

EXHIBIT 2

Transcript of January 4, 2022 Hearing

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

FALLON PAIUTE-SHOSHONE TRIBE and)	Case No. 3:21-cv-00512-RCJ-WGC
CENTER FOR BIOLOGICAL DIVERSITY,)	Las Vegas, Nevada
)	Tuesday, January 4, 2022
Plaintiffs,)	10:11 a.m. - 12:25 p.m.
)	Courtroom 6
vs.)	
)	MOTION HEARING
U.S. DEPARTMENT OF THE INTERIOR,)	
BUREAU OF LAND MANAGEMENT, and JAKE)	
VIALPANDO, in his official capacity as)	
Field Manager of the Bureau of Land)	
Management Stillwater Field Office,)	C E R T I F I E D C O P Y
)	
Defendants,)	
)	
and)	
)	
ORMAT NEVADA, INC.,)	
)	
Defendant-Intervenor.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE ANDREW ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES: (See next page.)

REPORTED BY: PAIGE M. CHRISTIAN, RPR, CRR, CCR #955
United States District Court
333 South Las Vegas Boulevard
Las Vegas, Nevada 89101

Proceedings reported by machine shorthand.
Transcript produced by computer-aided transcription.

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1 RENO, NEVADA; TUESDAY, JANUARY 4, 2022; 10:11 A.M.

2 P R O C E E D I N G S

3 --o0o--

4 **COURTROOM ADMINISTRATOR:** This is the date and time
5 for a motion hearing on a motion to intervene, motion for
6 temporary restraining order, motion for preliminary injunction,
7 in the matter of 3:21-cv-00512-RCJ-WGC, Fallon Paiute-Shoshone
8 Tribe, et al., vs. U.S. Department of Interior, et al.

9 Counsel for the plaintiffs, please state your
10 appearance for the record and then be followed by counsel for the
11 defendants.

12 **MR. GOLDING:** Good morning. Wyatt Golding for the
13 Fallon Paiute-Shoshone Tribe.

14 **MR. LAKE:** Good morning, Your Honor. Scott Lake for
15 the Center for Biological Diversity.

16 **THE COURT:** Other appearances, please.

17 **COURTROOM ADMINISTRATOR:** For the defense side?

18 **THE COURT:** Yes.

19 **MS. VANCE:** May it please the Court, Your Honor.

20 This is Holly Vance with the U.S. Attorney's Office in Reno on
21 behalf of the government, and I am just here to introduce the
22 government attorneys who are handling this case. If you would
23 allow me to do that, I would sure appreciate it, Your Honor.

24 **THE COURT:** Yes, please.

25 **MS. VANCE:** Thank you, Your Honor. So there are two

1 attorneys from the Department of Justice's Environmental and
2 Natural Resources Division who are assigned to handle this case.
3 The first attorney is Sara Costello. She is a trial attorney
4 with ERND based out of Washington, D.C., and the second attorney
5 is Esosa Aimufua. She is also a trial attorney with ERND in
6 Washington, D.C., and she will be presenting oral arguments on
7 behalf of the government today, Your Honor. That's all I have.
8 Thank you so much.

9 **THE COURT:** Do they have a Zoom connection, or are
10 they simply on the telephone --

11 **MS. VANCE:** Yes. My understanding is they do. Yes.

12 **THE COURT:** Would they enter their appearance --

13 **MS. COSTELLO:** Good morning, Your Honor. May it
14 please the Court. I am Sara Costello here today on behalf of the
15 federal defendants.

16 **THE COURT:** Thank you.

17 **MS. AIMUFUA:** And good morning, Your Honor --

18 **THE COURT:** Good morning.

19 **MS. AIMUFUA:** -- may it please the Court. I'm Esosa
20 Aimufua on behalf of the federal defendants.

21 **THE COURT:** Thank you so much.

22 **MR. LUKAS:** Good morning, Your Honor. It's Timothy
23 Lukas from Holland & Hart. I'd like to also introduce my
24 colleagues, Dessa Reimer, who will be doing sections on -- on the
25 merits in the imminent and irreparable harm. I also have client

1 representatives, Mr. Paul Thomsen, who is the vice president of
2 business development of Ormat Nevada, Inc., and also the
3 subsidiary ORNI 32 LLC. And then also on video there, you can
4 see Laura Jacobsen. She is the U.S. legal counsel for Ormat, and
5 then I have also my colleagues, Sarah Bordelon and Jessica
6 Freitas, though they will not be doing any argument today.

7 **THE COURT:** Okay. Is that all of the appearances?

8 Let me give a little preface. This is a request for
9 a temporary restraining order predicate to preliminary injunction
10 determination on the Dixie Valley Geothermal project.

11 First, we have a motion to intervene, of course, and
12 I'd like to ask that question first.

13 Is there any strong objection to allowing Ormat to
14 intervene since they have a very substantial interest here?

15 **MR. LAKE:** No objection from plaintiffs, Your Honor.

16 **THE COURT:** Very good. Let's allow them to
17 intervene, and of course, they will argue. They've already filed
18 their brief.

19 Second predicate is a question of whether we want to
20 consolidate this preliminary injunction motion with the TRO
21 request now. As you know, if we consolidate it, it will give
22 either side the right to an immediate appeal.

23 I'm not the final word on the law of this case, and
24 clearly, the appellate court will determine the law. And so, you
25 don't have to answer that question immediately or as you start to

1 argue. But as we get further down, I'll want you to tell me
2 whether you want to consolidate it or not.

3 I think it will delay, of course, a determination no
4 matter which way I decide on the TRO to give me time for the
5 preliminary injunction determination, and it will delay your
6 opportunity to get to the appellate court.

7 So I am interested, whichever way I decide. And I'll
8 tell you right now, my mind is not made up. I have serious
9 questions. For example, I've read all the briefs, but I have not
10 had time, for example, to read or to study the mitigation plan or
11 to determine whether or not it is a sufficient basis for a
12 finding of insignificant impact.

13 And so, in your arguments, you'll want to detail that
14 for me, your arguments from the briefs, which I have read, and
15 the support for that.

16 So -- so why is it a sufficient basis for a finding
17 of insignificant impact rather than a further study, an EIS, an
18 environmental impact statement?

19 That's the important question to me.

20 I will ask a number of questions because of the
21 brevity of time I've had to study this issue. And please, by way
22 of preface, do not take any of these questions as an indication
23 of how I intend to rule. If you're consolidating the two
24 hearings, I would like to give you a ruling at the end of the
25 hearing since construction is due to start on the 6th. And I'll

1 endeavor to do that if you do want to consolidate. If we can't
2 consolidate, then, of course, we'll just defer that decision, and
3 I'll make the decision on the TRO.

4 But do not take any questions that I ask as an
5 indication of how I would intend to rule. I am up in the air,
6 and you need to further enlighten me, especially on the TRO issue
7 versus a preliminary injunction. And be sure to argue. In other
8 words, do not take any questions as anything other than an
9 indication that I have a serious question about it in my mind,
10 and you do need to cover it.

11 The last consideration is completeness of the record.

12 You know, can we determine a complete record? Can we
13 establish a complete record for purposes of the appeal without
14 holding a further hearing, even an evidentiary hearing, although
15 I'm not inviting that?

16 So that's -- that's the course of the argument,
17 please. So cover the briefs and cover the background and
18 especially cover what the exhibits would tell us in upholding the
19 arguments in the briefs in your discussion. I'm not going to
20 limit your time. This is a serious question, and I'm going to
21 let you go on as long as you need to. Hopefully, it won't take
22 all day, but be brief in your comments because I have reviewed
23 the briefs and I've studied those.

24 Any other questions before we start?

25 *(No audible response.)*

1 **THE COURT:** All right. Let's have the plaintiffs
2 make their presentation, please.

3 **MR. GOLDING:** Good morning, Your Honor. Wyatt
4 Golding on behalf of the tribe. And we're joined today by
5 members of the tribal government, including members of the
6 business council and the tribal historic preservation officer,
7 Rochanne Downs.

8 **THE COURT:** Thank you.

9 **MR. GOLDING:** Yes. We are co-plaintiffs with the
10 Center for Biological Diversity, and so I will be sharing my time
11 with Mr. Lake, both on opening and rebuttal. I will cover the
12 tribe's perspective with respect to irreparable harm, the APA,
13 and the RFRA claims while Mr. Lake will cover the remaining
14 issues, including the center's irreparable harm, the NEPA claims,
15 and the equity and bond issues.

16 Of course, Your Honor, if you have any questions with
17 respect to the tribe, I'd be happy to answer them.

18 **THE COURT:** Thank you.

19 **MR. GOLDING:** The tribe is in court today on such
20 short notice because absent relief from this Court, Ormat is
21 poised to bulldoze and conduct major construction on a site
22 that's sacred to the tribe --

23 **THE COURT:** Can I ask you a question in that regard
24 right off the bat?

25 I really don't understand the project. I understand.

1 I've driven through.

2 Is this -- is this Dixie Valley springs, one
3 iteration of it is on either side of I-80 as you travel east from
4 Fallon?

5 **MR. GOLDING:** It's off Dixie Valley Road as you go up
6 Dixie Valley towards the north end.

7 **THE COURT:** Uh-huh. Where is it in relation to the
8 waters that you observe on -- on I-80 going east?

9 **MR. GOLDING:** I'm not sure, Your Honor.
10 Scott, do you know the answer to that question?

11 **MR. LAKE:** I do, Your Honor. The -- the project is
12 not visible from I-80. It is a short distance north of Highway
13 50.

14 **THE COURT:** Oh, yes. Okay.

15 **MR. LAKE:** So if you take Dixie Valley Road north
16 from Highway 50, you'll drive directly past the hot springs and
17 where the project is going to be.

18 **THE COURT:** Uh-huh. And where is the extent of the
19 reservation, not on the hot springs, of course, but where is the
20 extent of the reservation itself?

21 **MR. LAKE:** The tribe's reservation, Your Honor?

22 **THE COURT:** Yes.

23 **MR. GOLDING:** I can address that. So the tribe has a
24 relatively small reservation near the city of Fallon. These
25 lands are federally managed public lands within the tribe's

1 ancestral lands. One of the -- so the -- the bands of the Paiute
2 and Shoshone are separated onto different reservations, and some
3 have larger reservations than others. The Fallon Tribe --

4 **THE COURT:** Which is the one -- when you're traveling
5 east out of Fallon, you drive up, and you see the petroglyphs
6 close by just south of Fallon and east.

7 Which tribal land is that? You know what I'm talking
8 about, the petroglyphs just south and east of Fallon?

9 **MR. GOLDING:** I don't, Your Honor. I think they -- a
10 landmark, the Rattlesnake Hill, is right by. That's an important
11 area to the tribe. It's right by the tribal government.

12 **THE COURT:** Okay. And here's the important question.
13 As I understand, just reading between the lines, this project is
14 proposed for the landscape surrounding the wetlands. It's not
15 right in the wetlands. It's on land that would represent
16 potentially downward flow, underground flow, into the springs
17 area, but it's on the landscape surrounding that area. And what
18 Ormat has in mind, I'm just speculating, is drilling down and
19 then maybe even sideways towards the source of the headwaters of
20 the spring and then pumping the water back down after they use
21 the heat.

22 Can you tell me where the project, 126 acres or so,
23 is designed for in relation to the wet springs itself?

24 **MR. GOLDING:** Yes, Your Honor. And your question
25 calls to -- to attention a really critical distinction, which is

1 that when BLM talks about the springs, what they're referring to
2 is actual surface water. When we -- when the tribe talks about
3 the sacred site, it includes the water, the plants around the
4 water, and the uplands directly around there --

5 **THE COURT:** Yeah. But please answer my question.

6 **MR. GOLDING:** Yes. The reason that's part of the
7 sacred site is because it's necessary for the tribe's ceremonial
8 practices, their spiritual practices, which include camping,
9 prayer, contemplation, songs, and so --

10 **THE COURT:** Do they have any history of tribal
11 gatherings or intertribal gatherings on those upland areas?

12 **MR. GOLDING:** Yes, Your Honor. And so in the
13 declaration of Rochanne Downs --

14 **THE COURT:** Tell me what -- yeah. Go ahead.

15 **MR. GOLDING:** In the declaration of Rochanne Downs,
16 she details a conversation with Ashley George, who's a tribal
17 elder, who discusses going out there with his family and other
18 families for roughly a week at a time, camping near the springs,
19 and conducting ceremonies on the site. Mr. George is --

20 **THE COURT:** "Conducting ceremonies." In other words,
21 tribal gatherings.

22 Is that --

23 **MR. GOLDING:** Correct, Your Honor.

24 **THE COURT:** -- what you're talking about or just
25 camping?

1 **MR. GOLDING:** The former, Your Honor.

2 **THE COURT:** Go ahead.

3 **MR. GOLDING:** And so, part of the reason that -- so
4 I'm glad you asked this question right off the top because that's
5 the key issue is that, you know, Ormat and BLM contend that
6 everything's mitigated because they have a plan for the water,
7 which we disagree with for a separate reason. But they have no
8 real plan to mitigate impacts as to surface disturbance.

9 And so, at the outset here in this first year, the
10 tribe's major concern is that Ormat wants to cut in roads,
11 bulldoze, build major construction projects on areas that the
12 tribe uses for their spiritual practices. So that's the
13 irreparable harm prong in this case and also informs the merits.

14 Since we have a strong showing on irreparable harm,
15 under the Ninth Circuit sliding scale standard, our burden is now
16 to show serious questions as to the merits, and we can meet that,
17 as well.

18 I'll speak first to the APA claim, as to the
19 arbitrary and capricious conduct of BLM. It's important for this
20 claim to understand the timeline a little bit. As we've
21 explained in the briefing, this project has been in fits and
22 starts ongoing for quite some time. But on October 26th, federal
23 defendants visited the tribal government, informed them that the
24 project would not be approved anytime soon and that there was
25 ongoing review.

1 Shortly thereafter, on November 9th, the Secretary of
2 the Interior signed an important MOU specifically directing
3 agencies under her purview to protect sacred sites and letting --
4 setting out new and enhanced measures to do so.

5 On November 15th, she signed a joint secretarial
6 order governing management of federal lands with respect to
7 fulfilling custodies to tribes. Both of those went into effect
8 immediately.

9 Thereafter, on around November 22nd, the federal
10 defendants signed the finding of no significant impact and the
11 decision -- the record of decision, and then they came after the
12 fact and informed the tribe of the sudden reversal.

13 Now, this sequence is concerning because BLM did not
14 mention or -- or evaluate, in any way, these new important
15 documents put in place by their boss, the secretary of the
16 interior, the MOU, and the order. These two documents go to the
17 critical issues in this case -- how to protect sacred sites, how
18 to delineate their boundaries, the very question Your Honor was
19 asking.

20 The MOU talks about deference to the tribe,
21 considering tribal practices, and the sacred landscape that is
22 necessary for those practices. And the order also sets forth
23 direction of co-stewardship and management with tribes and
24 enhancements in consultation with -- specifically with respect to
25 sacred sites.

1 Now, BLM didn't consider any of this in their
2 decision-making. They didn't reference it. There's no evidence
3 that they thought about it. This is on its face arbitrary and
4 capricious conduct. The well-worn (phonetic) standard for
5 motor vehicles says that if there's a complete failure to
6 consider an aspect of a problem, it renders an agency decision
7 invalid. And that's what happened here.

8 **THE COURT:** A question, please.

9 **MR. GOLDING:** Yes.

10 **THE COURT:** I don't know whether you would concede or
11 not, but these are policy statements, executive order. I think,
12 in your discussions, at least the briefs assert that BLM was
13 interested in addressing those concerns initially and then
14 decided that they did not have to.

15 But the main legal question I have here is, under the
16 APA, I think, as the defendants suggest in their brief, the APA
17 deferential standard that I'm obligated to abide by applies only
18 to the NEPA determinations, not to the RFRA claim.

19 My question, though, is, are these statements of
20 policy binding on the BLM or on this project? And more
21 importantly, if you believe they are, how do you address the
22 Supreme Court case of *Lyng v. Northwest Indian Cemetery*
23 *Protective Association*, 1988, which holds basically, as I
24 understand it, an Indian tribe does not have a religious right to
25 a particular use of federal land?

1 In other words, the statute requires the -- the
2 bureau to administer public lands for multiple uses, and what the
3 Supreme Court said way back in 1988 is that it's not -- it's not
4 an element of their right, religious right, for a particular use.
5 We only violate RFRA if -- if we are prohibiting or seriously
6 endangering their right to practice.

7 So address especially the effect of that Supreme
8 Court decision, please, and whether these are simply policy
9 statements not binding on the bureau or not.

10 **MR. GOLDING:** Okay. Thank you, Your Honor. So as to
11 the first question, whether these are binding, they are binding
12 in that the BLM has to follow them, you know, their direction
13 from the secretary of the interior. I think there's a separate
14 question as to whether they're legally enforceable. And we
15 haven't gotten into that at this stage.

16 I think, with respect to that question, the order
17 potentially is in that it was issued by the secretary, it has
18 legal effect immediately, and that summons to secretarial orders
19 are determined to be legal and binding.

20 But as we state in the briefing, this is -- this
21 aspect, this claim is an APA claim for arbitrary and capricious
22 decision-making, so the cause of action is the APA. And for that
23 claim, the issue is that these are informative, important
24 direction to BLM on how to carry out the exact tasks that are at
25 issue, balancing federal land management direction with

1 protection of sacred sites, and they didn't do that at all. They
2 totally disregarded it. And so, that is the basis of the APA
3 claim.

4 You know, the government can have policies. It can
5 sometimes explain why it wants to deviate from them. But what it
6 can't do is have rules and then completely ignore them. And so,
7 that -- that's our -- that's the problem with -- with the BLM's
8 decision, and that's the basis of our APA claim.

9 As to the RFRA claim, the *Lyng* case you mentioned,
10 there's a couple of important distinctions. One is that it
11 predates RFRA. And so the analysis in the *Lyng* case of a -- you
12 know, was very close to what RFRA overturned, which was an idea
13 that if you have a law of neutral application, it's okay to
14 substantially burden religious practice. And RFRA was passed
15 because Congress didn't agree with that direction. And so, RFRA
16 has a much more stringent standard.

17 And so, if you look to, particularly, the recent
18 Supreme Court jurisprudence, like *Hobby Lobby*, *Hobby Lobby*
19 discusses RFRA and says -- one second. It provides, quote, very
20 broad protection for religious liberty. And in *Hobby Lobby*, the
21 Court also said, By enacting RFRA, Congress went far beyond what
22 this Court has held as constitutionally required.

23 So that makes the RFRA claim different than the
24 constitutional claims brought in *Lyng*.

25 I'd also note, in *Lyng*, a key -- a key factor for the

1 Court was the consideration that there wasn't actually blocked
2 access for -- for use and carrying out spiritual practices. That
3 is the case here. We have actual construction on the uplands
4 around the surface water of the spring that will block the
5 tribe's ability to use that site in its traditional and ongoing
6 spiritual manner.

7 Since we've -- if there are aren't further questions
8 on the MOU and order, I'll continue to discuss the RFRA claim.

9 **THE COURT:** Please.

10 **MR. GOLDING:** Okay. So RFRA is passed and it's --
11 there was an amendment through a following statute in 2000, which
12 is the Religious Land Use and Imprisoned Person Act (sic), and
13 it's -- it's based on the protection of the exercise of religious
14 practices. And that's important here because that's what the
15 tribe's concerned with, the exercise of their religious
16 practices.

17 By way of rough analogy, if you consider the springs
18 the hot water, the surface water, it's like the altar, and then
19 the surrounding uplands are like the walls of the church. And
20 so, for the tribe to carry out its religious beliefs, it needs
21 both. It needs to have the sacred site and to have the springs
22 within them. And as I've explained, that's because the springs
23 themselves are very hot. The tribe gathers around them to pray,
24 to make use of cooler waters to contemplate, to camp, and to have
25 a view of its origin site from Fox Peak.

1 Now, the text of RFRA provides that the government
2 cannot impose a substantial burden on these religious -- the
3 exercise of religious practices absent a demonstration of a
4 compelling interest and that the exercise of that compelling
5 interest is narrowly tailored to minimize or avoid the harm to
6 the religious practice.

7 Now, BLM can't meet that standard here, because if
8 you look, there's a declaration from Mr. Vialpando, who's the
9 regional director at BLM with a map attached, and that's at
10 ECF 25-1 at page 11. And you see on that map that there are
11 wells directly adjacent, right on the edge of the wetlands area
12 for the springs, and then the power plant, Mr. Vialpando states,
13 is within -- is going to be constructed from 1200 feet of the
14 open water. And so these are very close. They're within the
15 area, as Rochanne Downs -- had explained in her second
16 declaration that the tribe considers to be the sacred site where
17 they carry out their practices.

18 Now, this area will be physically occupied by the
19 industrial power plant and its infrastructure barring the tribe's
20 ability to use it. That sort of physical occupation in the
21 *Comanche* case has been held to constitute a violation of RFRA.

22 Now, again here, since we're on a PI, all we have to
23 show is serious questions as to the merits, and I think we've
24 clearly met that standard.

25 If Your Honor has more detailed questions as to the

1 nature of the practices, the exact contours of the project, I
2 think that the PI -- we've met the standard for the PI, and those
3 sorts of issues could be addressed either on summary judgment or
4 in a hearing.

5 At this point, I think I'll turn it over to Mr. Lake,
6 unless you have further questions.

7 **THE COURT:** No. Thank you.

8 Mr. Lake.

9 **MR. LAKE:** Good morning, Your Honor. For the record,
10 Scott Lake for the Center for Biological Diversity. I'm going to
11 be talking about the irreparable harm the center will suffer
12 absent an injunction, then I'll move on to talk about the NEPA
13 claims, the balance of the equities, and finally, the issue of
14 bond.

15 If Your Honor has any questions about these, I'm
16 willing to answer them up front or start my presentation now.

17 **THE COURT:** Well, I do have some questions. Really,
18 one of the most substantial questions is for defendants. But
19 I'll tell you what the concern is, and then I'll ask that
20 question to them.

21 Do we -- does the determination of significant --
22 insignificant impact really tell us or inform us or protect us
23 against the Jersey example? The tribe keeps citing the Jersey
24 analogy and saying that, you know, Ormat's work there actually
25 stopped the spring or slowed it.

1 So one of the major questions that you'll want to
2 address, but especially the defendants, is, does the mitigation
3 plan really help us there when we already allow the power plant
4 to go in and substantial investment to be made?

5 And I'll tell you the background for this, just by
6 way of anecdotal story. You know, almost 40 years ago, I started
7 my career on the bench as a bankruptcy judge, and for about ten
8 years plus, I had the geothermal energy case, which is on the
9 uplands over the Reno Valley, just north of Washoe Valley, and it
10 is on an uplands area. And for years, that project -- any of you
11 who have been into Reno will recognize the plumes of steam that
12 still come and the project that is based there. For years, that
13 project has been in and out of bankruptcy, and early in my
14 career, I encountered it and had that case for a decade or more.

15 The conclusion the experts came to and the conclusion
16 I came to ultimately at the end was that it was financially
17 unfeasible because the waters simply were not hot enough. And
18 so, the project that they planned and carried out was based upon
19 waters being a lot hotter and it never panned out. So it was
20 financially unfeasible through a series of owners. They filed
21 bankruptcy several times. And finally, it exists now as it
22 exists. It is producing steam, and -- but much more limited per
23 the financial claim.

24 So does the mitigation plan sufficiently tell us, or
25 can it tell us without studying, the impact that taking the

1 heated waters out and reinjecting cooler waters would have upon
2 these hot springs?

3 The tribe keeps saying in their brief over and over
4 again, the bureau nor Ormat have an appropriate calculation of
5 the effect nor have they really studied the effect that deriving
6 the heat from these hot springs would have on the headwaters or
7 the pressure or the upflowing pressure. And that's a substantial
8 concern as to whether the mitigation plan sufficiently covers
9 that concern.

10 I can tell you my own background. I grew up in Las
11 Vegas, and we had a well originally that produced almost Artesian
12 water down in the bottom valley of Las Vegas. It was Artesian
13 down where our famous singer down there -- what was his name?

14 His ranch, his Arabian horse ranch down there, had
15 Artesian water. But up where we were, it was very easy to pump
16 the water. And then Las Vegas grew from 30,000 to 2 million, and
17 those -- that -- that underground surface water dropped from 400
18 feet to 700 or below a thousand, and it just -- it filled the
19 well.

20 So does the mitigation plan appropriately provide for
21 that potential concern, or have you appropriately -- has the
22 bureau appropriately mitigated that concern that it will not have
23 that effect?

24 That's a question first for plaintiffs and then, of
25 course, for defendants.

1 **MR. LAKE:** Okay. Thank you, Your Honor. I can speak
2 to that. First I'd like to briefly mention the -- the applicable
3 law. The legal standard we're working under is whether the NTS
4 prepared an EIS, and the standard for that is whether there were
5 substantial questions raised as to the project's environmental
6 impacts and the significance of those impacts. And I think the
7 simplest way to illustrate the substantial questions raised in
8 this case is to look at the comments that came from other
9 agencies.

10 Due to the nature of the process BLM engaged in,
11 there were a lot of cooperating agencies. BLM initially set out
12 to make this a multi-agency effort. The problem was that the
13 mitigation plan they developed was insufficient, and the other
14 agencies recognized this. BLM simply refused to accept these
15 conclusions, perform any analysis to address these concerns, and
16 just charged ahead with the project.

17 Some of the comments the other agencies made, for
18 example, the Fish and Wildlife Service, said it was a plan
19 described in the development of the plan that effective
20 mitigation would not be possible; that even with the plan, the
21 project could still doom the Dixie Valley toad, which is the
22 endemic species that comes from the springs.

23 **THE COURT:** Which agency made that?

24 **MR. LAKE:** The U.S. Fish and Wildlife Service, Your
25 Honor.

1 **THE COURT:** Okay.

2 **MR. LAKE:** The same agency also submitted detailed
3 criticisms of Ormat's hydrogeologic conceptual model, which was
4 discussed extensively in defendant's briefing, which Ormat
5 considers the foundation of its mitigation plan.

6 And while technical disagreements themselves do not,
7 per se, create a NEPA violation, the strong disagreement with
8 Ormat as well as the similar critiques from other agencies and
9 plaintiff's geological experts demonstrates controversy as to the
10 nature and extent of the project's impacts, scientific
11 controversy, not simple public political controversy and calls
12 for the preparation of an EIS.

13 Other similar comments includes from the Nevada
14 Department of Wildlife that mitigation, quote, may not be
15 acceptable and may not be suitable and a recommendation that BLM
16 prepare an EIS. Even the Navy referred to the mitigation plan as
17 inadequate and incomplete.

18 And these comments were made on substantially the
19 same version of the plan that was released for public comment in
20 2021. And the record in this case is going to reflect that there
21 were very few modifications made to the plan itself. And by "the
22 plan itself," I mean the actions that will be taken under the
23 plan, the agency's understanding of the environment, not the
24 organizational plan --

25 **THE COURT:** If I can a little further, my general

1 understanding of your objection is -- the core of the dispute is
2 that the mitigation plan just simply requires further monitoring
3 and study in the future and doesn't identify, really, the
4 impacts. It just says, We will study those further, and we'll
5 stop the project if and when the impacts are significant.

6 That's the general core of your argument that the
7 mitigation plan is not sufficient to support a finding of -- of
8 insignificant impact?

9 **MR. LAKE:** That is correct, Your Honor.

10 **THE COURT:** Okay. Go ahead.

11 **MR. LAKE:** That's correct. It -- it represents a
12 leap-before-looking approach, which is inconsistent with NEPA.

13 I'll use the Dixie toad as an example, though it's
14 not the only one. There's just a lack of data. In order to
15 understand a project's impacts, you have to know what the project
16 is impacting. Here neither the mitigation plan or the EA really
17 demonstrate that understanding. The EA says, for example, little
18 is known about --

19 *(Whereupon, the reporter interrupts to preserve the*
20 *record.)*

21 **MR. LAKE:** Sure. All right. Got little carried away
22 there.

23 Little is known regarding the disbursal and
24 nonbreeding behavior of the Dixie Valley toad. That means we
25 don't know how the toad behaves, what its range is, how it uses

1 the environment that's going to be affected. Overall population
2 numbers are also unknown. And for the mitigation plan, we learn
3 that there is a, quote, paucity of information regarding habitat
4 preference data on the toad; that appropriate monitoring metrics
5 for the toad don't exist; that BLM is yet to quantify the amount
6 of available habitat, both the aquatic habitat and the
7 terrestrial habitat; that, quote, parameters and habitat quality
8 indices -- and these are things that are going to determine when
9 mitigation occurs -- have not been defined and will be defined at
10 a later date.

11 Similarly, thermal preferences and tolerances -- and
12 this is if the water gets too hot, too cold -- this hasn't been
13 defined, either.

14 **THE COURT:** In connection with that determination,
15 give me the background for -- on the petition to have a
16 declaration relative to the toad.

17 Where does that stand, where is it pending, and when
18 do you expect a determination? And what was the early
19 negotiation regarding that determination?

20 **MR. LAKE:** Just to clarify, Your Honor, are you
21 referring to the Fish and Wildlife Service's determination
22 regarding the ESA listing?

23 **THE COURT:** Correct.

24 **MR. LAKE:** That -- so the petition was submitted in
25 2017. The primary basis for that petition were the potential

1 impacts on the project. Fish and Wildlife Service's inquired and
2 made what's called a 90-day determination -- or within 90 days.
3 And in this case, we found that they made what's called a
4 positive determination finding that the petition supported
5 listing based largely on the project's impacts and also on the
6 impacts that the project could have on water temperature, which
7 had implications for disease.

8 This hasn't been briefed, but essentially lowering
9 the water temperature can make the toad more vulnerable to a very
10 destructive disease that's been found in the area that affects
11 amphibians. Fish and Wildlife Service is required to make a
12 12-month finding after a year of the petition, which would have
13 been a determination of whether the toad was warranted for
14 listing or not. The agency hasn't done that.

15 And unfortunately, I can't really discuss the details
16 of that because that -- those -- that is being addressed in a
17 different litigation, and it's in settlement discussions, so
18 those discussions are confidential.

19 **THE COURT:** But you do need to tell me where it
20 stands in the process.

21 **MR. LAKE:** In the process, it stands at the 90-day
22 determination. So we are awaiting a final determination on
23 whether the listing is warranted. It's in the work plan for the
24 agency for, I think, 2022 is when that -- they plan to make that
25 determination.

1 **THE COURT:** Sometime near the beginning or in the
2 middle or after 2022?

3 **MR. LAKE:** Unclear. Again, this is something that's
4 being discussed. Sorry. My -- my client is informing me that
5 this is -- that we do know it will be in September 30th, the end
6 of fiscal year.

7 **THE COURT:** Okay. Did you say beyond or within?

8 **MR. LAKE:** Within.

9 **THE COURT:** Okay.

10 **MR. LAKE:** Within the -- so on or before September
11 30th, 2022.

12 **THE COURT:** Okay.

13 **MR. LAKE:** So to return to the mitigation plan and
14 the inadequacies there, on that last point about defining, you
15 know, when does the water get too hot, when does the water get
16 too cold, one of the revisions BLM did make to the plan between
17 the draft and the final was that they completely eliminated those
18 thresholds. So, you know, they got comments from other agencies
19 saying the threshold they had were arbitrary, not supported by
20 data.

21 Their response to this wasn't to collect the data or
22 to create rational thresholds but to simply change their position
23 to we don't know. I mean, that might be more -- more of an
24 honest position for the agency, but we don't know is not a
25 sufficient basis for a finding of no significant impact.

1 There's also a lack of data on the mechanisms that
2 the mitigation plan will use to mitigate impacts and whether
3 these are going to be effective. I already mentioned the problem
4 with developing these critical thresholds and trigger values
5 after the fact, after the project has already been approved and
6 not by a date certain.

7 Other problems are apparent when you look at the
8 mitigation measures themselves. And for the Court's reference,
9 these began on page 34 of the final plan. It's page 40 of the
10 PDF document.

11 Now, what you'll find beginning on page 34 is a list
12 of potential mitigation actions arranged in no particular order
13 with no specification of what impacts these particular measures
14 are designed to mitigate, just simply a list of things that Ormat
15 and BLM might do in the future upon the occurrence of some
16 undefined event on an indefinite timeline. You'll also see that
17 there's no analysis on whether these mitigation measures will be
18 effective, which is necessary when the agency does what's called
19 a mitigative bond.

20 One of the leading mitigation measures, for example,
21 is piping and replacement water. So Ormat's going to bring in
22 hot water from somewhere else to presumably maintain the
23 temperature of the springs, but there's no analysis or discussion
24 in the AEA or the mitigation plan where this water is going to
25 come from, how this water is going to successfully recreate the

1 habitat condition, which depend on water chemistry. It could be
2 -- because BLM hasn't done the studies, we don't exactly know,
3 but could be very particular. The BLM simply assumes it's going
4 to work.

5 The same problem occurs with BLM's second leading
6 mitigation measure of changing the location of pumping or
7 injection. And one problem with this is that it's really only
8 one side of the equation. It's injection. The plan states that
9 changing the location of pumping is low feasibility, meaning it's
10 very unlikely to happen.

11 And second, there's no analysis of how it's actually
12 going to work. Some questions that you could ask are where are
13 the pumping and injection locations?

14 We don't know.

15 What are the rates of pumping and injection in these
16 particular locations, and how is it going to alter the pressure
17 in the system that produces spring discharge?

18 We don't know.

19 How will Ormat's mitigation measure change the
20 pressure in the system?

21 And we don't know. It's not explained. We don't
22 really even know that much about the hydrology of the area.
23 Ormat provided a conceptual model that repeatedly refers to
24 east-northeast trending faults, but that represents Ormat's
25 theory of how water comes to the surface. Doesn't really reveal

1 any understanding of how the subsurface geothermal reservoir
2 actually functions.

3 Now, Ormat's Jersey Valley project that you
4 mentioned, Your Honor, is an excellent illustration of this.
5 Through this briefing, we learned that at the Jersey Valley
6 project, Ormat encountered what appears to be a abandoned or
7 phantom mine shaft that interfered with their geothermal
8 extraction. And this demonstrates that in these geothermal
9 projects, a lot of the time, the company just doesn't know what's
10 down there. There are surprises. It's unpredictable. There's
11 an inherent uncertainty. And the inherit uncertainty hasn't been
12 addressed in either the EA or the mitigation plan.

13 Before moving on, I'd like to say a few things about
14 Ormat's claim that the ARMMP provides a rapid response. And AN
15 examination of the document shows that isn't true. And I'm going
16 to refer to table 17 of the document, which is after the main
17 text. And I'm going to, for the Court's reference, simply try to
18 find the relevant page number there. Bear with me.

19 That's beginning on PDF page 78. Three codes define
20 the responses -- Code A, Code B, Code C. Only Code B and Code C
21 actually require a response. Code A is the discussion. And Code
22 B and C are really only available in some circumstances and only
23 after impacts have been observed, not after impacts occur, after
24 impacts have been observed for two or three consecutive weeks.
25 Now, this doesn't seem like a rapid response. This means a

1 response that could take up to a month, even under the most
2 optimistic scenarios.

3 So to summarize, the general lack of baseline data,
4 the uncertainty and discretionary nature of these mitigation
5 measures, and the fact that BLM is simply asserting this will be
6 effective without providing any analysis showing that renders
7 this EA and its mitigation plan arbitrary and capricious.

8 Now, defendants point out that NEPA doesn't require a
9 particular environmental outcome. And that's true. But NEPA
10 require -- does require a particular process. In this case,
11 where the significant impacts aren't shown to be mitigated, it
12 requires the preparation of an EIS, a more detailed study. BLM
13 refused to do that here, and that's why BLM violated NEPA.

14 If the Court has no further questions, I'll move on
15 to the balance of the equities.

16 **THE COURT:** Yes, please.

17 **MR. LAKE:** Both the center and the tribe will suffer
18 irreparable harm. And I haven't had the opportunity to discuss
19 the irreparable harm that the center will suffer, but it's -- a
20 lot of the same facts the tribe is citing relate to the center's
21 irreparable harm, namely, the disturbance of site, the transition
22 from a pristine site that's characterized by the natural
23 environment to a site that's characterized by industry
24 development.

25 In this case, the center's Nevada Director, Patrick

1 Donnelly, who is in the hearing with us today, goes to the site
2 to observe wildlife, take photographs, seek solitude, enjoy the
3 undisturbed nature of the site. And instead of this tranquil
4 environment that Mr. Donnelly currently enjoys, you'll have,
5 after January 6th, heavy equipment noise, light, disturbance,
6 major industrial infrastructure. It's going to forever change
7 the character of the site and make it unsuitable for the purposes
8 that Mr. Donnelly uses it for.

9 And under the Ninth Circuit's *Alliance for The Wild*
10 *Rockies* precedent, "Where a proposed action will harm a plaintiff
11 group's member's ability to view, experience, or utilize an area
12 in its undisturbed state, they suffer irreparable harm."

13 Construction may also disturb Dixie toad -- Dixie
14 Valley toad habitat and kill individual toads. And I have to say
15 "may" here, again, due to the inadequacies in the EA, because
16 because of BLM's inadequate review, we don't -- didn't know where
17 the power plant would actually be until the TRO was filed. It
18 wasn't disclosed during the administrative process. There were
19 potential locations but not any specific location.

20 Ormat only disclosed location of this during
21 litigation, and also BLM, as I mentioned before, doesn't really
22 know what the toad's habitat is, so we can't really say what's
23 going to happen. But there is a substantial risk that there will
24 be impacts to the toad from the construction taking place so
25 close to the toad's aquatic habitat.

1 Ormat is straightforward about its plan. It's going
2 to build a power plant right next to the wetland on a highly
3 expedited schedule. Once the infrastructure is installed, it
4 will be impossible to remove it. Against this irreparable
5 environmental harm, defendants really have two arguments. One
6 involves delay, and the other involves economic harm to Ormat.
7 And I'll address those in order.

8 Federal defendants focus on this general nationwide
9 demand for renewable energy, but they can't show there's an
10 immediate need for energy from this particular project. There
11 are already numerous renewable energy facilities across the west
12 that I'm sure Your Honor's familiar with, including 22 projects
13 on federal lands currently operated by Ormat that are currently
14 fulfilling the demand for renewable energy, and the list is only
15 growing.

16 Most of these other projects, maybe all of these
17 other projects -- I can't say because it's not in the record for
18 this case -- are not threatening the destruction of the tribal
19 sacred site and extinction of the entire species. Federal
20 defendants also misconstrue the impact of an injunction on this
21 demand for renewable energy. A temporary delay in the project
22 while the case proceeds doesn't prevent it from coming online
23 later should plaintiffs' claims not prove meritorious. The
24 project -- if -- if the federal defendants are correct, the
25 project can still produce renewable energy.

1 It -- the demand simply won't vanish because the
2 Court issues an injunction in this particular case. They can
3 only really point to delay, which is an insignificant harm
4 against plaintiffs' irreparable injuries.

5 **THE COURT:** Yeah. But they have contract
6 obligations. They'll incur penalties. The delay itself will
7 cost substantial moneys.

8 What's your impression of that and whether a bond
9 should be required?

10 **MR. LAKE:** Well, Your Honor, I was just about to get
11 to that, Ormat's economic losses. Ormat claims it will lose
12 revenue based on its current contract, which allows it to sell
13 power at about 25 percent above the market rate. First of all,
14 courts in the Ninth Circuit and across the country have
15 consistently held that economic losses are not irreparable except
16 in rare circumstances such as where they were threatening the
17 existence of a company's business, and that's not the case here.

18 Ormat, by its own admission to help its reputation,
19 is a highly successful international energy developer. This is
20 one of its many projects. It claims, again, to operate 22 other
21 projects on federal public lands. It also claims to have a 1.1
22 gigawatts of generating capacity.

23 If an injunction is issued, Ormat will continue to
24 generate power from these other projects and continue to generate
25 revenue. For a large successful company like Ormat, the costs of

1 delay aren't irreparable.

2 Ormat's harms are also speculative. They're based on
3 the assumption that in the future, Ormat will lose the favorable
4 terms of its contract and have to renegotiate another. We don't
5 know what the terms of that contract would be. We don't know
6 what the market rate for energy will be at that time. We don't
7 know what market they'll even be selling to.

8 There are basically assumptions that this future
9 contract will be less favorable, but Ormat can't prove that. You
10 know, federal defendants and Ormat say that we're -- our harms
11 are speculative, but in -- in our case, they're going to be
12 building a power plant directly on the site starting this week.

13 Ormat is complaining of a loss that may occur in the
14 future after extensive negotiations and in market conditions that
15 are constantly changing.

16 **THE COURT:** No. They're also complaining about the
17 cost of delay.

18 **MR. LAKE:** Again, Your Honor, that is economic harm.
19 Well, it is indeed harm. The question here is the balance of the
20 equities. And the -- the irreparable nature of the harm that
21 plaintiffs will suffer against the cost of delay, which are
22 inherent in any project on -- cited on federal land due to public
23 interests considerations simply don't stack up, and the Ninth
24 Circuit has -- has established this time and time again.

25 **THE COURT:** When I'm assessing relative harm, when

1 could we anticipate the winding up of this case, in other words,
2 final summary judgment motions and maybe not trial that would
3 give an early response if I should grant a TRO or preliminary
4 injunction?

5 **MR. LAKE:** Well, Your Honor, plaintiffs have made
6 every effort to expedite this case, and we've -- we've been
7 pushing for an expedited briefing schedule. We believe that a
8 temporary injunction lasting six months would give sufficient
9 time to brief and resolve this case.

10 **THE COURT:** Okay.

11 **MR. LAKE:** I'd also like to address Ormat's
12 contention about a lengthy administrative process. Ormat first
13 cites exploration decisions, which are different decisions.
14 Plaintiffs are challenging the harm that results from this
15 project, the project to develop power plants at the Dixie Meadows
16 site.

17 At the time when -- when exploration happened, there
18 was no certainty that there would actually be development. Ormat
19 was just out there looking around. The situation was
20 fundamentally different back then and explains why plaintiffs are
21 approaching this project differently.

22 Further, Ormat's claims ring false because they've
23 been aware of the problems with this project for a long time.
24 They knew they were going to build on a tribal sacred site. The
25 tribe informed them of this several times. They also knew that

1 they were narrowing down an endemic species site completely
2 dependent on spring flow.

3 They knew about Jersey Valley project. They've known
4 since 2017 the toad was petitioned for ESA listing, and they've
5 known since that same year that Fish and Wildlife Service made a
6 positive 90-day finding on the toad.

7 These roadblocks were no surprise to Ormat, but
8 instead of seeking to resolve the conflicts, say, by developing
9 another lease or moving the facilities, they pressed forward.
10 Even when plaintiff sought a brief pause in -- as part of this
11 litigation to allow decision on the merits, Ormat refused. For
12 all these reasons, Ormat's monetary harm are not irreparable and
13 certainly does not outweigh the irreparable harm plaintiffs have
14 shown. Importantly, nothing here prevents Ormat from selling
15 power. It's just they just won't be able to sell power from this
16 particular project during the course of this litigation.

17 **THE COURT:** And if I should impose a bond requirement
18 of, say, a million dollars -- just pulling that figure out of the
19 air -- is that possible to post?

20 **MR. LAKE:** Your Honor, I -- we believe that would be
21 not practicable for plaintiffs and amount to a constructive
22 denial.

23 This case is fundamentally different from a case
24 where you have private interests pitted against each other.
25 Plaintiffs are seeking to enforce public rights, public rights

1 that Congress established through statutes like the APA and NEPA.
2 In such cases, the Ninth Circuit has held that waiving a bond or
3 imposing a nominal bond is generally appropriate consistent with
4 Congressional policy, public enforcement, and this is both for
5 practical reasons and policy reasons.

6 An imposition of a prohibitively expensive bond in a
7 public interest case would show enforcement of public rights.
8 When federal government agencies break the law, the public would
9 lack recourse.

10 **THE COURT:** That's my question, really, is what --
11 what constitutes a prohibitively expensive bond.

12 **MR. LAKE:** Your Honor, I can't speak to those issues.
13 I was not able to confer with my client on that, on the specific
14 monetary figures due to the holiday -- holiday break when this
15 occurred. If the Court does require that information, we can
16 brief that.

17 We contend, however, that a no -- no bond or a
18 nominal bond would be consistent with both the case law and the
19 interest in this case as well as the fact that the plaintiffs
20 have shown likely success on the merits, which argues in favor of
21 a nominal bond.

22 I'd also like to point out that, you know, there are
23 important purposes behind that nominal bond requirement, Rule 65,
24 to inform -- afford the enjoined party protection against an
25 erroneously granted injunctions or to deter frivolous motions.

1 Those goals are adequately met in this case by both
2 the high bar set for preliminary injunction under the *Winter*
3 standard and also the deferential standard or view on the merits
4 that plaintiffs face in public interest litigation against the
5 government.

6 If this Court concludes that under the standard that
7 plaintiffs have suffered irreparable harm and are likely to
8 succeed on the merits, it will be highly unlikely that the
9 injunction will be found to be improperly granted. And this is
10 bolstered here by the fact that Ormat's monetary harms are
11 largely speculative and certainly unquantified. And despite
12 Ormat's claims, the company is going to continue generating
13 revenue despite injunction. There's no allegation here that
14 Ormat itself will be rendered unprofitable or insolvent by this
15 case.

16 Some -- in other cases where a bond has been found
17 warranted, similar cases like this, it's generally in the
18 thousands, in the four figures.

19 **THE COURT:** Thank you.

20 Are you finished?

21 **MR. LAKE:** That is the end of my presentation. I'd
22 be happy to answer any questions the Court has.

23 **THE COURT:** Thank you so much.

24 Defendants, please. I assume, first, BLM and then
25 Ormat?

1 **MS. AIMUFUA:** Yes, Your Honor. Good morning, Your
2 Honor. May it please the Court. My name, again, is Esosa
3 Aimufua, and I will be representing the federal defendants, the
4 Department of Interior and the Bureau for Land Management, which
5 all parties just call BLM.

6 Concerning plaintiffs' motion for the TRO or the
7 preliminary injunction, defendants oppose this motion, and we ask
8 the Court to direct parties to confer regarding a schedule to
9 resolving the case based on its merits.

10 Your Honor, this case is about a project located
11 inside the Dixie Meadow's geothermal unit, federal public land.
12 The geographic area of this particular project is not located or
13 near any prime farmlands. It's not located on the Dixie Meadows'
14 hot springs. It's not located on any spiritual land or any
15 archaeologically important sites or scenic rivers. And this is
16 apparent in the final EA, pages 3-126 to 3-128.

17 This is simply not a case where an agency just
18 quickly rubber-stamps a project and moves on to the next one.
19 This approval of the project was a well thought out and very
20 lengthy period -- done over a very lengthy period, more than
21 seven years and counting, of tribal consultations, public
22 commenting, research, different analysis, even redesigning of the
23 project, and much more. BLM recognized the significance of the
24 tribe's view and the area of importance.

25 As a result, BLM -- in addition to the environmental

1 assessments conducted, BLM put key protections in place to ensure
2 that the project had minimal potential impacts or to offset those
3 impacts if they do ever happen. So the protection plan in this
4 case is the aquatic resource monetary and mitigation plan, which
5 is acronymed ARMMP, or I just call it the mitigation plan. It's
6 easier.

7 The mitigation plan is basically a tool that BLM used
8 to reach its finding of no significant impact, the FONSI, and I
9 will explain that further as I go through the argument.

10 Here, plaintiffs simply have not met the standard
11 granted under TRO or a preliminary injunction. Based on the
12 allegations that defendants violated NEPA, RFRA, the Religious
13 Freedom Restoration Act, or the American Indian Religious Freedom
14 Act, AIRFA. So many acronyms. And basically, they don't -- they
15 didn't meet the preliminary injunctive standard.

16 First, they haven't shown substantial questions going
17 to the merits of their claim and the likelihood of -- likelihood
18 of success. Second, they haven't shown that the preliminary
19 injunctive relief is necessary to prevent any irreparable harm
20 that would occur before this case can resolve on its merits.
21 Third, the balance of harms and public interest weigh against the
22 PI relief in this case.

23 To the first issue, plaintiffs are not entitled to a
24 PI relief because they have not demonstrated a likelihood of
25 success on the merits of their case. Plaintiffs claim that BLM

1 violated NEPA by issuing a finding of no significant impact, the
2 FONSI, based on its reliance on the mitigation plan. Plaintiffs
3 further state on page 2 of their reply brief that the FONSI is
4 wrong because the approval of the project would damage a
5 documented sacred site. However, plaintiffs fail to mention that
6 the -- the tribe together with BLM recorded the site boundary on
7 September 28th, 2010, and again on April 10th in 2015. And this
8 is in the -- Mr. Jason Wright's declaration at paragraph 10.

9 Plaintiffs misconstrue the facts because the project
10 would not physically impact the sacred site, as I mentioned
11 earlier. BLM rationally relied upon the mitigation plan in
12 making its FONSI and approving the project.

13 First, Your Honor, the mitigation plan is a tool used
14 by BLM to reach a FONSI. It lays out three steps, the first, a
15 collection of baseline data to further understand the baseline
16 variations; second, there's an early warning threshold which
17 looks -- looks at things like water level, water temperature,
18 chemical compositions; and third, if any of these thresholds are
19 ever met, the mitigation measures in place as approved by BLM's
20 expert would not allow the project to -- to proceed.

21 So some of the mitigation measures include having --
22 modifying the pumping, replacing water supplies, stopping pumping
23 altogether until Ormat can meet -- can resolve the -- the issue
24 or the project.

25 And just to remind the Court of the Ninth Circuit law

1 on -- on this, NEPA is a procedural statute. It does not mandate
2 particular results but simply prescribes the necessary process.
3 And like other agency actions reviewed under the APA, a
4 deferential standard review applies to BLM's FONSI here. And the
5 decision may be overturned only if it's found to be arbitrary,
6 capricious, and is an abuse of discretion.

7 As mentioned in the defendants' brief, the merit
8 question before the Court is whether BLM's conclusion in the
9 FONSI was a rational one, which defendants say it is. In
10 plaintiffs' reply brief on page 2, plaintiffs cites the *National*
11 *Parks* case and assert that the key questions for the Court
12 regarding the mitigative FONSI are whether defendants' proposed
13 mitigation measures constitutes an adequate buffer against the
14 negative impacts and whether mitigation measures will render such
15 impacts so minor as to warrant -- not warrant an EIS.

16 It also cites to the *National Parks* saying that in
17 order for an agency to prevail for -- under this standard, the
18 mitigation measures must be developed to a reasonable degree.
19 That is exactly what BLM did here.

20 Here, BLM -- developed the mitigation measures in --
21 in the mitigation plan to a reasonable degree. The case is more
22 like the *EPIC* case, the *Environmental Protection Information*
23 *Center* case that is cited on page 15 of defendants' brief,
24 because in this case, the Court -- in the *EPIC* case, the Court
25 upheld the agency's FONSI where the environmental assessment had

1 contained specific and detailed information, a cross-referenced
2 detailed best management practices, and incorporated concurrent
3 monitoring and implementation of those practices.

4 Here, before reaching its FONSI -- and this is on
5 page 1-14 on the final EA, the BLM thoroughly analyzed the
6 potential environmental impacts of both the exploration and the
7 development of the Dixie Valley unit area.

8 BLM also conducted and published three rigorous
9 environmental assessments, the preliminary one in 2017, the
10 revised draft in January 2021, and the final one in August 2021.
11 The --

12 **THE COURT:** Do those environmental assessments --
13 discuss the potential impact of pulling out the heat and
14 reinjecting cooler water?

15 **MS. AIMUFUA:** I believe it does go into -- it does
16 talk about that. But the mitigation plan also finds a way to
17 mitigate this type of situation if it ever happens.

18 So, for example, I know Ormat -- Ormat did a 46-day
19 test on the -- the effects of the -- the impacts on the springs,
20 and it -- the results came out that there was no (indiscernible).
21 So basically --

22 *(Whereupon, the reporter interrupts to preserve the*
23 *record.)*

24 **THE COURT:** Yeah. It was cutting out a little bit.
25 Would you repeat the last statement.

1 **MS. AIMUFUA:** Oh, okay, okay. I know that Ormat --
2 Ormat had a 46-day test period where it basically looked at the
3 springs -- the impacts that the project might have on the
4 springs. And based on that, they found no impacts. But BLM,
5 doing its homework in ensuring that there are no future impacts
6 that might occur, we created -- BLM created the mitigation plan
7 to ensure that, you know, when -- as the project -- as the
8 project continues, then any impacts that might be found
9 connecting to the spring might be found and reported, and the
10 project cannot continue until that -- that is resolved.

11 And this -- like the -- the environmental
12 assessments, the -- the mitigation plans were all open for public
13 commenting, and based on the public commenting, BLM took that
14 into consideration and created the final draft. So they
15 basically redid the project and moved some of the -- the plans to
16 a different area.

17 The mitigation plant basically -- plan basically
18 detailed a continuous monitoring and data collection to support
19 the threshold modicate -- modification for the life of the -- of
20 the project. This is all in the environment -- the final
21 environmental assessment and the -- the mitigation plan, pages 11
22 to 28, and also in the Jason -- Jake Vialpando declaration,
23 paragraph 15.

24 I would also like to emphasize that in the
25 environmental assessment, the agency actually collected data, and

1 this is generally, like I mentioned, in the environmental
2 assessment and based that -- based it to ensure that there isn't
3 going to be any significant impact.

4 So plaintiffs' reply brief says that the mitigation
5 plan is a plan to meet -- to -- basically, to make a plan, and BL
6 -- and that BLM did not bother to get them before -- get the
7 information before the fact. But this is a mischaracterization
8 of the facts, because BLM -- BLM has sufficient information to be
9 able to describe the affected environments and determined that
10 this wouldn't be significant impacts.

11 But the mitigation plan goes further. BLM is
12 requiring additional information to be gathered so that it can
13 have the best chance of mitigating any type of potential impact
14 or seeing what those impacts might be before they become
15 unfixable. These are like -- this project is not -- it's a
16 natural system, so we only know what we know, and the plan
17 requires BLM to continuously gather information and respond
18 accordingly. We're only at the first stage, and like the --
19 Mr. Sapp's declaration says, the agency can gather the
20 administrative record in 60 days. And this is a record that's
21 really big. It's going on for over seven years, and the agency's
22 willing to put this administrative record together and -- so
23 parties can brief the case on its merits, and it can be resolved
24 without the preliminary injunction or temporary restraining
25 order.

1 Also, Your Honor, there -- there is no requirement to
2 mitigate projects to zero impacts, like for the impacts to
3 completely be at zero. And this is apparent in the *Wetlands*
4 *Action Network* case. They don't need to completely compensate
5 adverse environmental impacts. This is in the C -- CQ guidelines
6 which stipulate that agencies may take projects related to
7 mitigation measures into account. And -- and also, there's a
8 complete mitigation plan here detailing the precise nature of the
9 mitigation measures, and this is all -- this is in the case, the
10 *Wetlands* case.

11 And also, in the -- another Ninth Circuit case, the
12 *Am. Wild Horse Campaign* case, the Court discusses NEPA principles
13 that are -- the NEPA principle that a lack of perfect data is not
14 necessarily required. Based on the law, the BLM -- that BLM
15 complied with NEPA, and it did not violate it. Hence, plaintiffs
16 have not met their burden to show that the allied people would
17 have shown the merits of its claim.

18 **THE COURT:** Thank you so much.

19 **MS. AIMUFUA:** And, Your Honor, I also want to
20 emphasize that this area is not -- is not undisturbed. There is
21 already --

22 *(Whereupon, the reporter interrupts to preserve the*
23 *record.)*

24 **THE COURT:** Ms. Aimufua, would you speak again,
25 ma'am, so we can see if we can hear you.

1 **MS. AIMUFUA:** Oh, I said I want to be able to give
2 the Court some extra information on the fact that the lands that
3 plaintiffs discuss is not undisturbed. There are roads, wells,
4 transmission lines already on site presently, and this is -- you
5 can see this based on the map attached to the Vialpando
6 declaration.

7 And just moving on to the plaintiff -- to the other
8 argument where plaintiff is alleging it can win on the merits
9 based on a premise that BLM violated RFRA. Defendants did not
10 violate RFRA. In fact, federal defendants certainly do not
11 question or second guess the sincerity or the extent of the
12 tribe's religious practices. However, plaintiffs are unlikely to
13 show, based on the preliminary injunctive relief standard that
14 BLM's approval of the project substantially burdens those
15 practices and beliefs.

16 For one, plaintiffs' allege -- allegations do not
17 suggest that BLM's approval of the project forces them to choose
18 between following the tenets of their religion or -- and refusing
19 the governmental benefit. And that's in the Navaho Nation case,
20 the Ninth Circuit case. The tribe is not barred from entering
21 and using the Dixie Meadows hot spring area for their religious
22 practices. BLM has not forced plaintiffs to act contrary to the
23 religious beliefs, and the tribes do not argue that it would face
24 civil or criminal sanctions or prosecution based on this.

25 Moreover, BLM took -- took extra steps here to ensure

1 that the project wouldn't overburdenly -- wouldn't overly burden
2 the tribes. For example, BLM redesigned the project to avoid
3 unnecessary interferences with the tribal religious practices, as
4 evidenced in Mr. Wright's declaration, in the EA, and the
5 decision record.

6 Also, Your Honor, the plant, as I mentioned before,
7 the specific plant is outside the geographic area defined by the
8 tribe as -- defined by the tribe. So the plant, although maybe
9 some auditory or visual burden may occur, it does not have a
10 physical one. BLM understands that these are strongly held
11 religious beliefs, and the obligation is to consult, is to
12 listen, and is to take -- take into account the tribe's views.
13 And BLM did that. And not only -- not only did BLM require an
14 adoption of the mitigation plan, it -- it did what it was
15 supposed to do in this situation. It took consideration of the
16 tribe's -- it took consideration of the tribe's views, and the
17 only thing that the -- that BLM did not do is it didn't deny the
18 project.

19 And moving on to the -- the AIRFA argument, BLM
20 complied with the spirit of the other policy documents, which
21 plaintiffs cite the executive orders and the joint secretarial
22 orders. But plaintiffs' reliance on this policy is insufficient
23 for another reason. Some of the -- some of those documents
24 explicitly state that it does not create any binding law or
25 enforceable rights or any type of obligation.

1 In section 4 of the executive -- 5 of the federal
2 agency memorandum, actually -- and I'm quoting, does not create
3 any right or benefit substituting (indiscernible) by law by any
4 party against --

5 *(Whereupon, the reporter interrupts to preserve the*
6 *record.)*

7 **MS. AIMUFUA:** Moving on to the irreparable harm,
8 plaintiffs have not demonstrated that irreparable harm would
9 occur before this case can be resolved on the merits. Plaintiffs
10 assert that they will suffer irreparable harm to their interest
11 if construction commences. However, plaintiffs misunderstand the
12 facts.

13 The analysis conducted in the environmental
14 assessment and the FONSI indicate that potential effects of the
15 hot springs and the Dixie Valley toad may occur when the project
16 actually becomes operational, basically, when full production
17 begins. And this does not happen for a minimum of 12 months.
18 Essentially, this project does not become operational until
19 January 2023.

20 As a matter of fact, the Dixie Meadows area where the
21 project will be placed is not some -- like I mentioned before,
22 some undisturbed area, as plaintiffs make it up to be. The maps
23 attached to the declarations, Exhibit 1, show that there are
24 roads, fencing, power lines, existing wells, some testing wells,
25 exploration sites, and the infrastructures already exist all

1 around the complexes in the whole area the tribe speaks of. So
2 it's not going to be an undisturbed, untouched area that is --
3 that is going to be completely bulldozed, contrary to what
4 plaintiffs state.

5 Moreover, the site, as defined by the tribe and
6 formerly reported by BLM, will not physically be occupied by the
7 proposed power plant. The only -- the only area that plaintiffs
8 do not have access to is the actual plant, which is also in the
9 environmental assessment and also in the decision record, because
10 the plant is a private facility. But throughout the whole area,
11 plaintiffs have complete access to it.

12 And just to also mention, Your Honor, there's nothing
13 in the record that indicates that the toads will be found in the
14 construction site. And even if they are, in the environmental
15 assessment and in the mitigation plan, there are procedures in
16 place for an expert to relocate those -- the Dixie Valley toad to
17 out of the construction area.

18 So there isn't any -- there isn't imminent harm
19 through this case, and basically, this case can be resolved in
20 six months before operation even begins, based on the 60-day
21 compilation of the administrative record.

22 Lastly, the -- the public interest and balance of
23 equities that disfavor an injunction in this case, there is a
24 strong interest that BLM has in this project, and it would not
25 only help western -- western states across the United States,

1 which there are mid- and long-term regional renewable energy
2 needs, but it would provide renewable energy sources of
3 electricity for the public, which in turn reduces climate --
4 climate impacts in the region by moving away from fossil fuels.

5 As you may know, they -- there are -- has been
6 extreme weather events to the West Coast and across the United
7 States, so projects like this help combat climate change and are
8 -- they are very consistent with Congressional and executive
9 government policies supporting clean -- cleaner energy.

10 Something I also wanted to mention, I know Your Honor
11 asked this question awhile back, but concerning the Jersey
12 Valley, the Jersey Valley is actually 40 miles north of the Dixie
13 Valley. And in that case, the -- the topography and the -- the
14 region is completely different from this Dixie Meadows case. And
15 also, in the *Jersey Valley* case, there wasn't a mitigation plan
16 in place.

17 As I mentioned, the mitigation plan is basically the
18 continuous watching, so continuous observing of the project, and
19 anytime it doesn't meet that threshold, the project is either
20 stopped, or there's some type of procedure in place for the
21 project to comply before it can move forward.

22 For these reasons, Your Honor, plaintiffs have not
23 shown that there would -- that they would win on the -- they're
24 likely to win on the merits in the case. They haven't shown
25 imminent and irreparable harm. And third, there is a public

1 interest here that the government has. And basically, those are
2 the three main prongs that you have to meet in order to be
3 granted a preliminary injunction, and plaintiffs have not met
4 that here. So for those reasons, the motion -- plaintiffs'
5 motion should be -- should be denied.

6 And if Your Honor doesn't have any further questions,
7 I will end it there.

8 **THE COURT:** Okay. Thank you.

9 Ormat.

10 **MS. REIMER:** Thank you, Your Honor. May it please
11 the Court. My name is Dessa Reimer. I'm here on behalf of Ormat
12 Nevada. Appreciate the Court's time today.

13 I wanted to first address your question about whether
14 you should decide the TRO versus the preliminary injunction. As
15 Your Honor knows, the standard for both is the same. You'll be
16 considering the same factors.

17 From Ormat's perspective, I believe that we would
18 prefer that the preliminary injunction -- that Your Honor make a
19 decision on that as expeditiously -- as expeditiously as possible
20 so that we could move on to the appellate stage of this case if
21 that's where we're headed. I don't know that additional factual
22 development would be useful given the extent of the declarations
23 here, but if Your Honor decides you need additional factual
24 development, obviously, we're prepared to come back to you with
25 -- on a hearing for preliminary injunction.

1 There are three key takeaways from the record, Your
2 Honor, that we'd like you to understand, and the first is that
3 this is not a case where BLM took shortcuts or rushed to a
4 decision. And I think you heard that a couple of times today.
5 This project was authorized after six years of environmental
6 study and consultation with the tribes. That's just since 2015,
7 when Ormat proposed the utilization project. And it's resulted
8 in the most comprehensive aquatic resource monitoring and
9 mitigation plan that Ormat has ever committed to or implemented.

10 Secondly -- ultimately, the plaintiffs' case comes
11 down to their disagreement with BLM's decision. It's not
12 necessarily about BLM's decision-making process itself. There's
13 just no case in which the plaintiffs would really bless this
14 project. BLM and Ormat have worked together for years in an
15 attempt to meet the tribe's needs, to hear their -- their
16 complaints. And short of cancelling the power project, they've
17 done everything they can, including moving the power line to the
18 west from its initial alignment along the existing power line
19 that runs through the valley, moving it west so that it would not
20 be in the view of -- of Fox Peak from the spring, moving the
21 power plant to the south as far away as it could, and now the
22 plaintiffs in their reply brief for the first time ask for more
23 and say that the power plant is actually located in the sacred
24 site. It's clear that sending it back to BLM for more
25 consultation with the tribe is not going to resolve plaintiffs'

1 opposition here.

2 Third, plaintiffs' alleged harm to the springs, Your
3 Honor, in Dixie Meadows is entirely speculative, and it's at
4 least a year in the future if it occurs at all. The alleged
5 immediate harm of watching the construction and seeing the
6 construction depends on their brand-new interpretation of where
7 the secret site is located, and that's just not supported by the
8 record --

9 **THE COURT:** Ms. Reimer --

10 **MS. REIMER:** Yes.

11 **THE COURT:** -- I guess, the crux of it for me is this
12 mitigation plan.

13 **MS. REIMER:** Uh-huh.

14 **THE COURT:** I think everybody -- what I get from the
15 briefs and between the lines of the brief is we don't know what
16 impact it will have on the waters of the spring, and does a
17 posthoc mitigation plan resolve the concern?

18 Normally, in the normal case, we would say we need to
19 know what those impacts are, not for sure, not definitely --
20 besides, probably couldn't tell us that -- but what the
21 identifiable impacts could be. And in the normal project, we
22 would ask those questions first, and we would have definite
23 standards.

24 I mean, how do we solve the insignificant impact
25 determination problem? By simply saying that posthoc, we will

1 monitor. And it's not like we're doing those studies before.

2 We're doing them after we build the plant once the first go up.

3 How do you tell Ormat to stop operating if, in fact,
4 those concerns come to pass?

5 That's the crux of it for me.

6 Is this mitigation effort, which simply calls for
7 posthoc study and monitoring -- how is that comparable to a
8 different approach, and that is, have identifiable impacts and
9 studies set out clearly and set standards?

10 I don't know how in the world we could tell or the
11 BLM could tell Ormat stop producing when they've invested
12 millions of dollars in the plant, the foundation, the lines, the
13 roads. I don't know how we can do that with just the monitoring
14 plant posthoc. That's where it comes down to, for me.

15 I'll let you address it.

16 **MS. REIMER:** Yeah. Thank you, Your Honor. Thank you
17 for setting that out.

18 First of all, BLM does have the authority to stop the
19 project. It's federal land. There's obligations to avoid
20 unnecessary and undue degradation, and they're federal leases.
21 So the -- and Ormat's committed to abide by the mitigation plan,
22 and one of the mitigation elements is potentially shutting down
23 the facility for as long as it takes to figure out how to
24 mitigate an impact.

25 Then I want to return to, is this a

1 leap-before-you-look-type situation, which is what plaintiffs
2 have characterized it as?

3 This is not a case where it's a plan to create a
4 plan. I think what we need to keep sight of is that this is --
5 this particular plan is based on systematic monitoring --
6 monitoring data at springs since 2018. There has been
7 exploration for the past decade that's helps to define the
8 geothermal and hydrogeologic characteristics of the reservoir.
9 So we know where the geothermal reservoir is. It's on the
10 western -- the eastern flank of the Stillwater range and the
11 western edge of the valley. It's a mile deep.

12 We know that there's an impermeable layer of --
13 probably caused by the Dixie Valley fault that separates the
14 geothermal reservoir from the shallow aquifer that is feeding the
15 springs. And I think we can't lose sight of the fact that Ormat
16 did a 46-day flow test. This isn't a situation where this hasn't
17 been tested.

18 Ormat used the precise production well that it
19 intends to use for phase 1 of this project. It flowed that well
20 at 1600 gallons per minute for 46 days, and there was no impact
21 to the springs.

22 So, you know, I think Your Honor hit it -- hit the
23 nail on the head when you said there's -- obviously, there's
24 uncertainty involved in what's going on a mile beneath the
25 ground. That can never be known entirely. And that's why we

1 have experts at Ormat and at the BLM who reviewed and approved a
2 hydrogeological matter. It's Attachment D to the ARMMP, and it
3 -- there's a nice figure in there. We can -- if we can bring it
4 up, I'm in Appendix D, which is attached the our brief, that
5 shows what the -- what the model is. And it's supported by the
6 most recent data.

7 So, you know, I think BLM appreciates that there's
8 uncertainty. However, as the EA states on page 3-126, the
9 hydrogeological conditions indicate that the proposed action
10 would not influence spring flow.

11 So what we have as a mitigation plan is a backstop.
12 And in this case, it's not a mitigation plan that's just a mere
13 listing, and -- as it was in some of the cases that were cited by
14 plaintiffs. This is more on par with *Wetlands Action Network*,
15 where we got actual analytical data, a flow test, a
16 hydrogeological model that supports this plan, and the definition
17 of the geothermal reservoir that's been supported by the best
18 available data so far.

19 I think it would be helpful -- Your Honor, if you
20 have more questions on this point, please. I'd be happy to
21 answer them.

22 **THE COURT:** Maybe later.

23 **MS. REIMER:** Okay. I think it would be helpful, and
24 I'm going to -- if the Court would indulge me, I'm going to share
25 my screen because we have a couple of figures that would help

1 explain this. And it says, "Host disabled participants' screen
2 sharing." I'm not sure if it's possible for the Court to allow
3 me to share a figure.

4 **THE COURT:** I believe it is.

5 **MS. VANCE:** How about --

6 **MR. LUKAS:** And for the record, Your Honor, this is
7 Tim Lukas. These were the exhibits we previously submitted to
8 the clerk of the Court to -- the three of them were attached to
9 the pleadings. Two are demonstrative compilations.

10 **THE COURT:** As long as they're included in the
11 previously submitted items.

12 You can give it a try.

13 **MS. REIMER:** Great.

14 **THE COURT:** There you go.

15 **MS. REIMER:** Your Honor can see the -- the figure on
16 the map -- or the screen?

17 **THE COURT:** Yes.

18 **MS. REIMER:** First, I do want to acknowledge that
19 Ormat is a global geothermal energy company that's been in
20 business for 50 years. It's an expert in this business. And as
21 the plaintiffs said, it's successfully operated 22 projects on
22 federal lands, including McGinness Hills, which is in Nevada, and
23 it's proven critical to Nevada meeting its renewable energy
24 portfolio goals.

25 As part of that being cutting edge, Ormat has

1 state-of-the-art technology that it uses. And this diagram that
2 you see up here, Your Honor, is a simplification of the power
3 plant. Your Honor mentioned a previous power plant that you've
4 been involved in when you were with the bankruptcy court, and
5 it's worth noting that this geothermal steam plant is miles ahead
6 of what was going on 20 years ago.

7 You are correct that you needed much more geothermal
8 energy, much more heat to support a facility 20 years ago. This
9 particular facility is going to only remove about a hundred
10 degrees of heat from the geothermal fluids. But the most
11 important point for Your Honor to note from this exhibit is that
12 there is no groundwater, no geothermal fluid that will be removed
13 from the system as part of this process.

14 And that's why the state engineer does not require
15 that -- that Ormat obtain a water right or a permit for
16 withdrawal, because there's no consumptive use of the water.

17 The way that it works is that the geothermal fluid is
18 piped from about a mile beneath the surface, 4800 feet. And Your
19 Honor can refer to Appendix L, which talks about the exploration
20 program and where, exactly, the geothermal reservoir was
21 discovered in the north -- east-northeast striking fault here.
22 So it comes from a mile deep. The flow that comes out of the
23 ground does not mix with the shallow groundwater aquifer. The
24 piping does not allow that to happen. The fluid goes directly to
25 the geothermal power plant where it flows alongside the secondary

1 fluid, which heats -- actually, becomes a gas, vaporizes to turn
2 the turban and create the electricity. Then the geothermal
3 fluid, a hundred percent of it flows back through pipelines and
4 is reinjected into that deep geothermal reservoir.

5 In this case -- and I -- I believe that these figures
6 are in the plan and development, possibly also in Chapter 2 of
7 the EA. The geothermal reservoir is about 300 degrees. When
8 that fluid is returned to the reservoir, it will be about 200
9 degrees. So we're talking about harvesting of a minute amount of
10 energy out of the underground system.

11 I think that this figure, too, Your Honor, might be
12 helpful for you. This is a map of the region. This comes from
13 the attachment to the ARMMP. And to get you a little bit
14 oriented to exactly where you are, you can see Fallon is there to
15 the southwest of the project. Dixie Valley itself is outlined in
16 yellow, the thicker yellow outline. And in the center is a black
17 box that shows the geothermal leases that were issued to Ormat
18 beginning in 2010, and the project itself is located on that
19 green dot.

20 **THE COURT:** Let me study that map for just a minute.

21 **MS. REIMER:** Yes. It also shows that Jersey Valley
22 about 40 miles there to the northeast.

23 **THE COURT:** Uh-huh.

24 **MS. REIMER:** Okay.

25 **THE COURT:** Where are the tribal lands, the

1 reservation?

2 **MS. REIMER:** I believe that the reservation is shown
3 near Fallon. This right here just to northeast of Fallon is the
4 Fallon Paiute-Shoshone reservation, the tribe who challenged this
5 project.

6 **THE COURT:** And where the -- what's that gray area
7 just below the word "Fallon," just below?

8 **MS. REIMER:** Yup. Naval Air Station, Fallon, is what
9 it says. I can blow it up here for you.

10 **THE COURT:** Okay. So the tribal lands are right
11 there to the northeast.

12 And do you understand the claim that the sacred
13 rights and cultural land dependency is related between those
14 tribal lands and the Dixie Valley and the hot springs? What's
15 the relationship?

16 **MS. REIMER:** Your Honor, my understanding -- and
17 certainly, we wouldn't contest the tribe's discussion of this.
18 My understanding -- and I'll just stop sharing for a moment, Your
19 Honor -- is that the tribe, even though they are now on the
20 reservation, this area was part of their ancestral homelands, and
21 they continue to go out and use the springs themselves for their
22 religious ceremonies.

23 In 2015, the Bureau of Land Management, after
24 consulting with the tribe, did designate a sacred area under the
25 National Historic Preservation Act eligible for listing under the

1 -- in the National Register of Historic Places --

2 **THE COURT:** And that's limited by the boundaries that
3 the tribe previously specified?

4 **MS. REIMER:** That is correct. When I asked prior to
5 this hearing if we could have a map delineating the extent of
6 that, that information is held to be confidential. With BLM,
7 however, at no time prior to receiving the reply brief yesterday,
8 had we heard that the actual power plant was located within the
9 sacred site. So that is new information that's not previously
10 supported by the record.

11 And -- and I wanted to point the Court to numerous
12 comments that these plaintiffs made on the environmental
13 assessment. These are all -- the response to comment is Appendix
14 G to the EA, and at G9, it talks about the Dixie Meadows hot
15 springs is particularly important to the sacred site. Indigenous
16 belief, including the tribe's view of Dixie Meadows Hot Springs
17 deserves full recognition and -- and protection, and that has
18 been the focus of consultation is protecting their religious
19 experience at the springs from the start.

20 So the physical occupation of the springs by the
21 power plant is not supported by the record before the Court.

22 **THE COURT:** Okay. Can you -- can you comment on the
23 bond? If I were to enter an injunction, what is the relative
24 harm of Ormat? I don't think there's that much harm to the BLM,
25 but what -- what harm would we have to protect against?

1 **MS. REIMER:** Well, I'd like to turn it over to my
2 colleague, Tim Lukas, because I should have mentioned that at the
3 beginning, Your Honor, that he's prepared to talk about the harm
4 to Ormat and the bond. So I'll let him field that question and
5 then perhaps return to talk about success on the merits.

6 **MR. LUKAS:** Thank you, Your Honor. Timothy Lukas.
7 The -- in terms of the -- if the Court was going to
8 consider the bond, I think it has to be significant. And all due
9 respect to the plaintiffs' counsel. There's not a free pass
10 under 365(c) in terms of posting a bond. The Court does have
11 some pretty wide discretion on what is going to be done here.

12 When you look at the impact on Ormat, which is set
13 out in Mr. Thomsen's declarations, the first one's paragraph 11
14 through 15 is the -- is the preparation and the execution of
15 phase 1, which means we have to -- to lay groundwork.

16 It's also got a critical path construction, as he
17 just -- as Mr. Thomsen described it. And if the Court would like
18 to see the screen, I can share my screen. Let me do that again.

19 **THE COURT:** There we go. Okay.

20 **MR. LUKAS:** It -- it delineates a time frame, Your
21 Honor, in order to get to line production and mechanical so that
22 we can be in compliance with the PPA, which has been in existence
23 since 2017. Publicly disclosed document is referenced in
24 Mr. Thomsen's declaration. It makes -- it is critical because it
25 makes the plan feasible of building a plant here. In particular,

1 as Mr. Thomsen describes in the second declaration, the AARP has
2 annual costs of a million dollars plus hundreds of thousands of
3 dollars in monitoring costs that Ormat will comply with. It has
4 done great projects over time.

5 It originally had envisioned, because the Court is --
6 and I know Ms. Reimer will discuss the timeline here. Back in
7 2017, when the -- the first draft came out that the -- the --
8 Ormat had expected that the -- it would be well into production
9 by this point, at least in phase 1. And as Mr. Thomsen tells us,
10 phase 1 is really only half the project, Your Honor. It uses all
11 of the existing wells. It has to require, obviously, the
12 building of the power plant, and a line in order to connect and
13 transmit that energy outside of it.

14 But if we don't -- if Ormat cannot get started, it's
15 already ordered part of the mechanical systems and are on site
16 and prepared to go now. We will not be able to continue the rest
17 of the monitoring and be in production of the 15 megawatts by the
18 end of 2022.

19 The loss to Ormat, as Mr. Thomsen has indicated, are
20 at least -- we're 68 million already into this project. But we'd
21 lose \$30 million if the PPA goes away. And it has a definitive
22 date. It's in the public record as it was referred to in
23 Mr. Thomsen's declaration.

24 **THE COURT:** Can you explain that, please.

25 What 30 million are you losing?

1 **MR. LUKAS:** It's a cost -- it's a 26-year-old power
2 purchase agreement, Your Honor. And over the course of the 26
3 years, if it's not implemented by the end of 2022, so production
4 ongoing, then Ormat will not be able to take advantage of the
5 kilowatt price of 75.5 cents per megawatt hour, which is -- it is
6 above market now. We realize that. But it also makes this
7 project viable with the ARMMMP requirements --

8 **THE COURT:** What is the damage if I were to limit the
9 injunction for six months, sufficient time, in my mind, to get an
10 emergency response from the circuit that tells the Court stop the
11 preliminary injunction, proceed to the merits? What -- what is
12 the damage for the next six months' worth of delay?

13 **MR. LUKAS:** As -- as I'm showing the critical path,
14 Your Honor, we would not -- Ormat would not be able to complete
15 the power plant and get it operational by the end of 2022.

16 **THE COURT:** Why not?

17 **MR. LUKAS:** The -- the construction critical path
18 requires an earth core and -- be done for the plant; that then
19 foundations be laid, tested. And there's a set under the --
20 under the MOU requirement.

21 **THE COURT:** For phase 1 only, right?

22 **MR. LUKAS:** That's correct.

23 **THE COURT:** One plant.

24 **MR. LUKAS:** And so it's dirt moving next to an
25 existing gravel pit, as Ms. Reimer will show you the schematics.

1 It's the laying foundations for a facility that's approximately
2 35 feet tall. The Court has -- has expressed its familiarity
3 with the site that's south of Reno --

4 **THE COURT:** All of that you can do after six months
5 if the circuit were to reverse a decision to enter an injunction.
6 All of that could be done after the Court gives you leave. No --

7 **MR. LUKAS:** If -- I guess I'm trying to understand
8 exactly the question, Your Honor, in terms of -- can we do work
9 after six months?

10 The obvious answer to that is yes. The problem is
11 can we complete the project in six months. The answer to that is
12 no.

13 **THE COURT:** The project of phase 1?

14 **MR. LUKAS:** The -- right. To include the
15 installation of power lines and mechanical systems to check the
16 electrical systems, to run the monitoring requirements --

17 **THE COURT:** I'm not sure I understand your argument.
18 What I hear you saying is that you violate the contract for
19 certain prices and can no longer expect those prices or rely on
20 the contract if you don't complete by 2022. And you're telling
21 me you can't complete by the end of 2022 if I enter an injunction
22 for three months or six months?

23 **MR. LUKAS:** Your Honor, yes. It would be very
24 problematic. That is the -- that is the testimony as attached to
25 the opposition of my client; that they would not be able to

1 complete that in time.

2 **THE COURT:** And what is the damage?

3 **MR. LUKAS:** Your Honor, if the -- the PPA being lost,
4 which requires production -- and as the Court may be aware, these
5 are four -- four approved contracts. It's not just a two-party
6 contract. They were -- they went through the approval process
7 over five years -- almost five years ago now -- is -- on this
8 phase, it would be \$30 million. And frankly, it would preclude
9 the building of phase 2, which would make the loss approximately
10 68 million -- or 6 -- \$150 million, excuse me. It's 30 million
11 on phase 1 and then another 120 million on phase 2. Okay?

12 Because if you hit milestones, then you can add into
13 the contract. If you fail to hit those milestones, then the --
14 then you don't have the ability to take advantage of that power
15 purchase agreement. You would also lose the savings of hundreds
16 of thousands of -- metric tons of CO2 that will not be produced
17 into the -- into the atmosphere.

18 So it's real quantifiable costs that -- and damages
19 that would be sustained by Ormat, which is exactly what 65(c)
20 specifies, to -- to protect our interest. And we do have --
21 well, economic interest may not be, per se, irreparable harm,
22 Your Honor. 65(c) doesn't say that the bond amount has to be
23 related only to irreparable harm.

24 **THE COURT:** Okay.

25 **MR. LUKAS:** Unless the Court has any questions, I'll

1 stop sharing --

2 **THE COURT:** Okay.

3 **MR. LUKAS:** -- and let Ms. Reimer continue.

4 **MS. REIMER:** Thank you. And I'm going to throw up --
5 and this is probably going to get you all dizzy. I'm going to
6 throw up one more screen share for you to take a look at, because
7 I think this is important to the Court's understanding of
8 precisely what we're talking about there.

9 This is a blown-up version of the project site in
10 Dixie Valley. The yellowish coloring around the outside is land
11 that's owned and managed by the Bureau of Land Management. And
12 you see the gray coloring down the center. This is land that's
13 owned and controlled by the Department of Defense, the Navy.

14 The spring complexes are highlighted in green. You
15 can see there are six of them running from the north to the
16 south.

17 The point I wanted to make with this map, Your Honor,
18 is twofold: One, I wanted to demonstrate for you or show you
19 that this is not an area where there's no development. This blue
20 line going down the center of the project area is the ox-filled
21 power line. It's a 130 kilovolt line. It's twice the size of
22 the gen-tie line that's being proposed for this project. And
23 originally, the -- the project had its -- had proposed to
24 parallel with the existing line, but at the request of the tribe,
25 the line was moved to the north. And so you'll see, the proposed

1 line that would be built starting in May, finishing up in around
2 October, November is this yellow line that will now parallel the
3 Dixie Valley Road.

4 The other items that are already out -- you see a
5 series of roads. This is open public land used so -- you know,
6 public can use this land. You also see the existing nine
7 geothermal exploration wells. Those are the pink dots. So those
8 are -- are already out there, and that development already
9 occurred, including the use of the drill rigs. And then we have
10 a mineral material site, which is this darker black crosshatched
11 area just south of the power plant location.

12 The power plant that's going to be constructed is in
13 a ten-acre area for phase 1 is right here. And that power plant
14 will operate for 12 months before -- and we have to demonstrate
15 no impact to the springs before we're allowed to expand the
16 plant.

17 It's also worth noting that the location of the phase
18 1 power plant was disclosed in both the revised draft EA and in
19 the final EA. So plaintiffs have known where the phase 1 power
20 plant would be. And as I said, it's not until yesterday that we
21 heard that this location is actually within the sacred site.

22 Your Honor, I think what I'll move on to now, because
23 I think this is of interest to you, is the ARMMP and what it's --
24 what it's based on. So in 2017, when the draft EA came out --
25 and I will stop sharing my screen here.

1 In 2017, when the draft EA came out, it is absolutely
2 true that there were numerous comments on that document. At that
3 time, the ARMMMP might have been described as the plan for a plan.
4 And that is precisely the comments that these -- that these
5 plaintiffs have attached to their briefing are comments on the
6 draft EA and later on the 2020 version of the draft ARMMMP. Those
7 comments resulted in a three-year process to develop the ARMMMP
8 that the Court has before it today, BLM's final decision.

9 It also -- it also resulted in moving that
10 transmission line to the west, the power plant to the south. And
11 the memorandum of agreement, I don't think the parties have
12 mentioned that up to this point. But a memorandum of agreement
13 was negotiated with the tribe's input, the State Historic
14 Preservation Office, and the Advisory Council on Historic
15 Preservation. It requires formats to engage in mitigation for
16 noise, site mitigation, so there's mitigation required to
17 minimize the lighting at the facility, to do what we can short of
18 not constructing the project at all to minimize the visual impact
19 to the tribe of what's going on out there.

20 The tribe maybe unsurprisingly determined it would
21 not sign the MOA, but the record reflects that the -- that Ormat
22 still is obligated to implement the terms of that MOA.

23 The ARMMMP, Your Honor, is a living document. As I
24 mentioned before, it's based on geothermal data that was
25 collected as part of the nine exploration wells that delineated

1 the hydrogeologic model, existing monitoring data, and the flow
2 test.

3 It's extensive. It requires continuous monitoring in
4 a number of locations. It is true that that data gets collected
5 weekly. But that monitoring data then supports the thresholds or
6 triggers. And then mitigation has to occur if those thresholds
7 are reached.

8 I think I'd like to address, in particular,
9 plaintiffs' comments about the lack of baseline data for the
10 toad. The Ninth Circuit has held that actual baseline conditions
11 -- this is in *Great Basin Resource Watch* -- actual baseline
12 conditions are not required for every parameter under NEPA, and
13 it was reasonable in this case for the agency to use estimated
14 habitat data as a proxy until that toad data is collected.

15 NDOW is currently engaged in studies. Ormat has
16 committed to engage in studies, and that data will be used to --
17 to refine the ARMMMP before this plant ever goes into operation.
18 And as we said, the first phase of the power plant, which must
19 last at least 12 months, is just the 12 megawatt plant using the
20 existing production wells --

21 **THE COURT:** And what happens -- what happens if there
22 is a later determination of endangered species?

23 **MS. REIMER:** If the toad is eventually listed, it is
24 possible that BLM would be require some consult- -- be required
25 to consult with the U.S. Fish and Wildlife Service to determine

1 if there would be jeopardy to the species.

2 We would submit that the aquatic water resource
3 mitigation plan would qualify under that standard and during that
4 consultation to demonstrate that impacts would not occur to the
5 toad. But it is possible, as BLM considers phase 2, that it
6 would have to consult with the U.S. Fish and Wildlife Service
7 before allowing that to proceed.

8 Counsel for the government, I think, answered most of
9 the Court's questions with respect to the RFRA and AIRFA claims.
10 I did want to point out, specifically, to answer the Court's
11 question about the U.S. Supreme Court's decision in *Lyng*. It is
12 true *Lyng* was prior to RFRA.

13 However, the *Navajo Nation* case, which is controlling
14 precedent in the Ninth Circuit, *Navajo Nation vs. U.S. Forest*
15 *Service*. In that particular case, the Court held that *Lyng* would
16 apply precisely to a situation like this where the tribe was
17 claiming use of federal property. And in that case, the
18 government held that even -- or the Court held that even if the
19 government actually virtually destroyed the ability to practice
20 the religion, it would not be a substantial burden under that
21 incredibly high standard that's set out by RFRA.

22 **THE COURT:** Let me terminate you at that point and
23 ask for a final reply from plaintiff.

24 **MS. REIMER:** Thank you, Your Honor.

25 **MR. GOLDING:** Thank you, Your Honor. I'll go first

1 and then Mr. Lake can close.

2 I'm going to first address this -- the repeated claim
3 that the reply brief was the first that Ormat and BLM have heard
4 of the extent of the sacred site. And I just note that, one,
5 that's completely false; and two, that illustrates the very
6 problem why we're here is because the tribe has explained since
7 at least 2017 that the site encompasses the surrounding uplands
8 that are necessary to carry out religious practices.

9 **THE COURT:** Well, how do you controvert their
10 allegation that the tribe twice before has designated exclusive
11 of the upland areas?

12 **MR. GOLDING:** Well, I'd point Your Honor to the
13 comment letter we submitted to BLM in 2017, which is at ECF 13-7.
14 I'd like to read from that because it's very applicable.

15 "The springs exist within a larger sacred landscape,
16 which includes the surrounding meadows and wetlands and
17 unobstructed views of Fox Peak. The correct delineation of the
18 traditional cultural property is therefore one that encompass the
19 surrounding area and viewshed."

20 That letter --

21 **THE COURT:** Does that not contradict the tribe's
22 prior designation exclusive of the upland areas or --

23 **MR. GOLDING:** Your Honor, I've never seen that --
24 sorry. I don't mean to interrupt you.

25 I've been working on this project since 2017. I've

1 never seen the map that the government and Ormat refers to. I've
2 conferred with my clients over texts during this hearing.
3 They've never seen it. So it's possible it exists.

4 We've been working with BLM for years, and I just
5 read from a letter in 2017. If -- they should have come to us
6 and said -- you know, that's what real consultation looks like to
7 say, Well, we might have a disagreement here. We may have a
8 misunderstanding. Again --

9 **THE COURT:** (Indiscernible) or is it contradicted by
10 the fact that there already are power lines, significant power
11 lines, and roadways and such on the northwest area from the
12 wetlands in the upland area?

13 **MR. GOLDING:** No, Your Honor. I mean, the fact that
14 the tribe has suffered some harm already doesn't mean that it's
15 just a free pass to -- to do more. And the project that Ormat is
16 proposing --

17 **THE COURT:** I don't get that argument. It certainly
18 does impact the historical cultural use. If there are already
19 significant power lines to the north and west, I don't understand
20 that argument that they have an expectation of cultural and
21 religious use in those upland areas.

22 **MR. GOLDING:** I mean, the fact that some distant
23 power lines have gone ahead doesn't deprive the tribe of its
24 right to carry out its spiritual practices. If anything, they
25 make further harm more damaging because the tribe has already

1 suffered damage to a site -- you know, the tribe has been here
2 for 10,000 years --

3 **THE COURT:** You bet.

4 **MR. GOLDING:** -- that's under the -- in the world
5 history. You may be familiar with Spirit Cave and the ancestral
6 remains have been tested by geneticists. They've been here for
7 10,000 years using this site --

8 **THE COURT:** Yeah.

9 **MR. GOLDING:** -- that's sacred to them.

10 And as we've prevented -- presented in the evidence,
11 all of the other springs that they used has been desecrated.
12 This is the last one. It's the most significant one. It's
13 documented in ethnographies going back before 1900. There's no
14 question that this is a sacred site the tribe values very highly.
15 The fact that some development has occurred does not undermine
16 that.

17 I'd note, with respect to the repeated -- repeated
18 communications to BLM, there's another letter. So that letter in
19 October 2017 says, It is important to recognize that tribal
20 members do not experience the Dixie Meadows Hot Springs as an
21 isolated element of the landscape. Again, that's from 2017 --

22 **THE COURT:** Okay. I've made up my mind.

23 **MR. GOLDING:** Okay.

24 **THE COURT:** Long-term, I'm going to deny this
25 preliminary injunction. I'm going to give you a 90-day temporary

1 preliminary injunction, a 90-day. And I rely -- delineate in a
2 written order my rationale based upon the law with the hopes that
3 the Ninth Circuit will correct me, and they'll give us the law
4 that governs the case.

5 As far as finding, I cannot say right now. I really
6 cannot determine whether there will be success on the merits.

7 The things that concern me are things that I've
8 already raised by way of questions before. There's no EIS here.
9 There really is no way for BLM or Ormat to tell us whether
10 they'll kill the springs or not. As counsel argued, a number of
11 the springs have already been destroyed that belong to the tribe,
12 and the tribe has been there for 10,000 years. So that is a very
13 significant concern.

14 It is a concern, of course, that the tribe, at least
15 as alleged -- we don't know whether it's true or not --
16 previously designated a more limited area without the upland
17 areas as a predicate to a determination of a historical site for
18 the Preservation Act purposes. And if that's true, then the --
19 the tribe should be limited in their claim.

20 I really can't say as I sit here whether there would
21 be a likelihood of success on the merits. And I think under the
22 Supreme Court standard, I need to determine that; that there is a
23 likelihood of success on the merits. The biggest concern for me
24 is that there's no EIS here. There's nothing to tell us whether
25 or not it will have an impact on the spring itself let alone the

1 toad. There's nothing to tell us that it may kill the springs or
2 whether it would not or whether it would endanger the
3 temperature, and that would depreciate the religious practice or
4 cultural practice or depreciate the existence of the toad.

5 So as I sit here, to be honest with you, I cannot
6 determine success on the merits. But I have substantial concerns
7 that BLM was pursuing studies, and they were negotiating delay
8 pending determination of the toad status and even determination
9 of the impact and then all of a sudden changed their mind and --
10 and went the other direction.

11 The main concern in that respect is the core argument
12 made by plaintiffs that this is not a mitigation plan in the
13 normal respect. You know, in a normal respect, the mitigation
14 plan would say, Here's the problems, here's the concern, and this
15 is why there will be no significant impact.

16 This plan does something different. It says, We'll
17 decide that after the fact, after the first phase of the plant is
18 available and after the damage to the surrounding upland areas
19 has occurred.

20 The thing that persuades me to limit the release here
21 is that there already is limits to the cultural use of the upland
22 area, not to the springs. That, everybody, both sides,
23 acknowledge there is a serious cultural religious interest in the
24 spring. But in the upland area, there's already big power lines,
25 there are already wells existing, and there is some development

1 in use and roadways in the upland area. That's the real concern.

2 I very much hear the tribe's expression of concern
3 about use defeat and the fact that use of the upland area in this
4 fashion could kill the springs and could certainly diminish the
5 right of cultural use and religious use of the upland area.

6 It's not just a matter of the wetlands. I mean, as
7 part of the cultural religious practice, view of the peak, view
8 of the surrounding area has an impact, too. And if you diminish
9 the ability to practice those religious matters in the wetlands
10 by virtue of developing or blocking out the upland area, you're
11 diminishing the religious ability to use the land. So I strongly
12 hear that concern.

13 And so my final ruling here to be embodied in a very
14 brief order, it will give the basic findings and conclusions of
15 the law so that the circuit has something to tell me, In this and
16 this and this, you made a mistake.

17 I will delineate the reasons for my ruling of no
18 permanent -- not permanent, no long-lasting preliminary
19 injunction, but I'm going to make this TRO, this preliminary
20 injunction, last for 90 days. I'm going to stop your -- your
21 construction and progress for 90 days to give the plaintiffs an
22 opportunity to get to the appellate court and on an emergency
23 basis and ask for further extension or reconsideration or further
24 extension of the preliminary injunction pending final
25 determination of the merits.

1 I'll also, to accommodate you, not as part of this
2 order, but to accommodate you, I will speed up any drafting or
3 anything I can do regarding a final determination of the merits.
4 There are lots of questions here that I don't think have really
5 been fully delineated. That -- that's a limitation on my ruling,
6 and it's why -- part of the reason why I am giving a preliminary
7 injunction for 90 days.

8 But I will issue a ruling that sets out the law as to
9 why I would deny a long-term preliminary injunction. I will also
10 accommodate the parties in speeding up a determination on the
11 merits. Hopefully, we'll get a specification of the law that
12 applies from the circuit and, of course, I will follow that
13 absolutely.

14 I do have -- in final conclusion, I do have serious
15 concerns on plaintiffs' behalf that have not been totally
16 satisfactorily identified for me, but the most I can say is I am
17 not fully persuaded yet that there is a strong likelihood of
18 success on the merits. There is relative harm, but the harm I
19 can see on the plaintiffs' part for 90 days, at least, is much
20 more serious than the harm to be suffered by defendants, even to
21 Ormat. Any bond to be required here would be for Ormat's
22 benefit. They're the ones who are going to suffer this harm, and
23 it's for that reason that I won't require much of a bond. I'll
24 require a thousand dollar bond, a de minimus bond, for 90 days.
25 Beyond that time, I may well have to require a much more

1 substantial bond.

2 So that's what I'm going to issue. I'll issue a
3 temporary restraining order immediately, and I'll ask defendants
4 to give me their written -- very brief, please -- their written
5 proposed order denying a preliminary injunction beyond 90 days.

6 I'm going to write my own order, but I would
7 appreciate a draft proposed order from the defendants as to what
8 is the justification for denying preliminary injunction beyond
9 that. You'll cover all the points that you've argued here today.
10 You won't contravene my overall findings, but you'll -- you'll
11 talk about the success on the merits and how that's up in the
12 air. But the relative damages really shift after that time
13 period allowing Ormat to get to the circuit, so -- allowing
14 plaintiffs to get to the circuit.

15 So that will be the ruling. There's an immediate
16 injunction. You've got to stop it for 90 days. And I'll issue a
17 ruling. Hopefully, defendants can give me a proposed order
18 talking about after the 90 days within the next couple of days,
19 and I'll issue this order.

20 The temporary restraining order is issued
21 immediately, and I'm incorporating this into a preliminary
22 injunction so that you have the immediate right of an appeal.
23 Both sides have the immediate right of an appeal. And I'll give
24 you a delineated order within ten days that spells out my
25 reasons.

1 That should not hold up your right to appeal because
2 the TRO is entered immediately, and the preliminary injunction
3 for 90 days is issued immediately. So both side have the right
4 to appeal that and raise the issue of the law governing with the
5 circuit.

6 Are there questions?

7 **MS. REIMER:** Your Honor, what time frame would you
8 like to see a draft proposed order on a denial after 90 days?

9 **THE COURT:** What timing?

10 **MS. REIMER:** Yes.

11 **THE COURT:** Can you give it to me within a week?
12 because I intend to issue mine within ten days.

13 **MS. REIMER:** Yes.

14 **THE COURT:** If you don't get it to me timely, I'll
15 just write my own. But I would appreciate your help.

16 **MS. REIMER:** Thank you.

17 **THE COURT:** Okay?

18 **MR. LUKAS:** Your Honor, can I also ask -- we
19 appreciate the Court's direct approach to this and getting us on
20 the path. I understand 90 days seems like a short period of
21 time, but I would just request that, without prejudice, if we
22 discover some type of discrete step that needs to be done so we
23 can hit the rest of that timeline, I mean, we got our -- we got
24 out work to do --

25 **THE COURT:** You bet. Make a motion. I'll hear it by

1 televideo immediately.

2 **MR. LUKAS:** Okay. Thank you, Your Honor.

3 **THE COURT:** Okay. Counsel, thank you so much. Thank
4 you for your appearance today. It was very, very helpful. I was
5 totally up in the air when we started, so I appreciate your
6 discussion.

7 That will conclude the hearing. Thank you.

8 *(Proceedings adjourned at 12:25 p.m.)*

9 --o0o--

10 COURT REPORTER'S CERTIFICATE

11 I, Paige M. Christian, Official Court Reporter, United
12 States District Court, District of Nevada, Las Vegas, Nevada, do
13 certify that pursuant to 28 U.S.C. § 753, the foregoing is a
14 true, complete, and correct transcript of the proceedings had in
15 connection with the above-entitled matter.

16

17 DATED: January 6, 2022

18

19 /s/ Paige M. Christian
20 Paige M. Christian, RPR, CRR, CCR #955

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