

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

GOVERNOR KRISTI NOEM, in her Official
Capacity as the Governor of South Dakota, et
al.,

Plaintiffs,

v.

DEB HAALAND, in her Official Capacity as
United States Secretary of the Interior, et al.,

Defendants.

CIV: 3:21-cv-03009

**CHEYENNE RIVER SIOUX TRIBE'S AND STEVE VANCE'S [PROPOSED]
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The State asks this Court to grant an extraordinary remedy in the form of preliminary injunctive relief to force the Department of Interior (“DOI”) to allow it to hold a Fourth of July fireworks spectacle at Mount Rushmore in the Black Hills, despite serious risks to public safety, public health, and the environment, in addition to threats to tribal religious and cultural rights. As a matter of law, this remedy is particularly extraordinary because it does not seek to maintain the status quo, but instead seeks an affirmative change and will, in effect, give the State the same relief it would obtain at trial. This kind of injunctive relief is disfavored and, as a result, the State bears an incredibly high burden of proving all of the four injunction factors.

Despite this incredible burden, the State fails to meet any of the four injunction factors. First, not only does it fail to demonstrate likelihood of success on the merits, it does not even meet the jurisdictional threshold for maintaining a lawsuit under the Administrative Procedures Act (“APA”). Second, it makes no showing of irreparable harm. It asserts speculative economic harm that does not even remotely approach the severe financial injury required for an injunction. And it alleges reputational harm that presumes that nationwide public interest in the 2020 fireworks event was positive (it was not) and that a public perception that South Dakota is unsafe during this unprecedented pandemic is the fault of the DOI’s permit denial rather than the Governor’s infamous rejection of lifesaving COVID-19 restrictions. Third, and finally, the State fails to show that its half-hearted assertions of harm outweigh the risk of harm to the Tribe’s and Mr. Vance’s serious Constitutional and statutory rights to free exercise of their religion or the general public’s interest in safety. The State’s attempts to elevate a holiday party over Constitutional religious liberties and statutory protection of sacred sites, as well as basic public health and safety, must fail as both contrary to law and contrary to the basic principles upon which this Nation was founded.

BACKGROUND

The Cheyenne River Sioux Tribe is comprised of four of the seven bands of the Lakota Tribe who reside on the Cheyenne River Sioux Indian Reservation in north-central South Dakota: the *Itazipco* or Sans Arc band, the *Siha Sapa* or Blackfoot band, the *Oohenumpa* or Two Kettle band, and the *Mnicoujou*. The Tribe and its four bands are successors to the Great Sioux Nation, with which the United States entered into the Fort Laramie Treaty of 1851, 11 Stat. 749, and the Fort Laramie Treaty of 1868, 15 Stat. 635, which set forth the boundaries of the Great Sioux Nation, including the sacred Black Hills. *See South Dakota v. Bourland*, 508 U.S. 679, 682 (1993); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980) (quoting 15 Stat. 635). In 1877, however, after gold was discovered in the Black Hills within the Great Sioux Reservation, the United States abrogated the Treaty to validate the intrusion and stole the sacred Black Hills from the Lakota people. *Id.* at 382-84. The United States Supreme Court later held this abrogation to have been illegal, noting that “[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history. . . .” *Id.* at 388.

Although the Black Hills were stolen, they remain crucial to the Lakota people. The Lakota people consider the Black Hills to be “the Heart of Everything That Is.” The Black Hills in their entirety are sacred to the Lakota people as the nexus of Lakota origin. Declaration of Steve Vance, ECF 31-1 at ¶ 26. Long before being defaced by the sculpture called Mount Rushmore, the mountain was already a sacred site to the Lakota people, which was called the Six Grandfathers before its destruction. *Id.* at ¶ 27. The Lakota people of the Cheyenne River Reservation still use the Black Hills extensively for a broad range of religious and ceremonial practices in a large number of locations, including some of the Tribe’s most important ceremonies. This includes the area around Mount Rushmore. *Id.* at ¶ 28. The Lakota people of

the Cheyenne River Reservation also gather plants for medicinal and religious practices within the Black Hills, and these plants could be destroyed – even wiped out completely – by a wildfire event. *Id.* at ¶ 29. Many of these plants do not exist anywhere else, and their loss would be a devastating blow to Lakota traditional ceremonial, religious, and medicinal purposes. *Id.* at ¶ 30. The Tribe gets lodge poles (*tipestola*) from the Black Hills and they have few other sources of these poles. A wildfire would devastate this resource. *Id.* at ¶ 31.

The Tribe and Mr. Vance have openly opposed the renewed performance of the fireworks display at Mount Rushmore because of the threat it poses to Lakota sacred sites, Traditional Cultural Properties (“TCP”), and trust lands located in the Black Hills. *Id.* at ¶ 16. For instance, there is an existing trust property that the Tribe uses for an important annual ceremony that belongs jointly to several Tribes, including the Cheyenne River Sioux Tribe, within 50 miles of Mount Rushmore, that would be in danger if a wildfire were to break out. *Id.* at ¶ 17. Because of the National Park Service’s (“NPS”) 2020 consultation with the Cheyenne River Sioux Tribe and other tribes, referenced in both the State’s Complaint (ECF 1 at ¶ 43) and the NPS’s denial letter (ECF 3-2 at 101), about the firework event last year, a joint team comprised of thirteen tribes are finalizing a report that identifies about 100 additional TCPs belonging to Lakota people located within the Black Hills. The team has completed the physical survey and is working on drafting the Survey report in consultation with the NPS consistent with the agency’s duty under Section 106 of the National Historic Preservation Act “NHPA”). *Id.* at ¶ 18.

The additional hundred or so TCPs add onto the already lengthy list of TCPs, sacred sites, and trust properties in the Black Hills belonging to the Cheyenne River Sioux Tribe and other tribes. *Id.* at ¶ 20. TCPs are properties that are eligible for inclusion on the National Register of Historic Places based on their association with the cultural practices, traditions, beliefs, lifeways,

arts, crafts, or social institutions of living in a community. *Id.* at ¶ 21. The Cheyenne River Sioux Tribal Historic Preservation Officer (“THPO”), Steve Vance, shared his comments in this process with the Acting Superintendent of Mount Rushmore prior to the 2020 event. At that time, Mr. Vance expressed his opinion as THPO for the Tribe that using fireworks on sacred lands in Treaty Territory was egregious because of the grief that it inflicts upon the Lakota people. The event itself is also offensive because of the history of the presidents depicted on the statue and their killing of Natives. *Id.* at ¶ 22.

Beyond these concerns, the same safety issues that caused the fireworks display to be discontinued still persist today. These concerns include the risk of wildfire, threat of water contamination, and the inability of NPS to evacuate that area safely in case of fire in large crowd situations. *Id.* at ¶ 23. All of the tribes at the 2020 meeting with the Acting Superintendent opposed the 2020 event. Nevertheless, the permit was still granted. *Id.* at ¶ 24. The State of South Dakota did not ever consult with the Cheyenne River Sioux Tribe’s THPO regarding the event last year and did not apparently consult with the Tribe at all. *Id.* at ¶ 25.

The fireworks themselves will have the immediate impact of interrupting anyone who is using one of the sacred sites for ceremony or prayer during the duration of the event. The summer months are active in Lakota ceremonial practices, and there is a high likelihood that traditional people will be disrupted in their practices by this event. *Id.* at ¶ 32. The fact that this event could be forced upon the Lakota people in the Tribe’s sacred lands despite the Tribe’s clear opposition to the event traumatizes them as a people and inflicts grief upon the Tribe. To the Tribe, allowing this event to occur is an attack on one of the Tribe’s most sacred places. *Id.* at ¶ 33. The Tribe and Mr. Vance assert that allowing fireworks displays at Mount Rushmore creates an actual,

extreme threat to the religious, ceremonial, and medicinal practices of the traditional Lakota people of the Cheyenne River Sioux Tribe. *Id.* at ¶ 34.

STANDARD OF REVIEW

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 24 (2008). “[T]he burden of establishing the propriety of an injunction is on the movant.” *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (citing *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987)). The “burden on a movant to demonstrate that a preliminary injunction is warranted is heavier when, as here, granting the preliminary injunction will in effect give the movant substantially the relief it would obtain after trial on the merits.” *Calvin Klein Cosmetics Corp.*, 815 F.2d at 503. When a plaintiff “is asking the Court to order affirmative change . . . to obtain a mandatory injunction requiring such action, the Plaintiff bears a heavy burden.” *Wigg v. Sioux Falls Sch. Dist. 49-5*, 259 F. Supp. 2d 967, 971 (D. S.D. 2003) (citing *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993)). “It is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). “Disfavored injunctions do not merely preserve the parties positions pending litigation, but [rather] mandate action instead of prohibiting it, alter the status quo, or grant all the relief that the movant would win at trial.” *Flandreau Santee Sioux Tribe v. U.S. Dep’t of Agriculture*, No. 4:19-CV-04094, 2019 WL 2394256, at *2 (D. S.D. Jun. 6, 2019).

“The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Bandag, Inc. v. Jack’s Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)). When there

is an adequate remedy at law, a preliminary injunction is not appropriate. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 738 (8th Cir. 1989).

A plaintiff seeking a preliminary injunction must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. The *Dataphase* test remains the standard in the Eighth Circuit. *Watkins*, 346 F.3d at 844 (“The party seeking injunctive relief bears the burden of proving all the *Dataphase* factors.”).

In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

Dataphase Sys. Inc. v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981).

STATUTORY AND CONSTITUTIONAL OVERVIEW

The State’s Complaint raises claims for relief based upon the APA, 5 U.S.C. § 706, and the United States Constitution, Article I, Section 1. ECF 1 at ¶¶ 16-18. Because Article I of the Constitution does not create a private right of action, the State’s claims against the DOI are both necessarily brought under Section 704 of the APA. Thus, the standard of review in this case is set forth in the judicial review provisions of the APA, 5 U.S.C. §§ 701 et seq. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) n.22; *Lockhart v. Kenops*, 927 F.2d 1028, 1032 (8th Cir. 1991). The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see *Citizens to Pres.*

Overton Park v. Volpe, 401 U.S. 402, 416 (1971); *Iowa Dep't of Human Servs. v. Centers for Medicare and Medicaid Servs.*, 576 F.3d 885, 888 (8th Cir. 2009). The party bringing an APA case bears the burden of demonstrating that the agency's actions were arbitrary and capricious. *Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 794 F.2d 1339, 1342-43 (8th Cir. 1986).

The APA directs the court to “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. Thus, the court's review is limited to the administrative record before the agency decisionmaker. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *Camp v. Pitts*, 411 U.S. 138, 143 (1973). When evaluating a challenge to agency action, the Eighth Circuit has directed that “great deference should be accorded an administrative agency's interpretation of its own regulations.” *Moore v. Custis*, 736 F.2d 1260, 1262 (8th Cir. 1984). An agency's interpretation of its own regulations controls unless it is plainly erroneous or inconsistent with the regulations. *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 527-28 (8th Cir. 1995).

ARGUMENT

Preliminary injunctive relief such as that demanded by the State here is “an extraordinary measure, and . . . the power to issue such exceptional relief ‘should be sparingly exercised.’” *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (quotations and citations omitted); *see also Boivin v. US Airways, Inc.*, 297 F. Supp. 2d 110, 116 (D.D.C. 2003) (“It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.”) (citation omitted). In this case, the State is not entitled to preliminary injunctive relief. It has failed to demonstrate that the balance of the four factors weighs in favor of an injunction. Because a preliminary injunction is extraordinary relief, the State has the burden of

proving all four factors. See *Winter*, 555 U.S. at 24. The State has not carried this high burden. In particular, the State has not shown a likelihood of success on the merits because they have failed to plead a claim for which this Court can award relief. In addition, the State has not demonstrated that irreparable harm is likely to occur, that the public interest supports an injunction, or that the balance of the equities tips in their favor. This memorandum addresses each factor in turn and shows that the State’s motion should be denied.

I. The State Has Not Demonstrated a Likelihood of Success on the Merits

A preliminary injunction is a drastic remedy not awarded as a matter of right, *Yakus v. United States*, 321 U.S. 414, 440 (1944), and to obtain a preliminary injunction, the moving party must demonstrate “a likelihood of success on the merits,” *Munaf*, 553 at 690 (2008) (citing *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006)); *Gen. Motors Corp. v. Harry Brown’s LLC*, 563 F.3d 312, 316 (8th Cir. 2009) (“Under *Dataphase*, the district court is to consider the likelihood that the party seeking a preliminary injunction will ultimately prevail on the merits.”). A party must at least show there is “fair ground for litigation.” *Watkins*, 346 F.3d at 844 (citing *Loveridge v. Pendleton Woolen Mills, Inc.*, 788 F.2d 914, 916 (2d Cir. 1986)); *Kaplan v. Bd. of Educ.*, 759 F.2d 256, 259 (2d Cir. 1985).

A. The Court Lacks Subject Matter Jurisdiction to Consider the State’s APA Claims

The State’s Complaint raises claims for relief based upon the APA. However, “[t]he APA is not an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.” *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 n.2 (8th Cir. 1996) (citing *Califano*, 430 U.S. at 107). Here, the APA specifically disallows judicial review as national parks use permitting is committed to the discretion of the Secretary of the Interior. Furthermore, the State has failed to show that the challenged decision constitutes final agency action.

1. Judicial Review Is Unavailable as the Agency’s Action Is Legally Committed to Agency Discretion by Statute

The APA does not allow for judicial review of agency decisions to the extent that “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). “There is a ‘basic presumption of judicial review’ of final agency action, *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993), but this presumption may be overridden in certain circumstances.” *Tamenut v. Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008). “The [APA] declares that its provisions for judicial review do not apply when (1) a statute precludes judicial review, or (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). *Id.*

The DOI has been granted complete discretion pursuant to statute by Congress with respect to permitting. The plain language of the 54 U.S.C. Section 320102(i) makes clear that permitting “for public use historic sites, buildings, and objects of national significance” shall be conducted at the discretion of the Secretary of the Interior:

The Secretary may operate and manage historic and archeologic sites, buildings, and property acquired under this chapter together with land and subordinate buildings for the benefit of the public and **may charge reasonable visitation fees and grant concessions, leases, or permits for the use of land, building space, roads, or trails when necessary or desirable** either to accommodate the public or to facilitate administration. The Secretary may grant those concessions, leases, or permits and enter into contracts relating to the contracts, leases, or permits with responsible persons, firms, or corporations without advertising and without securing competitive bids.

54 U.S.C. § 320102(i). Within Count II of the State’s Complaint, it inappropriately attempts to challenge a statute via the APA; however, in doing so, it admits that the DOI has broad discretion. ECF 1 at 20-21. The Complaint asserts that “these statutes provide DOI with no meaningful guardrails on the regulations that it can issue.” *Id.* at 20. The Plaintiffs further contend that “Congress provided no guidance on what constitutes ‘for the benefit of the public’ or when a permit would be ‘necessary or desirable’ for managing the parks. The statute thus allows DOI to issue

whatever regulations it pleases to govern its permitting authority without running afoul of Section 320102.” *Id.* at 21. The Tribe and Mr. Vance agree strongly with the State regarding the significant discretion Congress granted to the Secretary of the Interior in the statutes authorizing the DOI to issue special use permits pursuant to 54 U.S.C. § 320102(i).

It is also worth noting that within its Complaint, the State miscites the holding of a case asserted for the proposition that the APA grants courts jurisdiction over all DOI permitting decisions. In *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972 (N.D. Cal. 2013), the court did find that “[i]n general, a decision not to issue a special use permit constitutes agency action under the [APA].” *Id.* at 984. (Plaintiffs failed to include “in general” in their citation of the case.)

However, the court then went on to find that:

courts have interpreted Subsection 701(a)(2) to exclude from review “agency actions” that fall within one of two categories, either those actions where: (i) a court has no meaningful standard against which to judge the exercise of discretion and therefore no law to apply; or (ii) the agency's action requires a complicated balancing of factors peculiarly within the agency's expertise. *Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of U.S. Trade Representative*, 540 F.3d 940, 944 (9th Cir.2008); *see Heckler v. Chaney*, 470 U.S. 821, 830, (1985) (“Congress has not affirmatively precluded review” but review cannot be had “if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion”—*i.e.*, law commits “decisionmaking to the agency's judgment absolutely”).

Drakes Bay Oyster Co., 921 F. Supp. 2d at 986-87. In *Drakes Bay Oyster Co.*, the court held that “the record demonstrates that Congress afforded the Secretary discretion to make his Decision without sufficient meaningful standards for the Court to review the Decision within the confines of the APA” and that the plaintiff “failed to provide any evidence of Congressional intent to the contrary.” *Id.* at 988. As a result, the court further held that judicial review of the permitting decision in that case was not authorized. *Id.* at 990.

Like in *Drakes Bay Oyster Co.*, here, the permitting statute provided the DOI clear discretion in its permitting decision. The State has not offered the Court any evidence to the contrary but have instead complained – within Count II – about the broad discretion that was admittedly granted. Judicial review of the DOI’s decision in this case is not permitted pursuant to the APA, and thus, the State will not be able to succeed on the merits of their claims.

2. The Challenged Decision Does Not Constitute Final Agency Action

The Supreme Court has explained that “two conditions . . . generally must be satisfied for agency action to be ‘final’ under the APA.” *U.S. Army Corps of Eng'rs. v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). “First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). “It is well settled that administrative remedies must be fully exhausted before jurisdiction vests in the federal courts.” *Edwards v. Dep’t of the Army*, 708 F.2d 1344, 1346 (8th Cir. 1983) (citations omitted).

The Eight Circuit has explained the purpose of the requirement for exhaustion of administrative remedies:

The underlying principle of this doctrine, as expressed in *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), is that “[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only erred but has erred against objection made at the time appropriate under its practice.” *See generally* 3 K. Davis, *Administrative Law Treatise*, §§ 20.01–.09 (1958 and 1970 Supp.). To allow the bypass of agency expertise would be inefficient and would undermine Congressional intent. *Far East Conference v. United States*, 342 U.S. 570, 574–575 (1952). *See also McGee v. United States*, 402 U.S. 479, 484 (1971); *McKart v. United States*, 395 U.S. 185, 194–195 (1969).

First Nat’l Bank of St. Charles v. Bd. of Governors, 509 F.2d 1004, 1007 (8th Cir.1975).

In this case, the State failed to pursue appropriate administrative appeal of the March 11,

2021 letter from Herbert C. Frost, NPS Regional Director of the Midwest Region. The State does not claim to have filed an appeal with the named Defendant Deb Haaland, Secretary of the Interior. It does not claim to have filed an appeal with the named Defendant Shannon A. Estenoz, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at DOI. It does not claim to have filed an appeal with the named Defendant Shawn Bengé, the acting Director of the NPS. Perhaps, most importantly, the State does not claim to have filed an appeal with the DOI's Office of Hearings and Appeal.

The powers and duties set forth in 54 U.S.C. § 320102 are ascribed to the Secretary [of the Department of the Interior] "acting through the Director." 54 U.S.C. § 320102(a). The statutes define "Director" as the Director of the NPS. 54 U.S.C. § 100102(1). Thus, the State should have sought to appeal their unfavorable decision to Defendant Shawn Bengé, the acting Director of the NPS. However, rather than seeking administrative review of their unfavorable decision, the State instead sent a letter to President Joseph Biden. Plaintiffs' have cited to no case in which a plaintiff was excused from administrative appeals by sending a letter to the President.

It is also noteworthy that judicial review from a decision by a regional director of the NPS was not at issue in either of the two permitting cases cited within the State's Complaint. In *McClung v. Paul*, 788 F.3d 822, 825-826 (8th Cir. 2015), appellants exhausted administrative appeals after receiving a decision from a regional official. ("They subsequently submitted an appeal to the Corps and requested a hearing."). In *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 985 (N.D. Cal. 2013), Plaintiffs challenged an unfavorable decision issued directly by the Secretary of the Interior.

In failing to pursue an administrative appeal, the State not only denies the DOI an opportunity to further develop the administrative record, but they also deny due process to

interested parties to the administrative processes. Had the Regional Director's decision been properly appealed to the Director of the NPS, the DOI could have provided notice to known interested parts, particularly Native American tribes. Instead, the State now seeks to challenge a decision that it has not claimed is "final agency action" and is attempting to prevent participation by interested parties in this case.

3. The Claim Asserted in Count II of the State's Complaint Does Not Allow for the Relief Requested

It appears that within Count II of their Complaint that the State is attempting to challenge the DOI's decision by alleging that the statutes under which authority the decision was issued are invalid. This argument is particularly confusing because if this Court were to find that the DOI has no authority to issue permits, then the State would not be entitled to any of the relief that it has requested in this case. Assuming *arguendo* that the DOI does not have authority to issue special use permits, then neither the requested relief of remand to the DOI nor an order to the DOI to issue a permit would be appropriate remedies. If the DOI does not have authority to issue special use permits, then the State cannot prevail on the merits because then only Congress, not the DOI or this Court, could provide the State with their requested relief of being permitted to put on their fireworks show. It seems this argument could only have been beneficial or appropriate for the State (or a Tribe) if it were challenging an affirmative decision by the DOI with respect to the fireworks show.

B. The DOI's Decision Was Not Arbitrary and Capricious

An agency's decision may be considered arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “This is a highly deferential standard of review.” *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 566 F. Supp. 2d 995, 997 (D.S.D. 2008) (citing *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1317 (8th Cir. 1981). “The court cannot substitute its judgment for that of the agency, and affirmance is required if a rational basis exists for the agency’s decision.” *Id.* The DOI’s decision to not issue a special use permit to the State for a fireworks show was entirely rational when consideration is given to the stated reasons for the decision, particularly the strong opposition of tribal leaders who have objected to the show for reasons detailed extensively below and within the Tribe’s and Mr. Vance’s Motion to Intervene.

II. The State Has Not Demonstrated Irreparable Harm Is Likely to Occur.

The State has failed to offer evidence that demonstrates they will suffer any harm to their interests, let alone irreparable harm. Under Eighth Circuit precedent, the State must demonstrate that there is a threat of irreparable harm to the movant in the absence of relief. See *Dataphase*, 640 F.2d at 114. “Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.” *Watkins*, 346 F.3d at 844; see *Gen. Motors Corp.*, 563 F.3d at 320 (8th Cir. 2009); *Blue Moon Entm’t, LLC v. City of Bates City, Mo.*, 441 F.3d 561, 564 (8th Cir. 2006). “[A] party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” *Iowa Utils. Bd. v. Fed. Commc’ns. Comm’n.*, 109 F.3d 418, 425 (8th Cir. 1996). A party seeking preliminary relief must demonstrate a likelihood, not merely a possibility, of irreparable injury in the absence of an injunction. *Winter*,

555 at 21. Such harm must be shown to be likely to occur to the complaining party, not to the public or other persons. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990).

The State asserts that it will suffer irreparable harm in the absence of an injunction for three purportedly separate reasons that actually amount to one single reason: (1) loss of commercial income; (2) loss of tax income; and (3) reputational harm to the State's economy that could lead to loss of income. ECF 31 at 22-23. In this circuit, as in others, "[i]t is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm." *E.g., Packard Elevator v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986); *accord Ranchers Cattleman Action Legal Fund*, 556 F. Supp. 2d at 1007; *see also Valspar Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pa.*, 81 F. Supp. 3d 729, 733 (D. Minn. 2014) ("[I]t has long been recognized that financial injury is simply not the type of *irreparable* harm for which equity must intervene through the extraordinary use of injunctive relief.") (internal punctuation omitted).

The State can find no Eighth Circuit authority that supports its claim that mere speculative economic harm amounts to an irreparable harm sufficient to warrant injunctive relief, so it attempts to rely on authority from the U.S. District Court for the District of Columbia: *Xioami Corporation v. Department of Defense*, No. 21-280, 2021 WL 950144 (D. D.C. 2021). Specifically, the State relies on *Xioami* for the proposition that the State of South Dakota is entitled to injunctive relief because "due to the sovereign immunity enjoyed by Defendants, courts have recognized that unrecoverable economic loss can indeed constitute irreparable harm." ECF 3-1 at 22 (quoting *Xioami*, 2021 WL 950144, at *10). The State also relies on *Xioami* for the proposition that "[b]ecause injury to reputation or good will is not easily measurable in monetary terms it is typically viewed as irreparable." ECF 3-1 at 22 (quoting *Xioami*, 2021 WL 950144, at *10).

Not only does the State cite *Xioami* selectively, *Xioami* is also so factually distinct as to be totally inapposite here. In *Xiaomi*, the government officially designated a Chinese corporation as a “Communist Chinese military company.” *Id.* at *1. Under federal law, such a designation prohibits “all U.S. persons from purchasing or otherwise possessing [the company’s] public traded securities or any derivatives of such securities.” *Id.* The court held that, as a result, the Chinese corporation had suffered “irreparable reputational harm and severe unrecoverable economic injuries.” *Id.* at *12. Between February 16, 2021, when the government announced the designation and the date of the district court’s decision, the Chinese corporation had suffered “an enormous loss of approximately **\$10 billion** in market capitalization,” they had been abandoned by numerous banks, they had lost lucrative contracts with existing customers, their stock exchange listings were withdrawn, the corporation found it could not recruit or retain employees, and the court determined such harms were certain to accelerate in the absence of injunctive relief. *Id.* at *10-12.

The court in *Xioami* was clear that its finding of irreparable harm as to economic injury was an aberration, citing the general rule that economic loss is generally not enough. *Id.* at 10. The court noted that even where the plaintiff’s damages are unrecoverable due to the sovereign immunity of the defendant, there must be a showing that the economic harm is “sufficiently significant, serious, or severe to warrant emergency relief” and it should be “substantiated with concrete evidence.” *Id.* (internal citations omitted). The State alleges a wholly speculative loss of \$2 million in revenue, which it calls substantial, but makes no effort to connect to the concrete and enormous economic injuries that befell the corporation in *Xioami*. The State’s attempts to bolster its claims of harm by highlighting increased web traffic in 2020 fail to elevate the specious claim,

as the State cannot possibly prove that these curious internet users were Googling “Mount Rushmore” out of admiration or a desire to visit South Dakota.¹

The court in *Xioami* likewise noted that irreparable harm arising from reputational injury is also unusual and limited to extreme circumstances such as “where defendants conduct could not fail to damage plaintiff’s good name,” where the government had accused plaintiff of “engaging in unsavory business practices,” and where defendant had “left a black mark on [plaintiff’s] reputation” that would result in lost contracts. *See id.* (collecting cases). The State claims that it will suffer reputational harm as a result of DOI’s concern about protecting the public from COVID-19 because it speculates that this will lead potential visitors to believe that South Dakota is unsafe. ECF 3-1 at 23. The State admits that these potential harms are purely speculative, noting that “there is simply no way to measure these losses” (*id.*), and it does not even attempt to connect the public perception that South Dakota is unsafe to this permit denial. In reality, public perception of the State’s safety during the pandemic seems focused on the Governor’s policy decisions.² It is very

¹ Much of the press surrounding the 2020 event, which might appear in a Google search, actually highlighted negative aspects of the spectacle. *E.g.*, Jordyn Phelps and Elizabeth Thomas, *Trump at Mount Rushmore: Controversy, Fireworks and Personal Fascination*, ABC News (Jul. 4, 2020), <https://abcnews.go.com/Politics/trump-mount-rushmore-controversy-fireworks-personal-fascination/story?id=71595321> (last accessed May 17, 2021) (subtitled “Trump’s long-sought July Fourth visit has sparked racial and health controversy”); David Welna, *Revived Mount Rushmore Fireworks Will Feature Trump But No Social Distancing*, NPR News (Jul. 1, 2020), <https://www.npr.org/2020/07/01/886317524/mount-rushmore-fireworks-revival-to-feature-trump-but-no-social-distancing> (last accessed May 17, 2021); Juliet Eilperin, Darryl Fears & Josh Dawsey, *Trump Is Headlining Fireworks at Mount Rushmore. Experts Worry Two Things Could Spread: Virus and Wildfire*, Washington Post (June 25, 2020), <https://www.washingtonpost.com/climate-environment/2020/06/24/trump-mount-rushmore-fireworks/> (last accessed May 17, 2021).

² *See, e.g.*, Tracking Coronavirus in South Dakota: Latest Map and Case Count, N.Y. Times (updated May 17, 2021), <https://www.nytimes.com/interactive/2021/us/south-dakota-covid-cases.html> (noting “Gov. Kristi Noem, a Republican, encouraged vaccination but prohibited government offices from requiring businesses to provide proof of vaccination. Previously, Ms. Noem had announced that she would not order a lockdown or mask mandate such as those in other states.”); Chris Cillizza, *This GOP Governor Has It All Wrong on Covid-19*, CNN Politics (Mar.

possible that potential visitors to South Dakota who are worried that the State is unsafe might be more concerned about the Governor's boast that "South Dakota is the only state in America that never ordered a single business or church to close[;] South Dakota never instituted shelter in place, never mandated people wear masks," than they are about the government's permit denial. Chris Cillizza, *This GOP Governor Has It All Wrong on Covid-19*, CNN Politics (Mar. 2, 2021), <https://www.cnn.com/2021/03/02/politics/kristi-noem-covid-19-south-dakota-cpac/index.html> (last accessed May 17, 2021)

In any event, the State's claims of economic and reputational harm do not remotely meet the high standard in the case the State selected to guide this Court: *Xioami Corporation v. Department of Defense*, 2021 WL 950144. Moreover, the State has certainly not shown a true threat of harm that is "certain and great and of such imminence that there is a clear and present need for equitable relief." *See Iowa Utils. Bd.*, 109 F.3d at 425. The State's stated harm is the inability to obtain a permit to put on a July 4 fireworks show. The fact that the proposed fireworks show did not occur from 2010 to 2019 creates the strong presumption that neither the State of South Dakota nor Governor Noem will face great harm if the show is unable to proceed.

III. The Balance of Harms and the Public Interest Both Weigh Against the State

The balance of harms and the public interest are the two final *Dataphase* factors. *Dataphase*, 640 F.2d at 113. "When the federal government or agency is the defendant, the final two factors can 'merge' into one." *Flandreau Santee Sioux Tribe*, 2019 WL 2394256, at *5

2, 2021), <https://www.cnn.com/2021/03/02/politics/kristi-noem-covid-19-south-dakota-cpac/index.html> (last accessed May 17, 2021); Stephen Rodrick, *The Covid Queen of South Dakota: Gov. Kristi Noem's State Has Been Ravaged by Her Trumpian Response to the Pandemic – but That Hasn't Paused Her National Ambitions*, Rolling Stone (Mar. 16, 2021), <https://www.rollingstone.com/politics/politics-features/south-dakota-kristi-noem-covid-1142068/> (last accessed May 17, 2021).

(quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The State dismisses out of hand any harm to other parties, claiming that it “is not aware of even the ‘slightest’ harm that would befall DOI if the Court enters an injunction. ECF 3-1 (quoting *D.M. by Bao Xiong v. Minn. State High School League*, 917 F.3d 994, 1003 (8th Cir. 2019)).³ The Tribe and Mr. Vance are now parties to this litigation, a possibility that the State well-understood based on its repeated reference to tribal interests in its Complaint. ECF 2, at ¶¶ 8,39, 43, 52. And the Tribe and Mr. Vance respectfully submit that the harm an injunction would inflict on other parties will be more harmful than any harm that might be visited upon the State in its absence.

The Tribe and Mr. Vance have described at length the profound importance of the Black Hills and the Mount Rushmore area to the Lakota people. *See generally* ECF 31-1. This area is a part of the Tribe’s most crucial ancestral lands – the *Heart of Everything That Is*. *Id.* at ¶ 26. The specific area around Mount Rushmore is a sacred site known as the Six Grandfathers. *Id.* at ¶ 27. The area contains hundreds of sacred sites that are currently being documented. *Id.* at 18. The Lakota people of the Cheyenne River Reservation still use this area for a wide range of religious and ceremonial practices, including some of the Tribe’s most important ceremonies. *Id.* at ¶ 28. The Lakota people gather plants for medicinal and religious practices in the area. *Id.* at ¶ 29. Sacred sites, sacred medicines, and historic and cultural properties could be destroyed forever if a wildfire ignites in this area. *Id.* at ¶ 29; ECF 3-2 at 101.

³ Although *D.M. by Bao Xiong* uses the word “slight,” which the State has quoted, this case has almost no application here and does not support the State’s claim that its speculative economic harm outweighs harm to the landscape and sacred sites in the Black Hills. 917 F.3d at 1003-04 (upholding injunctive relief for boys who were prohibited from joining school’s competitive dance team based on their sex noting that “negative public consequences to the school of [allowing boys to participate in the school activity], if any, will be slight.”

The injuries that will befall the Tribe and Mr. Vance, unlike the State's mere speculative economic harm and questionable reputational harm, are of a Constitutional and federal statutory magnitude. The Tribe and Mr. Vance have alleged that the granting of the subject permit would infringe their right to practice the Lakota religion in the Black Hills generally and the Mount Rushmore area specifically. Under the First Amendment and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a), the Tribe and Mr. Vance enjoy "very broad protection for [their] religious libert[ies]." *Burwell v. Hobby Lobby*, 573 U.S. 682, 693 (2014). A government undertaking, like the granting of the instant fireworks permit, that would have the effect of prohibiting practices that are both sincerely held by the Lakota people and rooted in their religious beliefs, would constitute a substantial burden on the Tribe's and Mr. Vance's free exercise of religion under both RFRA and the First Amendment. *See United States v. Ali*, 682 F.3d 709, 710 (8th Cir. 2012). This burden exists when, as here, it would prevent the Tribe and Mr. Vance from participating in ceremonies, prayer, and medicine gathering that are motivated by their sincerely held beliefs in the Lakota religion. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

Notably, RFRA and its companion statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, provide even greater protection than is afforded under the First Amendment, hence the Tribe and Mr. Vance enjoy a correspondingly lower threshold for showing that the government undertaking constitutes a substantial burden than under the First Amendment. *Holt v. Hobbs*, 574 U.S. 352, 361 (2015). Specifically, unlike First Amendment claims, under RFRA, a substantial burden still exists even when the religious adherent enjoys other ways to practice their religion. *Id.*; *see also Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751 (8th Cir. 2014) (holding prison's wholesale ban on tobacco use by Native Americans substantially burdened their exercise of religion, rejecting the prison's claims that the

inmate's religious exercise might be satisfied by a substitute for tobacco); *Haight v. Thompson*, 763 F.3d 554, 561 (6th Cir. 2014) (holding prison's refusal to provide Native American inmates with certain traditional foods in connection with ceremonies substantially burdened their exercise of religion, rejecting the notion that the provision of some but not all of the traditional foods was sufficient). In other words, the government undertaking need not totally foreclose the practice.

Most importantly for this analysis, the Supreme Court recently recognized that government undertakings that result in "**destruction of religious property**" can constitute a "RFRA violation." *Tanzin v. Tanvir*, 141 S. Ct. 486, 493 (2020) (emphasis added) *c.f.* *United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003) (assuming that "raz[ing]" a "house of worship" would constitute a substantial burden). Even threatened harm is sufficient to demonstrate a substantial burden. *Gonzalez*, 546 U.S. at 43. Such destruction of religious property distinguishes the Tribe's and Mr. Vance's injuries from the line of cases that the State incorrectly has asserted in prior briefing should control here. ECF 32 at 3-7. Those cases did not concern any destruction of religious property, but instead concerned questions regarding mere management of federal lands. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 82 (D. D.C. 2017) (concerning federal authorization of "mere presence of a crude oil pipeline under a body of water"); *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988) (concerning federal approval of a project to pave a road through a sacred site); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (concerning federal approval of a plan to allow use of wastewater to make artificial snow for a ski resort on a sacred mountain).

In *Lyng*, not only was there no destruction of religious property, but the Court emphasized that the government "could not have been more solicitous" of tribal religious beliefs. *Lyng*, 485 U.S. at 454. The government planned a route for the disputed road that was "the farthest remote

from contemporary spiritual sites,” and “provided for one-half mile protective zones around all the religious sites.” *Id.* at 454, 443. The government chose the route with the explicit goal that “[n]o sites where specific rituals take place were to be disturbed.” *Id.* at 454. Unlike in *Lyng*, even if the government could exercise solicitude, wildfires, by their nature, are ungovernable. Recent catastrophes have proven that there is little that humankind can do when the conditions are right and a wildfire ignites.⁴ The DOI has denied the fireworks permit for this very reason. As it concerns Lakota religious exercise, if a forest fire was ignited, the government could not propose a particular route for the fire, it could not plan to avoid spiritual sites, and it could not possibly ensure that “no sites where specific rituals take place were . . . disturbed.” *See Lyng*, 535 F.3d at 454, 443. Indeed, as discussed *infra* and in the Tribe’s and Mr. Vance’s opening brief, the government is still in the process of working with tribal people to determine precisely **where** those sacred sites may be. The government could not protect those sites now even if it were physically possible.

In *Navajo Nation*, the Ninth Circuit held that the snow-making project would have no physical impact on the disputed area, as no “plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified.” *Navajo Nation*, 535 F.3d at 1063. Thus, the sole effect of the artificial snow was on the Plaintiffs subjective spiritual experience. Here, unlike in *Navajo Nation*, the Tribe and Mr. Vance have alleged a threat that sacred plants and medicines and sacred

⁴ *See* Priyanka Boghani, *Camp Fire: By the Numbers*, Frontline (Oct. 29, 2019), <https://www.pbs.org/wgbh/frontline/article/camp-fire-by-the-numbers/> (last visited May 15, 2021) (noting that the fire spread at the rate of 80 football fields a minute at its peak burned 153,335 acres).

shrines **will** be destroyed by wildfire. They have alleged that waters **will** be polluted. They have alleged that religious ceremonies and places of worship **will** be affected.

The DOI indeed has identified tribal concerns as a reason that it has denied the subject permit. ECF 3-2 at 101. The government is not only concerned as the Tribe's and Mr. Vance's trustee, but it has an obligation pursuant to the National Historic Preservation Act ("NHPA") to engage in meaningful consultation with the Tribe and Mr. Vance on the existence of sites that are on, or could be eligible for, listing in the National Historic Register of Historic Places. 54 U.S.C. § 302706.

The ongoing NHPA process is another reason that the State's injunctive relief will injure the Tribes. The relief that the State seeks in this litigation would abort an ongoing Section 106 process that the DOI is currently conducting in the Black Hills, including engaging tribes in "a Tribal Cultural Sites / Traditional Cultural Properties Survey of [Mount Rushmore]," completion of which has been delayed until later this summer due to the pandemic. ECF 3-2 at 101. The government's engagement in this process is no mere courtesy to the Tribe and Mr. Vance; it is a legal obligation that the Tribe and Mr. Vance are **entitled to** under federal law. Specifically, Section 106 of the NHPA requires that federal agencies must take into consideration the effects of any federal undertaking, including the granting of a permit or license, on historic properties. 54 U.S.C. § 306108; *see also Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-03026, 2016 WL 5478428 at *5 (D. S.D. Sep. 29, 2016). The Section 106 process requires agencies to engage in meaningful consultation with Indian tribes on federally authorized undertakings that could affect sites that are on, or could be eligible for, listing in the National Register of Historic Places, including sites that are culturally significant to Indian tribes. 54 U.S.C. § 302706 (providing that "[p]ropert[ies] of traditional religious and cultural

importance to an Indian tribe . . . may be determined to be eligible for inclusion on the National Register” and agencies “shall consult with any Indian tribe . . . that attaches religious and cultural significance to [such property]”). Agencies must consult regarding sites that hold “religious and cultural significance” to Indians even if they occur on ancestral or ceded land. 36 C.F.R. § 800.2(c)(2)(ii)(D). The agencies must ensure that the tribes have “a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” *Id.* at 800.2(c)(ii)(A). This process also requires “reasonable and good faith efforts” to consult with tribes on the part of the agencies. *Id.*

An agency’s failure to abide by the Section 106 process, particularly the failure to ensure tribes a reasonable opportunity to identify their concerns and the failure of the agency to make its own reasonable and good faith efforts to consult, is arbitrary and capricious and should be set aside. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 860-63 (9th Cir. 1995). The DOI’s obligation to the Tribe and Mr. Vance under the NHPA – an obligation that also shows respect to the Tribe’s and Mr. Vance’s First Amendment and RFRA-based rights – reflects the fact that the DOI is entrusted with the responsibility of protecting this land for all current and future users of the land, not just one party who claims she has the most valid right to use that land. The DOI’s denial of the subject permit has the effect of protecting powerful statutory and Constitutional rights that the Tribe and Mr. Vance enjoy. The granting of an injunction that eliminated those protections would result in an injury that far outweighs the thin economic and reputational harm that the State has alleged here.

IV. The Public Interest Would Not Served by Granting the Injunction

As set forth above, the balancing of harms and the public interest merge when the federal government or agency is the defendant. *Flandreau Santee Sioux Tribe*, 2019 WL 2394256, at *5 (quoting *Nken*, 556 U.S. at 435). The DOI's denial of the subject permit serves the public interest generally, including shielding the public from health risks like the Coronavirus and safety risks like a catastrophic wildfire. *See* ECF 3-2 at 101. More specifically, however, the DOI's denial has had the effect of protecting the Tribe's and Mr. Vance's statutory and Constitutional rights. *See* part III *supra*. The public interest is very important in this calculus, because while the Tribe and Mr. Vance disagree with regard to the existence of irreparable injury to the State here, the Court may deny a preliminary injunction even where irreparable injury to the movant exists if the injunction is contrary to the public interest. *See Winter*, 129 S. Ct. at 376 (holding that even though plaintiffs showed a "near certainty" of irreparable injury to marine mammals resulting from the Navy's use of mid-frequency active sonar, that harm was outweighed by the public interest in facilitating effective naval training exercises); *Amoco Production v. Village of Campbell*, 480 U.S. 531, 545; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Yakus v. United States*, 321 U.S. 414, 440 (1944). In this case, the public interest favors not issuing an injunction.

CONCLUSION

In weighing the preliminary injunction factors, the Court should strongly consider Plaintiffs' failure to show likelihood of success on the merits and irreparable harm, as well as the strong public interest weighing against issuing an injunction. The balance of harms, therefore, favors not issuing an injunction in this case. For the foregoing reasons, Proposed Intervenor Defendants respectfully submit that this Court should deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully Submitted this 18th day of May, 2021.

s/ Leonika Charging-Davison
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