-dating the Complaint that serve solely to inject Defendants' own factual narrative and attack Plaintiffs' allegations (which must be taken as true) and plausible claims for relief. See, e.g., Fed.Br.60 ("[T]he record," including extrinsic materials, demonstrates that "the complaint fails to state a claim").

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 12 of 50 However, these extrinsic materials--and BLM's arguments that rely upon them--cannot be considered in ruling on a motion to dismiss. See *Lee, 250 F.3d at 688* ("[W]hen the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), [r]eview is limited to the complaint," unless the material can be incorporated by reference, or is subject to judicial notice (quotation omitted)). 1 Not only were these materials not attached to Defendants' motions below, but they also cannot be incorporated into the Complaint by reference, as they were prepared during preliminary injunction proceedings, and therefore did not "form the basis of the complaint." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. Nor can the Court take judicial notice of the contested materials, as they contain facts that are subject to reasonable dispute. *Lee, 250 F.3d at 689* (citing *Fed. R. Evid. 201(b)*).

Reliance on extrinsic materials is also improper where they raise disputed questions of fact. *Lee, 250 F.3d at 689* (reversing dismissal where court relied upon declarations attached to motion containing facts the plaintiffs "vigorously denied").

Most glaringly, BLM's proffered materials omit key exhibits and other factual materials from the preliminary injunction record that dispute BLM's self-serving narrative.

1 Plaintiffs concede that the PA, Final EISs, and ROD, which form the basis of Plaintiffs' Complaint and whose authenticity is not contested, are incorporated by reference.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 13 of 50 For example, BLM relies on staff declarations to assert that Plaintiffs did not "identif[y] the [Valley] as a TCP during the entire period leading to the [ROD]." Fed.Br.8. However, this conveniently ignores that when developing the PA, BLM insisted it was "not in a position to reroute" the Project to address cultural resource concerns during the NEPA process and would not "s[p]end time discussing" realignment prior to finalizing the PA and ROD in 2014. Plaintiffs' Supplemental Excerpts of Record ("Pl_SER") at 044. Instead, BLM explicitly assured Plaintiffs that the post-ROD implementation of the PA's terms would be BLM's chosen--and only--"vehicle by which the agency resolves the adverse effects of the [P]roject," and that the PA process would be "broad enough and flexible enough to allow for all manner of avoidance and mitigation." Id. (emphases added).

BLM likewise relies on declarations to assert that Plaintiffs "did not suggest any unidentified TCPs" in comments on the draft cultural resource inventory report in 2018. Fed.Br.47. However, BLM misleadingly omits the declarations' own exhibits containing both Plaintiffs' comments on the draft inventory in which Plaintiffs specifically requested a cultural landscape study to identify TCPs, and BLM's response expressly agreeing to complete such a study separate from the cultural resource inventory.

Pl_SER_096. BLM likewise omits documentary evidence containing the numerous queries from Plaintiffs regarding the timing of such a study, BLM's requests for more information about the study (which Plaintiffs promptly provided), see, e.g.,Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 14 of 50 Pl_SER_070, 115-23, 144-171, and BLM's acknowledgement that it had "set[] [its] sights on the Sobaipuri cultural landscape of the [Valley]," Pl_SER_154. 2 In sum, the extrinsic materials selectively proffered by Defendants paper over disputed issues of fact that go to the heart of this case, and therefore cannot serve as the basis for determining that BLM complied with its duties under the NHPA and PA as a matter of law. The Court must reject Defendants' attempts to "present their own version of the facts at the pleading stage." *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018)*; cf. *U.S. Commodity Futures Trading Comm'n v. Monex Credit Co., 931 F.3d 966, 972 (9th Cir. 2019)* (explaining that Plaintiffs are not required to "plead around affirmative defenses").

B. The Court Must Accept Plaintiffs' Characterization Of The PA's Plain Terms

Because BLM's NHPA process cannot withstand scrutiny, Defendants ask this Court to ignore the plain language of the ROD and PA and accept their revisionist

2 Similarly, to undermine Plaintiffs' claim that BLM failed to engage in "reasonable and good faith efforts" to identify TCPs, BLM cites staff declarations to complain that Plaintiffs "never raised the idea that the [Valley] is a TCP until 2023." Fed.Br.48.

However, this assertion conveniently omits evidence that, between 2009 and 2023, on at least twenty-one documented occasions, Plaintiffs and others informed BLM of the Valley's cultural significance, tied their concerns regarding the Project's effects to culturally significant landscapes (including the Valley), and urged BLM to explore these issues through the proper vehicle of a cultural landscape study. See Pl_SER_010, 017, 027, 032-33, 040-41, 047-48, 055, 065, 115, 118, 122, 144, 147, 151, 153-55, 157, 162, 166, 169-70.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 15 of 50 history of NHPA consultation for the Project. See, e.g., Fed.Br.39; Intervenor's Brief ("Int.Br.") at 36-39.

Defendants spill much ink questioning Plaintiffs' characterization of the PA's terms. But the PA's plain language requires BLM to prioritize the avoidance of "all types of historic properties" and to condition construction authorizations on BLM's determination that any activities "will not restrict subsequent measures to avoid, minimize or mitigate" adverse effects to such properties "through rerouting of the corridor." ER_109 (emphasis added); see also *Klamath Water Users Prot. Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999)* ("Contract terms are to be given their ordinary meaning."). Thus, Defendants' novel, self-serving reading of the PA is an improper post hoc rationalization. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 23 (2020)* (rejecting agency's post hoc position because "[p]ermitting agencies to invoke belated justifications . . . can upset the orderly functioning of the process of review, . . . forcing both litigants and courts to chase a moving target").

Additionally, contrary to Intervenor's assertion, Int.Br.49, a determination of whether a party's actions comply with the PA's express obligations presents a question of fact, not law. See *L.K. Comstock & Co. v. United Eng'rs & Constr., Inc., 880 F.2d 219, 221 (9th Cir. 1989)*. In the alternative, assuming, arguendo, that any ambiguity in interpretation of the PA might exist, compliance with the PA would present "a mixed question of law and fact." *State Farm Mut. Auto. Ins. Co. v. Fernandez, 767 F.2d 1299, 1300-01 (9th Cir. 1985)* (emphasis added). Plaintiffs plausibly allegedCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 16 of 50 that the plain meaning of the PA's terms require BLM to consider alternatives to avoid TCPs identified during the post-ROD consultation process, including through realignment. See ER_103; ER_109. Although Defendants dispute Plaintiffs' reading, the resolution of this material fact "cannot be resolved on a motion to dismiss." See *ASARCO, 765 F.3d at 1009-10* (citation omitted); see also *Dolores Press Inc. v. Jones, 766 Fed. App'x 455, 459 (9th Cir. 2019)* (reversing dismissal where the contractual language was ambiguous because the "district court's selective reading . . . was improper" at the "pleading stage where the plaintiff is entitled to reasonable inferences in its favor" (citing *Consul Ltd. v. Solide Enters., 802 F.2d 1143, 1149* (9th Cir.

1986))). 3

3 Assuming, arguendo, that the PA's terms are ambiguous. See *Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989)* (explaining that a contract's terms are ambiguous where they are "susceptible to two different and reasonable interpretations, each of which is consistent with the language of the contract as a whole"). And, "where the language of the contract is unclear, a court must look to evidence outside the pleadings"; "[a]s such, resolution of the disputed meaning of the contract on a motion to dismiss is inappropriate." *WWP Luxembourg Gamma Three Sarl v. Spot Runner, Inc. 655 F.3d 1039, 1051 (9th Cir. 2011)*, abrogated on other grounds by *Lorenzo v. SEC, 587 U.S. 71 (2019)*. This is especially true here, given that where a PA "is ambiguous, that provision should be construed against the drafter of the [PA], in this case the BLM." *Battle Mountain Band of Te-Moak Tribe of W. Shoshone Indians v. BLM, 302 F. Supp. 3d 1226, 1235 (D. Nev. 2018)*.

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II. PLAINTIFFS' CHALLENGE IS TIMELY UNDER EITHER ACCRUAL RULE

A. BLM Cannot Avoid The Consequences Of Its Decision To Defer

NHPA Compliance Until After It Issued The ROD

Plaintiffs' NHPA challenge is timely under the Corner Post accrual rule and the final-agency-action accrual rule. Plaintiffs' Brief ("Pl.Br.") at 22-43. Before refuting Defendants' specific arguments, Plaintiffs address the overarching defect that pervades Defendants' responses: their stubborn refusal to acknowledge that the NHPA imposes obligations distinct from other laws--i.e., to identify and resolve adverse effects to historic properties--that must be satisfied before BLM authorizes Project construction. See, e.g., Int.Br.27 (insisting that BLM does not have "a separate obligation to comply with the NHPA, independent of" its obligations under other statutes).

Despite ample opportunity to do so, Defendants fail to muster any legal support for their facially illogical proposition that issuing the ROD under NEPA and the ROW under FLPMA somehow discharges BLM's NHPA obligations, which had not yet been met when BLM issued the ROD and ROW. That is unsurprising; this Court has recognized "an agency cannot escape its obligation to comply with [one statute] merely because it is bound to comply with another statute that has consistent, complementary objectives." *San Luis & Delta-Mendota Water Auth. v. Jewell,*

747 F.3d 581, 640 (9th Cir. 2014) (citation and quotation marks omitted); cf. United States v. 0.95Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 18 of 50 Acres of Land, 994 F.2d 696, 698 (9th Cir. 1993) (The "NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

Taken to its logical conclusion, Defendants' position renders the NHPA process a sham, eviscerating Congress' express intent of "contribut[ing] to the preservation of nonfederally owned historic property." 54 U.S.C. § 300101. It would allow BLM to engage in a pseudo-consultation designed to create the impression that BLM "take[s] into account the effect of [its] undertaking[s] on any historic property," id. § 306108, when, in fact, the agency's preferred route had already been "set" through the NEPA process without full consideration of historic properties. Indeed, here, BLM set the Project route prior to conducting any surveys for TCPs. ER_070.

Defendants' interpretation would thus effectively absolve the agency from any obligation to meaningfully identify historic properties (such as TCPs) or to seriously consider alternatives to avoid adverse effects to those properties, in clear contravention of Congress' stated goals. See Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior, 608 F.3d 592, 609 (9th Cir. 2010) ("[T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources."); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006) (The NHPA is "designed to encourage preservation of sites and structures of historic, architectural, or cultural significance.").

Because Defendants distort the facts and relevant law, it is necessary to clarify the applicable statutory and regulatory schemes. Contrary to Defendants' misleading assertions, Int.Br.31; Fed.Br.37, the "execution" of the PA in 2014 did not satisfy BLM'sCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 19 of 50 Section 106 obligations with respect to the Project. Logically, the PA could not have "completed the [Project's] Section 106 process," Int.Br.26, because, at the time it executed the PA, BLM had not completed the most fundamental aspects of consultation, including the identification of historic properties and the resolution of effects.

By definition, the PA is a prospective document; it "answers the question of what further Section 106 analysis is required" for the Project to comply with the NHPA. Or.-Cal. Trails Ass'n v. Walsh, 467 F. Supp. 3d 1007, 1071 (D. Colo. 2020).

Once executed, the PA's procedures "substitute" for the Section 106 regulations. Thus, while the PA must be executed prior to the ROD, BLM is not required to conclude implementation of the PA's procedures prior to issuing its ROD under NEPA. See Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 553 (8th Cir. 2003) ("Th[e] [NHPA] process may be conducted separately, or . . . in conjunction with an environmental review under NEPA").

Importantly, "merely entering into a programmatic agreement does not satisfy Section 106's consultation requirements." Quechan Tribe v. U.S. Dep't of Interior, 755 F.

Supp. 2d 1104, 1110 (S.D. Cal. 2010). Only "[c]ompliance with the procedures established" by the PA will "satisf[y] the agency's section 106 responsibilities." 36 C.F.R. § 800.14(b)(2)(iii) (emphasis added). Those procedures must be developed through consultation, and must be consistent with the Section 106 regulations, id.

§ 800.14; see also 54 U.S.C. § 306102(b)(5), which set forth a four-step consultation process: (1) initiate consultation; (2) identify, through reasonable and good faithCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 20 of 50 efforts, historic properties (including TCPs) and evaluate their eligibility for listing in the National Register of Historic Places ("NRHP"); (3) assess whether the Project will adversely affect eligible historic properties; and (4) consult to resolve adverse effects by developing and evaluating alternatives or modifications to the Project that could avoid, minimize, or mitigate such effects. 36 C.F.R. §§ 800.3-.6; see also United Keetoowah Band of Cherokee Indians v. FCC, 933 F.3d 728, 745 (D.C. Cir. 2019) ("Section 106 review comprises four steps: initiation, identification, assessment [or evaluation], and resolution." (citation and quotation marks omitted)).

Thus, when consultation is deferred pursuant to a PA, BLM must undergo two distinct processes. First, it must execute the PA setting forth the procedures to ensure that the agency completes any remaining required consultation steps before authorizing activities that will adversely affect historic properties. Second, BLM must

actually "carry[] out" those procedures and do so in a lawful manner to ensure compliance with its obligations under the *NHPA. Quechan Tribe, 755 F. Supp. 2d at 1110* (emphasis added).

Here, BLM initiated consultation in 2009. See Fed.Br.7. But as Plaintiffs alleged (and the ROD shows), when BLM executed the PA in 2014, BLM deferred the remaining three consultation steps--i.e., identification of historic properties, assessment of adverse effects, and resolution of those effects--until "after the ROD and [ROW] are issued, but prior to Project construction." ER_167 (emphasis added).

Consistent with the regulations, the PA sets forth the mandatory procedures forCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 21 of 50 completing these steps and requires BLM to condition the issuance of construction notices upon the results of the deferred steps of Section 106 consultation. Id.; ER_99- 103. 4 Thus, as Plaintiffs plausibly allege, BLM necessarily concluded its NHPA process in 2023 when it issued the LNTPs because the PA (and ROD) bound the agency to fulfill its NHPA obligations prior to authorizing Project construction.

Further, BLM issued the LNTPs based on its final determination that there were no historic properties present in the Valley.

With the proper the NHPA process in mind, it is likewise necessary to clarify Plaintiffs' claims. Contrary to BLM's suggestion, Fed.Br.31, Plaintiffs have always maintained that they do not challenge the ROD, BLM's NEPA process, or the terms of the PA itself. See, e.g., Pl_SER_098 (Plaintiffs' preliminary injunction reply stating that "Plaintiffs do not challenge the 2015 ROD or BLM's NEPA process"). Instead, Plaintiffs challenge BLM's unlawful implementation of the PA post-ROD, notwithstanding the timing or conclusion of any prior NEPA or FLPMA processes.

4 Indeed, the PA requires: (1) the "prepar[ation of] a comprehensive Inventory Report" to identify cultural resources and evaluate their NRHP eligibility, ER_101-02;

(2) the "determination[] of effects to historic properties," ER_102; and (3) consultation to resolve adverse effects, including through "realignment of the transmission line," ER_103. The PA also prohibits construction unless BLM determines that any "authorizations will not restrict subsequent measures to avoid, minimize or mitigate the adverse effects to historic properties through rerouting of the corridor," notwithstanding any earlier, preliminary approvals. ER_109; see also ER_167 (ROD noting same).

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 22 of 50 Finally, contrary to Defendants' assertions, Plaintiffs do not seek to "force BLM to avoid the entire [Valley]." Int.Br.28. Nor do Plaintiffs "attempt to circumvent the effect of the execution of the PA," *id. at 32*; accord Fed.Br.50, or argue that the NEPA process should be "reopened," Int.Br.36.

The NHPA is a procedural statute. Accordingly, Plaintiffs advance the modest position, supported by the NHPA and the PA's terms, that the Section 106 process specifically designed for this Project mandates that BLM first identify historic properties (including TCPs), then consider and analyze measures to avoid those properties prior to authorizing construction, which to date BLM has not done. Plaintiffs merely request that the Court ensure BLM fulfills these NHPA obligations.

B. Plaintiffs Timely Challenged The LNTPS That Injured Their Concrete Historic Preservation Interests

Under Corner Post, a right of action under the APA accrues only once Plaintiffs are injured by final agency action. Pl.Br.22. Thus, Corner Post does not "extend" the limitations period, Int.Br.18; rather, it establishes the date of the injury as the operative touchstone for accrual, rendering the date of final agency action irrelevant to the question of timeliness. See Pl.Br.23 n.11. Here, Plaintiffs' injuries did not materialize until 2023, when for the first time, BLM authorized construction in the Valley on the purported grounds that there were no historic properties present.

Plaintiffs' lawsuit, filed mere months later, is timely. Pl.Br.22-26.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 23 of 50 Defendants first suggest that the Court should confine Corner Post to its facts.

See Int.Br.19; Fed.Br.40. However, as this Court recently recognized, the Supreme Court's sweeping language clearly evinces an intention to apply "the traditional rule" that a claim accrues "only after the plaintiff suffers [an] injury" to all APA actions, including procedural challenges. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. ___, 144 S. Ct. 2440, 2450 (2024)*; see also Or. Wild v. U.S. Forest Serv., No. 23- 35579, *2024 WL 4286965 (9th Cir. Sept. 25, 2024)* (mem. decision) (noting that Corner Post "likely . . . abrogated" the rule that "challenges to procedural violations in the adoption of . . . agency action must be brought within six years").

Defendants' remaining arguments fare no better. Defendants insist that Plaintiffs' injury occurred in 2015 when BLM issued the ROD adopting the PA, see, e.g., Fed.Br.37-38, but this merely repackages their erroneous assertion--thoroughly refuted above--that the execution of the PA satisfied BLM's NHPA obligations. But, BLM's NHPA obligations can only be discharged by implementing the PA's terms, which here, required BLM to complete the Section 106 process. See *supra at 11-14*.

As BLM recognizes, claims challenging the execution of a PA are distinct from those challenging the later implementation of the PA's procedures. See Fed.Br.31 ("[A] challenge to [BLM's] ongoing compliance with the NHPA is timely"); Fed.Br.42 n.5 (claims challenging "the issuance of the PA" are time-barred). Claims challenging the execution of a PA--which Plaintiffs do not bring--generally allege deficiencies in the development of the PA or its terms. See, e.g., Colo. River Indian Tribe v. Dep't of Interior,Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 24 of 50 No. ED CV14-02504, 2015 WL 12661945, at *14 (C.D. Cal. June 11, 2015) (reviewing claim that BLM's use of a PA was improper because project was not sufficiently "complex"); *Or.-Cal. Trails, , 467 F. Supp. 3d at 1071* (agreeing "that a [PA] does not shield an agency from judicial inquiry into . . . whether entering into a [PA] was [unlawful]," and finding that a "clause of the [PA] is arbitrary and capricious" in violation of the NHPA). Such claims accrue with the relevant injury--i.e., upon the execution of the PA. Cf. Fed.Br.42 n.5.

Plaintiffs' claims are different. They challenge the implementation of the PA and allege serious defects in BLM's compliance with the PA's procedures. See, e.g., *Quechan Tribe, 755 F. Supp. 2d at 1110*; *Dine Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 846-48 (10th Cir. 2019)* (considering plaintiffs' arguments that BLM failed to comply with the NHPA and an executed PA by inadequately analyzing indirect and cumulative effects to cultural landscapes). These claims accrue when Plaintiffs "suffer[] the injury required to press [their] claim in court." *Corner Post, 144 S. Ct. at 2451*.

Legally and logically, the relevant injury to Plaintiffs' historic preservation interests only occurred once BLM concluded its implementation of the PA with respect to the Valley, which as Plaintiffs plausibly alleged, did not occur until 2023.

Up to that point, Plaintiffs did not know whether or how BLM would carry out its NHPA Section 106 obligations under the PA, see *N. Cheyenne Tribe v. Norton, 503 F.3d 836, 845-46 (9th Cir. 2007)* (resolving NEPA claims but finding NHPA claims unripeCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 25 of 50 because the ROD and EIS provided for post-ROD "consultation with tribes," and there was not yet "a specific final agency action [that] has an actual or immediately threatened effect" on cultural resources), rendering any injury to Plaintiffs' interests tentative and, thus, insufficiently "complete and present" to trigger the statute of limitations, *Corner Post, 144 S. Ct. at 2450-51*. And during that ongoing NHPA consultation process, Plaintiffs had a "right to assume" that BLM would "comply with applicable law." *Preserv. Coal., Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)*.

The dispositive fact is that BLM specifically designed the NHPA process for this Project to conclude after issuing the ROD and ROW. Indeed, BLM admits that cultural resource surveys to identify historic properties did not begin until 2017, well after BLM executed the PA. Fed.Br.13.

Hence, Defendants' assertions that Plaintiffs somehow "knew" in 2015 that "the route would go through the [Valley]," despite the pending results of the yet-to- occur NHPA process, defy logic and fact. Int.Br.19. It is axiomatic that BLM could not possibly have complied with its obligations under the NHPA and the PA to resolve adverse effects to historic properties (including TCPs) by considering measures to avoid, minimize, and mitigate those effects before it even determined whether any historic properties were present. Accord *65 Fed. Reg. 77,698, 77,715* (Dec.

12, 2000) ("[A]n agency cannot take into account effects on historic properties if it does not first assess the nature of those effects."). Thus, Plaintiffs could not have been "aware in 2015 that the route would go through the [Valley]," Int.Br.20, becauseCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 26 of 50 BLM had not yet concluded the ongoing Section 106 consultation process and therefore, had not yet identified historic properties along the route, much less considered measures to avoid such properties, as required by the NHPA and PA. 5 Finally, Intervenor's suggestion, Int.Br.19, that Plaintiffs' participation in the NHPA process somehow negates their injury is wrong. As Plaintiffs plausibly allege (and the ROD and PA show), BLM informed Plaintiffs that it would not even begin to identify cultural resources along the Project route until after issuing the ROD and ROW. ER_167; ER_99-109. Merely alerting BLM to potential concerns during its NEPA and FLPMA decisionmaking processes did not (and could not) injure Plaintiffs' concrete interests until BLM in fact conducted and concluded its NHPA process, which did not occur until 2023. 6

5 Although Plaintiffs were not injured until 2023 when BLM authorized construction, necessarily signaling that it had completed its NHPA process, Defendants undercut their own accrual arguments by conceding that Plaintiffs did not know, and could not have known, until the July 2018 cultural inventory report that BLM would not identify or recognize any TCPs or cultural landscapes in the Valley. See, e.g., Fed.Br.13, 49.

Even setting aside the fact that BLM promised a separate, later cultural landscape study to address the distinct issue of TCPs, Pl_SER_096, Defendants' own identified date of the report--July 2018--was within six years of Plaintiffs filing suit in early 2024.

6 In particular, Plaintiffs could not have known during the NEPA and FLPMA processes how BLM would address the identification of TCPs when BLM insisted during those processes that NHPA issues would be addressed at an indeterminate point in the future. Pl_SER_044, 096.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 27 of 50 C. Plaintiffs Timely Challenge The LNTPs That Constitute The Final Agency Action In BLM's NHPA Process Plaintiffs' suit is also timely under the final-agency-action accrual rule because Plaintiffs properly challenged the 2023 LNTPs, i.e., the final agency action that injured their concrete historic preservation interests. Defendants fail to rebut Plaintiffs' arguments.

i. The NHPA Applies To All Stages Of The Project As explained, although the NHPA's regulations permit BLM to defer the Section 106 process until after the initial approval (i.e., the ROD and ROW), BLM must ensure that its NHPA obligations are fully satisfied before authorizing activities that may adversely affect historic properties. Pl.Br.28-30. It necessarily follows that Plaintiffs may challenge BLM's failure to comply with those duties once it concludes its NHPA decisionmaking process. Id.

Crucially, BLM acknowledges that a challenge to BLM's "ongoing compliance with the NHPA"--i.e., precisely the type of challenge Plaintiffs bring--"is timely." Fed.Br.31. Intervenor likewise recognizes that binding precedent "affirms the obvious proposition that BLM has a continuing obligation to comply with the PA." Int.Br.34. That precedent provides that Plaintiffs are "able to enforce the agreement"Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 28 of 50 once BLM espouses a decision that allegedly violates the terms of the *PA. Tyler v. Cisneros, 136 F.3d 603, 609 (9th Cir. 1998)*. 7 To evade this now-inconvenient precedent and in defiance of the plain language of the ROD and PA, Defendants advance two meritless arguments. First, Defendants insist that Plaintiffs' challenge is time-barred because any challenge that may impact the Project route is necessarily a challenge to the 2015 ROD. See, e.g., Int.Br.27-29 (arguing that the NHPA process cannot "be severed from the underlying BLM decision"). But this merely repackages Defendants' assertion, refuted above, *supra at 10-11*; accord infra at 36-37, that BLM's voluntary decision to issue its NEPA/FLPMA decisions before concluding the Section 106 process somehow relieved the agency of its distinct NHPA obligations.

Inherent in Defendants' argument is the notion that BLM may disregard Congress's express statutory command to "take into account the effect" of any "undertaking" on historic properties. *54 U.S.C. § 306108*. This contradicts the strong presumption that "Congress intends the executive to obey its statutory commands 7 Intervenor's attempts to distinguish the cases affirming the "obvious proposition" that the PA gives BLM continuing authority to require consideration of historic preservation issues (including avoidance measures) on the basis that "there was no PA" in

those cases, Int.Br.32-35, are futile. Intervenor ignores that the agency-selected NHPA approaches in the cited cases were designed to continue after it issued an initial decision, exactly like BLM designed the NHPA process here. Faced with those analogous facts, courts have held that the statute of limitations runs not from the initial approval of the project, but from the date the Section 106 review is completed.

See *N. Oakland Voters All. v. City of Oakland, No. C-92-0743, 1992 WL 367096, at *11 (N.D. Cal. Oct. 6, 1992)*. The same result is required here.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 29 of 50 and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 (1986)*; see also *Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1095* (9th Cir.

2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action.").

Second, despite acknowledging that "compliance with the procedures in th[e] [PA] satisfies the agency's NHPA Section 106 responsibilities," Defendants insist that Plaintiffs challenges nevertheless accrued with the "[e]xecution of the PA." Int.Br.30 (emphasis added). By relating claims challenging the implementation of the PA back to the date of the PA's execution, Defendants' argument would allow agencies to insulate their ongoing NHPA compliance from judicial review simply by delaying their implementation of the PA's terms until six years after its execution. Such a result is fundamentally at odds with the basic administrative law principle that agency action is presumptively reviewable under the *APA, Weyerhaeuser Co. v. U.S. FWS, 139 S. Ct. 361, 370 (2018)*. Indeed, courts routinely examine the merits of a complaint alleging that an agency failed to adequately implement the terms of a PA after it enters into one. See, e.g., *Dine Citizens, 923 F.3d at 846-48*. 8 8 Although Intervenor cites Dine Citizens as binding authority, Int.Br.2, this Tenth Circuit case is merely persuasive authority. See *923 F.3d at 831*. Nevertheless, in Dine Citizens, the court carefully considered the merits of plaintiffs' claims that BLM failed to adequately examine the undertaking's indirect and cumulative effects under the terms of a PA. See *id. at 847-51*. This is precisely the analysis Plaintiffs request the CourtCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 30 of 50 Intervenor's rationale justifying BLM's refusal to consider the Project's effects on TCPs prior to issuing the LNTPs further undermines Defendants' position.

Intervenor acknowledges, as it must, that the "work of implementing the PA would continue" after the ROD, including by conducting for the first time "intensive surveys to inventory and evaluate cultural resources." Int.Br.26. Yet, according to Defendants, regardless of the relative number or value of historic properties identified during this process, once BLM issued the ROD, it was barred from considering alternatives or modifications to the Project route that would meaningfully avoid adverse impacts to those properties. See, e.g., Int.Br.36; Fed.Br.41-42. This cannot be squared with the plain language of the NHPA. See *54 U.S.C. § 306108*.

In sum, the interpretation urged by Defendants exposes the sham consultation process to which Plaintiffs were subjected. To wit, BLM deferred consideration of historic properties until it was too late (exactly as Plaintiffs alleged). This absurd result, is contrary to the statute and must be rejected because it would allow agencies to circumvent their obligations under the NHPA by effectively delaying challenges out of existence. Cf. *Zuniga v. Barr, 946 F.3d 464, 470 (9th Cir. 2019)* ("We need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the statute under which the regulations were promulgated." (cleaned up)).

take here because such compliance was not known (and could not have been known) at the time BLM executed the PA.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 31 of 50 ii. Neither The 2015 ROD Nor The PA Constitute Final Agency Action Under The NHPA Notwithstanding BLM's compliance with NEPA and FLPMA (which are not at issue here), the ROD could not have served as BLM's final agency action under the NHPA because it neither "consummate[ed]" BLM's Section 106 process, nor resulted in "direct and appreciable legal consequences" with respect to historic preservation issues. Pl.Br.30-34.

In response, defying the plain language of its own decision documents and flouting its obligations under the NHPA and the PA, Defendants mechanically insist that the ROD constituted BLM's final decision under the NHPA, despite the fact that the Section 106 process had scarcely commenced when the ROD and PA were issued.

See, e.g., Int.Br.21; Fed.Br.35. However, this recharacterization of the ROD and PA as concluding BLM's NHPA process is revisionist history based on post hocrationalizations that cannot be squared with the plain language of the ROD and PA.

It is undisputed that the ROD did not document BLM's final Section 106 decision. 9 Instead, the ROD expressly declined to resolve NHPA issues, unequivocally stating that the mandatory procedures for completing the still-outstanding steps of the Section 106 process would be completed in accordance with 9 To rely on a NEPA document to demonstrate NHPA compliance, agencies must follow certain notification procedures, and must initiate consultation (including by identifying historic properties and developing alternatives to avoid, minimize, or mitigate any adverse effects on historic sites) during the development of the draft NEPA documents and hence before issuance of any ROD. See *36 C.F.R. § 800.8*.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 32 of 50 the PA "after the ROD and [ROW] are issued, but prior to Project construction." ER_167 (emphases added). And, the PA required that BLM identify and evaluate historic properties along the preferred route consistent with the standards set forth by National Bulletin 38; assess the Project's adverse effects to those properties; and resolve adverse effects, prioritizing "avoid[ance]," including by "realignment," ER_103. Logically and legally, therefore, the ROD could not have served as BLM's final determination on the NHPA issues raised in this case because the ROD did not "consummate" BLM's decisionmaking process with respect to its post-ROD obligations under the NHPA (and PA). See *Bennett v. Spear, 520 U.S. 154, 178 (1997)*.

Intervenor's assertion that the ROD had legal effect because "[o]nce the ROD's terms and conditions were fulfilled," BLM had "no ability . . . to stop the [Project]" is false. Int.Br.23. By its terms, the ROD "does not authorize [Intervenor] to commence construction . . . or to proceed with other ground-disturbing activities in connection with the Project on federal lands." ER_137. Instead, the PA specifically conditions the issuance of construction authorizations on the successful, lawful completion of the NHPA process, as required by the PA's procedures. See ER_109 (prohibiting the issuance of construction authorizations unless BLM determines that any authorized activities "will not restrict subsequent measures to avoid, minimize or mitigate the adverse effects to historic properties through rerouting of the corridor" (emphasis added)).

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 33 of 50 Tellingly, Defendants fail to explain how the ROD's analysis encompasses the evaluations and determinations required under the NHPA. Instead, they selectively cite the ROD's documentation of BLM's decisions under NEPA and FLPMA, while conveniently ignoring that the ROD expressly defers the fundamental aspects of Section 106 compliance until after the ROD and ROW issued. See Fed.Br.37;

Int.Br.21-23. But "[t]he basic rule" of administrative law "is clear: An agency must defend its actions based on the reasons it gave when it acted." *Regents, 591 U.S. at 24*.

The Court should reject Defendants' revisionism. See *id. at 19*. Despite Defendants' unsupported assertions to the contrary, although the ROD was the final decision under NEPA (and started the litigation clock for NEPA claims), by definition, the ROD did not constitute final agency action under the NHPA.

Intervenor tries to whistle past this factual graveyard by arguing that "[e]xecution of the PA completed the NHPA consultation process for the [ROD]," Int.Br.33. However, the plain language of BLM's decision documents cannot be evaded. As Plaintiffs plausibly allege, the ROD and PA establish that three steps of Section 106 consultation indisputably had not yet occurred in 2015, and did not conclude until 2023 with the issuance of the LNTPs.

Defendants vigorously resist this conclusion, but cannot point to any evidence that cultural resources were considered as required by the NHPA and PA before BLM issued the ROD. Instead, they argue that "[c]ontinued implementation of the PA did not prevent the 2015 ROD from constituting final agency action." Int.Br.36;

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 34 of 50 Fed.Br.41. However, as explained, *supra at 10-11*; infra at 36-37, where agency action is subject to multiple laws demanding distinct determinations, each process necessarily results in a final agency action (and associated statute of limitations) that is reviewable under the APA. Thus, even if BLM satisfied its obligations under NEPA--which is not at issue here--such compliance does not assure compliance with the NHPA.

Defendants' arguments would allow the regulations permitting the deferral of Section 106 consultation to become a gaping loophole, allowing BLM to ignore Congress's command to "take into account the effect of the undertaking on any historic property" before committing to a course of action that will compromise historic properties. *54 U.S.C. § 306108*. This reading cannot be sustained.

The NHPA's regulations require that where NHPA compliance is deferred, agencies must "proceed with the identification and evaluation of historic properties" as aspects of an alternative are "refined." *36 C.F.R.§ 800.4(b)(2)*. "Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects." 65 Fed. Reg. at 77,719.

Practically, the regulations envisage a system where, once the preferred alternative is selected under NEPA, the agency proceeds to conclude the NHPA process by implementing any outstanding Section 106 obligations as provided in the PA. Consistent with this understanding, the Advisory Council on Historic Preservation ("ACHP") admonishes agencies deferring Section 106 compliance to "avoid issuing NEPA documents [i.e., RODs] that present a final agency decisionCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 35 of 50 before they have completed their Section 106 process because the Section 106 process may result in a [subsequent] finding that requires the NEPA document to be revised or supplemented." See ACHP, NEPA and NHPA 35 (March 2013) [hereinafter NHPA Handbook] (emphasis added), https://tinyurl.com/2z24pz4n. 10 Here, BLM voluntarily elected to defer the time- and resource-intensive steps of NHPA consultation until after it selected the preferred route. While authorized by regulation, that choice has legal and practical consequences. In particular, BLM is obligated to conduct and conclude Section 106 consultation in a manner consistent with the NHPA and PA, even if this may require considering measures to avoid any later-identified historic properties (including TCPs) by realigning the route. That is especially true where BLM expressly agreed in the PA to subsequently consider measures to avoid effects on historic properties--including "realignment of the transmission line," ER_103, and "rerouting of the corridor," ER_109 --during the post-ROD NHPA process.

Accordingly, the ROD and PA, by BLM's own design, cannot and do not constitute final agency action with respect to Plaintiffs' claims exclusively challenging BLM's post-ROD compliance with the NHPA and the PA's terms.

10 The Court may take judicial notice of the ACHP's official guidance document because it is a matter of public record published on the agency's website. See *Daniels- Hall v. NEA, 629 F.3d 992, 999 (9th Cir. 2010)*.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 36 of 50 iii. The LNTPs Constitute Final Agency Action For BLM's Decisionmaking Process Under The NHPA Here, BLM deferred NHPA compliance until after it issued the ROD and ROW, prohibiting construction until it satisfied those obligations. Within this framework, the LNTPs reflect that BLM concluded its Section 106 process, rendering them its final decision under the NHPA. Pl.Br.34-39. Plaintiffs' challenge to BLM's final NHPA determination, embodied in the LNTPs, is timely.

Defendants' efforts to resist this conclusion are unpersuasive. First, Intervenor argues that the LNTPs are "not a NHPA `license' for the Project's route, since [they] did not authorize the route, authorize Project construction, or set construction of the Project." Int.Br.41 (emphasis added). However, Intervenor's self-serving assertion is flatly contradicted by the plain language of the PA and the LNTPs. But for the LNTPs, Intervenor could not have broken ground. See *ONDA v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006)* (finding the subsequent agency action implementing an earlier decision was nevertheless final because it had "practical and legal effects" on the

permittee's "day-to-day business"). Moreover, by the PA's plain terms, BLM's decision to issue the LNTPs hinged directly upon BLM's determination that the Project's adverse effects to historic properties had been adequately identified, evaluated, and resolved, including through consideration of realignment of the Project and other options for avoiding adverse effects to historic properties. ER_103. Defendants concede this point, emphasizing that the PA prescribed the mandatory procedures for BLM'sCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 37 of 50 ongoing compliance with the NHPA. See, e.g., Int.Br.30; Fed.Br.44-45. Thus, by design and definition, the LNTPs served as BLM's "principal means of imposing" the NHPA's requirements on the San Pedro Valley. Id. at 989. 11 Intervenor's attempts to sever the LNTPs from the NHPA process slice the salami too thin. In essence, Intervenor argues that Plaintiffs' challenge is untimely because the NHPA limits Plaintiffs' challenge to the initial "license" (the ROD) that triggered NHPA consultation. Int.Br.29, 41-42. Intervenor thus suggests that to the extent that BLM attempts to comply with the NHPA after issuing the initial license, such actions are immune from judicial review if completed more than six years later.

As Intervenors concede, however, BLM "obvious[ly] . . . has a continuing obligation to comply with the PA." Int.Br.34. Additionally, as explained, consistent with Congress's intent, the ACHP's interpretation of the statute, and its regulations allowing nondestructive planning activities and phased compliance, the NHPA applies to all parts of the single undertaking, not just the initial "license," as long as the agency has "continuing authority" to require consideration of historic preservation issues. See *Tyler, 136 F.3d at 608-09* (recognizing that an agency's NHPA obligations continue to apply to the undertaking after the initial approval or "license," as long as the agency has "continuing authority" at any stage to demand modifications to meet historic 11 Plaintiffs do not allege that the LNTPs "decide where historic properties were located." Int.Br.41. Rather, Plaintiffs point out that, consistent with the plain language of the ROD, PA, and LNTPs, the LNTPs documented BLM's final determination that "there are no historic properties present" in the Valley. ER_174-76.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 38 of 50 preservation goals); *Vieux Carre Prop. Owners v. Brown, 948 F.2d 1436, 1444-45* (5th Cir.

1991) (citing cases); NHPA Handbook, supra, at 17. Because BLM designed its post- ROD Section 106 consultation process such that BLM retains continuing authority to avoid, minimize, and mitigate effects to any historic properties ultimately identified, see, e.g., ER_103, it necessarily follows that Plaintiffs can now challenge BLM's failure to comply with those obligations once the agency concludes its decisionmaking process.

Second, Defendants' characterization of an LNTP as "simply serv[ing] to confirm that the specific criteria" set by the ROD, ROW, and PA "have been satisfied," Int.Br.42, ignores the crucial role that the LNTPs played in this process.

The Section 106 procedures required by the ROD and PA are not "ministerial" acts.

Rather, they require BLM to determine that its NHPA process is complete before issuing an LNTP. This specifically includes the highly discretionary tasks of identifying historic properties along the route and lawfully considering and resolving adverse effects. ER_167; ER_99-109. Thus, by design, the LNTPs are BLM's final, and only, determination that the NHPA has been satisfied for this Project and that construction may proceed. See *ONDA, 465 F.3d at 986* (finding that a subsequent agency action implementing an earlier decision was nevertheless final because it "represents the consummation of [the agency's] determination regarding the extent, limitation, and other restrictions on the permit holder's right[s] . . . under the terms of the permit"); *Hammond v Norton, 370 F. Supp. 2d 226, 256 (D.D.C. 2005)* (BLM'sCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 39 of 50 determination that ROD and ROW conditions were satisfied "so that the NTP may issue . . . [is] not `purely ministerial' because BLM retains discretion to halt the [project] should [the applicant] not meet its environmental obligations" (emphasis added)).

Intervenor nevertheless asks this Court to disregard controlling authority, citing to inapposite unpublished decisions. Int.Br.44-46. In Moapa Band of Paiutes v. U.S. BLM, the district court simply recognized that where BLM had already fully complied with its obligations under NEPA, BLM was not obligated to conduct any supplemental NEPA review when issuing an NTP. No. 2:10-cv-02021, *2011 WL 4738120, at *12 (D. Nev. Oct. 6, 2011)*. In contrast, here, BLM had only executed a PA when it issued the ROD. It did not conclude its implementation of the PA (and

thus, its NHPA process) until 2023, when BLM determined as a final matter that construction in the Valley could proceed because (in BLM's view) there were no historic properties present.

Likewise, in Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians v. U.S. BLM, BLM conducted the NEPA and NHPA processes concurrently and did not defer compliance with the NHPA. No. 3:16-CV-0268, *2016 WL 4497756, at *4* (D.

Nev. Aug. 26, 2016). Hence, BLM conducted studies to identify historic properties (including TCPs) before issuing the ROD. Id. Moreover, the plaintiffs challenged BLM's consideration of TCPs identified after the conclusion of the concurrent NHPA/NEPA process, *id. at *4-5*, and expressly declined to challenge BLM's NHPA compliance before the agency issued the ROD. Instead, plaintiffs argued only that theCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 40 of 50 subsequent, post-ROD issuance of the NTP was an entirely new undertaking triggering a separate Section 106 process, *id. at *7*.

In contrast, here, BLM expressly deferred its NHPA compliance until after the issuance of the ROD and thus did not identify or evaluate effects to any historic properties prior to the ROD. ER_167; ER_99-109. Then, during the subsequent NHPA process, despite repeated requests to identify TCPs within the Valley, BLM issued the LNTPs without ever considering, much less determining, whether any TCPs were present in the Valley before authorizing construction. ER_174-75.

Plaintiffs thus challenge BLM's NHPA compliance for the entire Project because the LNTPs necessarily terminated BLM's NHPA process.

Intervenor disregards these crucial facts and insists "there is no separate NHPA claim against an NTP." Int.Br. 46. But the Battle Mountain court concluded that no further consultation was required because "the project's Section 106 review ha[d] already been completed." *2016 WL 4497756 at *7*; see also *id. at *4-5* (explaining that BLM conducted its NHPA compliance prior to the ROD, meaning that successive stages of the project had already undergone Section 106 consultation). Accordingly, Battle Mountain stands for the uncontroversial principle that an agency need not conduct a new, separate NHPA process where BLM already concluded the Section 106 process by lawfully completing all four required consultation steps before issuing its ROD. That is not this situation, where BLM's ROD expressly deferred three of the required Section 106 consultation steps until a later time, ER_167--thereby requiringCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 41 of 50 potential litigants to await the completion of those steps to ascertain the legality of BLM's post-ROD actions under the NHPA.

Intervenor catastrophizes that holding BLM accountable for its decisions under the NHPA would be a "radical shift" "requir[ing] a new BLM authorization amending the [ROD], supported by a new NEPA review and new NHPA consultation on that new route." Int.Br.39. Courts have conclusively rejected this argument. See Morris Cty.

Trust for Historic Pres. v. Pierce, 714 F.2d 271, 279-281 (3d Cir. 1983) (rejecting argument that requiring stage-by-stage NHPA compliance would lead to absurd results by "convert[ing] each review and funding action . . . into a new opportunity to delay or halt the project"); *WATCH, Inc. v. Harris, 603 F.2d 310, 324 n.30 (2d Cir. 1979)* (same).

Moreover, as the ACHP recognizes, the potential amendment of an earlier final decision under NEPA is the natural consequence of BLM's discretionary decision to defer the statutorily mandated, time-intensive steps of Section 106 until after the conclusion of the NEPA process. See NHPA Handbook, supra, at 35. BLM elected to follow this approach over Plaintiffs' objections that bifurcating the NEPA and NHPA processes in this manner would compromise BLM's efforts to comply with the NHPA and threaten to "impermissibly foreclose" the consideration of "alternatives . . . to `avoid, minimize or mitigate' the adverse effects of the project." ER_59; see also PI_SER_52 (ACHP letter expressing concerns with BLM's bifurcation of the Project's NEPA and NHPA processes). Plaintiffs should not bear the burden of BLM's poorlyCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 42 of 50 designed decisionmaking process; BLM must be held to the choice it made. See *Niz- Chavez v. Garland, 593 U.S. 155, 172 (2021)* ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

iv. The District Court's Ruling That Plaintiffs' Claims Are Untimely Is Contrary To Circuit Precedent Defendants' assertions (and the ruling below) that Plaintiffs' suit is time-barred because the requested relief could indirectly impact the route selected in the ROD is contrary to logic and law. Indeed, this Court has routinely entertained claims where the requested relief could, after further process, potentially "interfere with activities specifically authorized by" an earlier agency decision. See *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs, 683 F.3d 1155, 1159-60 (9th Cir. 2012)*; *Cal. Sea Urchin Comm'n v. Bean, 828 F.3d 1046, 1049-52 (9th Cir. 2016)* (finding plaintiffs' challenge timely where an earlier decision granting "the authority to terminate the program" merely "laid out the criteria" for the agency to follow when subsequently deciding whether to actually terminate the program).

Defendants' attempts to distinguish this controlling precedent, Fed.Br.54-56;

Int.Br.28-29, 47-48, are futile because they rest on the flawed premises, rebutted above, that: (1) the NHPA does not impose a distinct legal obligation on BLM separate from NEPA to consider the effects of the Project on historic properties;

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 43 of 50 (2) the ROD constituted BLM's final action under the NHPA; and (3) the LNTPs do not constitute final agency action under the NHPA.

This Court's precedents, which control the outcome here, involved factual circumstances highly analogous to those presented here. For example, in Snoqualmie Valley and Cal. Sea Urchin, the agency expressly declined to conclude one decisionmaking process that adversely affected plaintiffs' concrete interests until after another decision that did not concretely impact those same interests. See, e.g., *683 F.3d at 1159-60*; *828 F.3d at 1049-52*. There, as here, challenges to the subsequent decisionmaking process (i.e., Section 106 consultation) accrue only once the agency purports to complete the relevant process (here, by issuing the LNTPs). Until that point, any claims that the agency failed to comply with its legal obligations are necessarily theoretical. Cf. *N. Cheyenne Tribe, 503 F.3d at 845-46*.

Contrary to Defendants' assertions, it is far from "novel" that independent statutory obligations provide independent paths to judicial review under the APA, even when they relate to a single project. Int.Br.27. Indeed, within the specific context of the NHPA, the ACHP recognizes that an agency's voluntary decision to conduct the NEPA and NHPA processes sequentially "may result in a finding that requires the NEPA document to be revised or supplemented." See NHPA Handbook, supra, at 35;

see also *Snoqualmie Valley, 683 F.3d at 1159-60* (acknowledging distinct APA challenges to two project-related decisions issued four years apart, where one decision "had not yet" been issued at the time of the first agency decision).

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 44 of 50 Likewise, this Court has specifically rejected the argument that claims arising under distinct statutes are barred merely because the "procedural claim may indirectly implicate some of the terms and conditions of the [earlier-issued] permit." *Jones v. Gordon, 792 F.2d 821, 824 (9th Cir. 1986)*. In Jones, this Court rejected an argument that plaintiffs' NEPA challenge to a permit issued under the Marine Mammal Protection Act ("MMPA") was barred by the sixty-day statute of limitations applicable to MMPA permits. Id. The Court recognized that plaintiffs' assertion that the agency "violated the procedural requirements of NEPA" was distinct from a challenge to the "`terms and conditions' of [MMPA] permits," which was time-barred. Id. Accordingly, even though plaintiffs' NEPA claim may, if successful, impact the final underlying MMPA permit, plaintiffs' challenge under a distinct statute was not time-barred. Id.

So too here. Despite Defendants' efforts to muddle the different regulatory schemes at issue, the fact remains that NEPA, FLPMA, and the NHPA impose distinct obligations that BLM must satisfy prior to construction. The Court must hold BLM to its statutory obligations, even if doing so would "indirectly implicate" earlier decisions under other laws. *Jones, 792 F.2d at 824*; cf. *San Luis, 747 F.3d at 640*. This is particularly true here, where this dispute arises largely because BLM chose (over the objections of Plaintiffs and others, see ER_59) to conduct the NEPA/FLPMA process and the NHPA process sequentially, rather than concurrently. That choice has consequences.

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III. PLAINTIFFS' COMPLAINT PLAUSIBLY ALLEGES BLM FAILED TO ABIDE BY THE TERMS OF THE PA

Applying the appropriate standard, Plaintiffs' Complaint articulates a plausible claim that BLM violated its obligations under the NHPA and PA when the agency failed to engage in any efforts to identify and consult regarding TCPs prior to authorizing construction (through LNTPs) that will adversely affect such TCPs and limit the consideration of alternatives to avoid, minimize, and mitigate such effects, despite repeated requests during consultation that BLM do so. Pl.Br.43-48. In reaching the opposite conclusion, the ruling below not only distorts the plain meaning of the NHPA and PA, but also impermissibly relies on an incomplete record that served to exacerbate, rather than resolve, disputed issues of fact. Accordingly, dismissal was inappropriate. See *ASARCO, 765 F.3d at 1004*.

Intervenor's response rests on its erroneous assertion that the question of "[w]hether the PA requires, or even contemplates consideration of an alternate route for the Project is a question of law, not a question of fact," which the district court resolved against Plaintiffs. Int.Br.49. Because the interpretation of the PA is subject to reasonable dispute, the "district court's selective reading . . . was improper" at the "pleading stage where the plaintiff is entitled to reasonable inferences in its favor." *Dolores Press Inc., 766 Fed. App'x at 459* (citation omitted).

BLM's response is premised on its baseless assertion that BLM "has complied with the [PA]." Fed.Br.45. That, of course, is a merits question, not to be decided atCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 46 of 50 this early stage without a full administrative record, as the APA requires. See *5 U.S.C. § 706(2)* (requiring that in reviewing the validity of an agency action, and "[i]n making the foregoing determinations, the court shall review the whole record" underlying the agency action" (emphases added)). In any event, BLM's arguments improperly rely on extrinsic materials to inject a one-sided narrative into the Complaint to defeat Plaintiffs' otherwise cognizable claims. *Khoja, 899 F.3d at 1002*. 12 The Court must reject BLM's efforts to "short-circuit the resolution of a well-pleaded claim." Id.

BLM also insists, as another disputed factual matter, that Plaintiffs' allegations fail to articulate a plausible claim that BLM violated the PA because BLM was under no obligation to consider the Project's impacts on the Valley, because the Valley was not identified as a "historic property" in BLM's July 2018 cultural resources inventory report. Fed.Br.47-50. But this is circular: in effect, BLM asserts that it complied with the PA in exactly the same way Plaintiffs allege BLM violated the same PA--by failing to identify TCPs and document them in the agency's inventory report or in the cultural landscape study BLM promised in addition to the inventory report (but never 12 For example, BLM relies on staff declarations to assert Plaintiffs failed to identify the Valley as a potential TCP during the 2018 cultural inventory process, and that BLM was not required to conduct a cultural landscape study. Fed.Br.47-48. However, as explained, BLM selectively omits the fact that in light of Plaintiffs' repeated comments explaining the need for a cultural landscape study, BLM agreed during the cultural inventory process to conduct a separate cultural landscape survey. Pl_SER_096.

Accordingly, Plaintiffs reasonably believed that there would be an opportunity for their specialized input on TCPs at a later, different point in the NHPA process. Yet, despite repeated assurances from BLM, this promised process never materialized.

Case: 24-3659, 10/28/2024, DktEntry: 32.1, Page 47 of 50 completed), see Pl_SER_096. In BLM's distorted view, the agency somehow complied with the PA by violating the express requirements of the PA. This is legal error. 13 Even assuming arguendo that the Court sustains the alleged defect identified by BLM (i.e., Plaintiffs did not "plausibly allege that the BLM failed to comply with the PA," Fed.Br.43-51)--a finding unfounded in law or fact--such a defect can easily be remedied by granting Plaintiffs leave to amend their pleading. "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1034 (9th Cir. 2008)* (quotation omitted). Here, Plaintiffs can easily bolster their allegations with additional facts that, taken as true, further demonstrate their already-plausible claims that BLM failed to carry out its Section 106 obligations as required by the NHPA and the PA.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the ruling below and remand the case to the district court for resolution of the merits.

13 BLM also bizarrely insists that "allegations from before the [PA] was executed are irrelevant to the issue of [BLM's] ongoing compliance with the [PA]." Fed.Br.47.

However, BLM offers no explanation or legal support for this proposition, which cannot be squared with its earlier assertions that the Section 106 consultation process began in earnest in 2009, and would continue after the ROD. See ER_167.

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This brief complies with the requirements of *Fed. R. App. P. 32(a)(7)(B)* and Circuit Rule 32-1(a) because it is accompanied by an unopposed motion for additional words requesting a total of 10,000 words for Plaintiffs' reply. This brief has 9,999 words, excluding the items exempted by *Fed. R. App. P. 32(f)*. This brief also 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 motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Respectfully submitted, /s/Elizabeth L. Lewis Elizabeth L. LewisCase: 24-3659, 10/28/2024, DktEntry: 32.1, Page 50 of 50

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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