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Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

COALITION FOR SONORAN DESERT
PROTECTION; CENTER FOR
BIOLOGICAL DIVERSITY; FRIENDS OF
IRONWOOD FOREST; and TUCSON
AUDUBON SOCIETY,

Plaintiffs,

v.

FEDERAL HIGHWAY
ADMINISTRATION; and KARLA PETTY,
acting in her official capacity as DIVISION
ADMINISTRATOR, FEDERAL
HIGHWAY ADMINISTRATION,
ARIZONA,

Defendants.

Case No. 4:22-cv-193-JCH

**DEFENDANTS' MOTION FOR
PARTIAL DISMISSAL FOR LACK OF
SUBJECT MATTER JURISDICTION**

(Oral Argument Requested)

MOTION TO DISMISS

1
2 The Federal Highway Administration (“FHWA”) and Karla Petty, named in her official
3 capacity as defendant, hereby move for partial dismissal of Plaintiffs’ Complaint, ECF No. 1,
4 pursuant to Fed. R. Civ. P. 12(b)(1) and request entry of judgment in their favor as to Plaintiffs’
5 claims for relief under Section 4(f) of the Department of Transportation Act, 23 C.F.R. § 774,
6 and the Fish and Wildlife Coordination Act, 16 U.S.C. § 663.
7

8 Plaintiffs allege that “FHWA’s failure to adequately consider the [I-11 Corridor]
9 Project’s impacts on Sonoran Desert National Monument, Ironwood Forest National Monument,
10 Saguaro National Park, Tucson Mountain Park, Tucson Mountain Historic District, and City of
11 Tucson and Pima County lands and alternatives to avoid the Tucson Mitigation Corridor
12 precluded informed consideration of feasible and prudent alternatives and ‘all possible planning’
13 to avoid and minimize impacts on these properties,” in violation of Section 4(f). Compl. ¶ 111.
14 Plaintiffs also allege that “FHWA’s decision to carry forward the West Option to Tier 2,
15 including use of the Tucson Mitigation Corridor for the Project, violates the Fish and Wildlife
16 Coordination Act’s directive that properties acquired under 16 U.S.C. section 663 for wildlife
17 conservation purposes ‘shall be in accordance with general plans jointly approved’ by the agency
18 administering the project, the Department of the Interior, and the state wildlife agency.” *Id.* ¶
19 115.
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23 Taking the allegations of fact as true, Plaintiffs’ claims should be dismissed pursuant to
24 Fed. R. Civ. P. 12(b)(1). Plaintiffs fail to state cognizable Section 4(f) and Fish and Wildlife
25 Coordination Act claims because the Complaint does not and cannot identify final agency action,
26 as the APA requires. FHWA’s review of the proposed and currently unfunded Interstate-11 (“I-
27 11”) freeway in Arizona (the “Proposed Facility”) and its potential impacts to Section 4(f)
28

1 resources is preliminary and thus not final. FHWA’s preliminary review precedes a final review
2 of Section 4(f) resources that the Arizona Department of Transportation (“ADOT”) must perform
3 in Tier 2 should the agency secure sufficient funding. Similarly, in their Fish and Wildlife
4 Coordination Act claim Plaintiffs ask the Court to review a deferred rather than final agency
5 action (*i.e.*, selection of the West Option). FHWA’s deferment of the decision as to whether to
6 select the West or East Options through Pima County renders Plaintiffs’ Fish and Wildlife
7 Coordination Act claim unripe.
8

9 For all of these reasons and those detailed in the attached Memorandum Defendants
10 respectfully ask the Court to dismiss all of Plaintiffs’ Section 4(f) and Fish and Wildlife
11 Coordination Act claims and their associated Requests for Relief in their entirety, with prejudice,
12 and enter judgment in their favor. *See id.* ¶¶ 105-116.
13

14 Respectfully submitted on August 5, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2022, a copy of the foregoing Motion for Partial Dismissal was filed via the Court’s electronic case filing (ECF) system, which will send notice to all counsel of record.

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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**
16

17 COALITION FOR SONORAN DESERT
18 PROTECTION; CENTER FOR
19 BIOLOGICAL DIVERSITY; FRIENDS OF
20 IRONWOOD FOREST; and TUCSON
21 AUDUBON SOCIETY,

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23 v.

24 FEDERAL HIGHWAY
25 ADMINISTRATION; and KARLA PETTY,
26 acting in her official capacity as DIVISION
27 ADMINISTRATOR, FEDERAL
28 HIGHWAY ADMINISTRATION,
ARIZONA,

Defendants.

Case No. 4:22-cv-193-JCH

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL DISMISSAL FOR LACK OF
SUBJECT MATTER JURISDICTION**

(Oral Argument Requested)

INTRODUCTION

1
2 Defendants seek dismissal of Plaintiffs' claims brought under Section 4(f) of the
3 Department of Transportation Act and the Fish and Wildlife Coordination Act because they are
4 predicated on non-final agency action. This case concerns the proposed and currently unfunded
5 Interstate-11 ("I-11") freeway in Arizona (the "Proposed Facility") that would run 280 miles
6 north to south from Wickenburg to Nogales and the I-11 Corridor Tier 1 Environmental Impact
7 Statement ("EIS") identifying a general area in which the future freeway could be located (the
8 "I-11 Corridor") pending additional, more detailed study and available funding. Plaintiffs
9 challenge the Record of Decision ("ROD") and Final Preliminary Section 4(f) Evaluation of the
10 first phase (*i.e.*, "Tier 1") of the Proposed Facility. The U.S. Department of Transportation's
11 Federal Highway Administration ("FHWA") and local project sponsor Arizona Department of
12 Transportation ("ADOT") issued the Tier 1 ROD and preliminary Section 4(f) evaluation on
13 November 15, 2021.

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16
17 Should funding become available, identification of a precise alignment, design, and
18 additional environmental review of the Proposed Facility will occur in a second phase, Tier 2.
19 ADOT is solely responsible for advancing any Tier 2 projects as it has assumed all NEPA
20 responsibility under 23 U.S.C § 326. The ROD identifies the 2,000-foot wide Preferred Corridor
21 Alternative analyzed in the I-11 Final Tier 1 Environmental Impact Statement and Preliminary
22 Section 4(f) Evaluation as the Selected Corridor Alternative. But the ROD defers to Tier 2 and
23 ADOT the further study and selection through Pima County of either the West or East Options,
24 No Build, or a different alignment altogether. Moreover, there is no specific timing for the Tier
25 2 process, and the State legislature only recently authorized \$25M in funding for further Tier 2
26 study in Maricopa County, which does not include funding for final design, right-of-way
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1 acquisition, or construction. Def. Ex. 1, Declaration of Karla Petty (“Declaration”) ¶ 7. And no
2 funding, federal or otherwise, has been authorized for any other segment. *Id.* Even assuming
3 ADOT completes its review of the Tier 2 project and secures funding for construction, it is up to
4 the State Transportation Board (“STB”) to determine its priority in the Five-Year Transportation
5 Facilities Construction Program and ADOT may not unilaterally prioritize it over other
6 competing projects. *Id.* ¶ 6.

8 Plaintiffs now challenge, among other things, a largely unfunded freeway construction
9 project and preliminary Section 4(f) analysis that represents one initial step among many more
10 steps in the agencies’ review of the Proposed Facility’s potential impacts. ADOT cannot even
11 begin the design phase or resume NEPA and Section 4(f) review of segments of the Proposed
12 Facility until it has secured funding for that purpose, which has not occurred for the West or East
13 Option segments in Pima County. Yet Plaintiffs’ Fish and Wildlife Coordination Act claim
14 assumes that the agencies’ have already selected the West Option.

16 The Court should dismiss both Plaintiffs’ Section 4(f) claim and their Fish and Wildlife
17 Coordination Act claim under Rule 12 of the Federal Rules of Civil Procedure. Neither claim is
18 justiciable. FHWA’s high-level evaluation of the Proposed Facility’s impact to Section 4(f)
19 resources is preliminary. Challenges under the APA require final agency action. FHWA’s
20 preliminary review, however, precedes the complete and final review of Section 4(f) resources
21 that ADOT must perform in Tier 2 should it secure funding before it can select a build
22 alternative for the Proposed Facility. Similarly, the West Option for the corridor in Pima County
23 that Plaintiffs claim violates the Fish and Wildlife Coordination Act is, as the name suggests, a
24 route that the agencies have not yet chosen. Yet Plaintiffs’ claim assumes that FHWA and
25 ADOT have selected the West Option. The ROD itself, however, acknowledges that it carries
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1 the West and East Options forward to allow ADOT to make a more informed decision to choose
2 one of them, take no action (No Build), or develop a new alternative, after completing detailed
3 environmental and engineering studies in Tier 2.

4
5 Thus, as explained in greater detail below, the Court should dismiss Plaintiffs' Section
6 4(f) and Fish and Wildlife Coordination Act claims.

7 **FACTUAL BACKGROUND**

8 **A. ADOT and NDOT Issue the I-11 and Intermountain West Corridor Study**

9
10 In 2014, ADOT and the Nevada Department of Transportation issued the I-11 and
11 Intermountain West Corridor Study identifying the I-11 Corridor as a critical transportation
12 corridor that would diversify, support, and connect the economies of Arizona and Nevada.
13 Compl. ¶ 67, ECF No. 1; Def. Ex. 2, Final Tier 1 Environmental Impact Statement and
14 Preliminary Section 4(f) Evaluation ("Final EIS") at ES-1.

15
16 In May 2016, FHWA and ADOT issued a Notice of Intent to Prepare a Tier 1
17 Environmental Impact Statement for Interstate 11 Corridor Between Nogales and Wickenburg,
18 Arizona. Compl. ¶ 68. The notice initiated a forty-five day scoping period during which FHWA
19 and ADOT received public input and held six public meetings on the scope of the EIS, the
20 Project's purpose and need, potential alternatives to be considered, and impacts to be evaluated.
21 *Id.* Materials presented at these meetings depicted the study area, detailed the purpose and need,
22 and defined the overall Tier 1 EIS study process. *Id.*

24 After the scoping period, FHWA and ADOT considered numerous corridors composed of
25 twenty-seven segments that would be consistent with the Proposed Facility's purpose and need
26 through the Alternative Selection Report (ASR) process, which included six additional public
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1 information meetings and various other outreach efforts, and narrowed them to three end-to-end
2 alternatives for analysis in the Draft EIS. *Id.* ¶¶ 70-71.

3 **B. FHWA and ADOT Issue the Draft Tier 1 Environmental Impact Statement and**
4 **Preliminary Section 4(f) Evaluation for the Project**

5 On April 5, 2019, FHWA and ADOT issued a Draft Tier 1 Environmental Impact
6 Statement and Preliminary Section 4(f) Evaluation for the Project. *Id.* ¶ 71. During a ninety-
7 four-day comment period, the agencies held six public hearings attended by more than 1,300
8 people. *Id.* The agencies received over 12,400 public comment submissions on the Draft EIS.
9 *Id.* ¶ 81.

10 The Draft EIS noted that in a final Tier 1 EIS the agencies would select either a Build
11 Corridor Alternative or a No Build Alternative. Compl. ¶ 72. If the agencies selected the Build
12 Corridor Alternative, the process would require Tier 2 environmental studies to determine the
13 specific alignment of the freeway within the selected I-11 Corridor. *Id.*

14 The Draft EIS considered three Build Corridor Alternatives (Purple, Green, and Orange)
15 and a hybrid of the alternatives. *Id.* ¶¶ 75-76. The document identified the hybrid alternative as
16 the Recommended Alternative that FHWA determined would best meet the Proposed Facility's
17 purpose and need. *Id.* ¶ 76.

18 The Draft Section 4(f) Evaluation determined that: (1) neither the Ironwood Forest
19 National Monument nor Sonoran Desert National Monument qualified for Section 4(f)
20 protections because they do not function and are not designated within the BLM Resource
21 Management Plan as a significant park, recreation area, or wildlife and waterfowl refuge; (2) the
22 Tucson Mitigation Corridor qualified for Section 4(f) protection because it is a significant
23 wildlife refuge and the Proposed Facility would result in a direct use of the property; and (3) the
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1 Saguaro National Park and Tucson Mountain Park are protected by Section 4(f) as a park and
2 recreation resource but there would be no direct or constructive use because the Proposed
3 Facility's impacts would not incorporate land from the properties nor substantially impair the
4 activities, features, or attributes that qualify each park for Section 4(f) protection. *Id.* ¶ 86.

5
6 The Draft Section 4(f) Evaluation also determined that it did not need to consider the
7 Proposed Facility's ecological intrusion as a constructive use of Saguaro National Park and
8 Tucson Mountain Park because the two parks are managed for conservation, preservation, and
9 public recreation as opposed to use as a wildlife or waterfowl refuge where ecological intrusion
10 is a relevant a factor. *Id.* ¶¶ 87, 88.

11 12 **C. FHWA and ADOT Issue the Final Tier 1 Environmental Impact Statement and** 13 **Preliminary Section 4(f) Evaluation for the Project**

14 On July 16, 2021, FHWA and ADOT issued the Final Tier 1 EIS and Preliminary Section
15 4(f) Evaluation for the I-11 Corridor. Compl. ¶ 90.

16 The Preferred Alternative identified in the Final EIS differed from the Recommended
17 Alternative in the Draft EIS in several ways. Notably, the Preferred Alternative deferred the
18 decision as to whether to create a new corridor west of Tucson in Pima County (the West
19 Option), or whether to co-locate the Project with I-19 and I-10 in and around Tucson between
20 Sahuarita and Southern Pinal County (the East Option). Def. Ex. 2, Final EIS at ES-4.

21
22 A thirty-day public review period followed the issuance of the Final EIS. Compl. ¶ 92.
23 All correspondence received was reviewed and made available on the EIS website.¹

24 25 **D. FHWA Issues the Record of Decision for the Project**

26
27
28 ¹ Interstate 11 Corridor Tier 1 Environmental Impact Statement, Nogales to Wickenburg, Study Documents, Correspondence Report Appendix A - D2 (<http://i11study.com/Arizona/Documents.asp>), last visited Aug. 4, 2022.

1 On November 15, 2021, FHWA and ADOT issued the ROD for the I-11 Corridor.
2 Compl. ¶ 100. The ROD identified the Preferred Corridor Alternative analyzed in the Final EIS
3 as the Selected Corridor Alternative for the I-11 Corridor Project and found that the No Build
4 Alternative would not meet the purpose and need. *Id.*

6 STANDARD OF REVIEW

7 A Rule 12(b)(1) motion challenges the federal court’s jurisdiction over the subject matter
8 of the complaint. Plaintiffs bear the burden of establishing that subject matter jurisdiction exists.
9 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A Rule 12(b)(1) motion
10 will be granted when, looking at the entirety of the complaint, its allegations fail to establish
11 jurisdiction either facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
12 (9th Cir. 2004). While in a facial attack all material allegations are taken as true, the court need
13 not assume the truthfulness of the allegations in a factual attack and may review evidence
14 beyond the complaint without converting the motion into one for summary judgment. *In re*
15 *Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1236 (9th Cir. 2008).

18 ARGUMENT

19 A. The Court Lacks Jurisdiction Over Plaintiffs’ Section 4(f) Claim

20 The Court should dismiss Plaintiffs’ Section 4(f) claim because Plaintiffs seek judicial
21 review of a preliminary approval rather than a final agency action.

22 The Administrative Procedure Act (“APA”) provides authority for the Court’s review of
23 decisions under Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), but
24 limits that review to “final agency action” under 5 U.S.C. § 704. *See Lujan v. Nat’l Wildlife*
25 *Fed’n*, 497 U.S. 871, 882 (1990). To be final, two conditions must be met: “the action must
26 mark the consummation of the agency’s decision-making process,” and it must also determine
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1 “rights or obligations” or be one “from which legal consequences will flow.” *Bennett v. Spear*,
2 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted).

3
4 First, FHWA’s Tier 1 review of the Proposed Facility’s impact on Section 4(f) resources
5 decidedly does not “mark the ‘consummation’ of the agency’s decision-making process.” *Id.*
6 (citation omitted). The Tier 1 ROD includes only a final preliminary Section 4(f) evaluation.
7 Def. Ex. 3, ROD at 19. Though “FHWA completed a Preliminary Section 4(f) Evaluation, . . .
8 ADOT will complete Section 4(f) evaluations during the Tier 2 analyses.” *Id.* That evaluation
9 will not only revisit but also expand upon the analyses FHWA performed at the Tier 1 level.
10 Specifically, ADOT will: (1) select a specific roadway alignment; (2) identify and assess
11 potential impacts and uses of Section 4(f) properties based on that alignment; (3) potentially
12 identify additional Section 4(f) resources; (4) evaluate measures to avoid or minimize impacts to
13 Section 4(f) properties; (5) identify and commit to measures to mitigate adverse impacts to
14 Section 4(f) properties; (6) assess least overall harm as warranted; and (7) complete a Final
15 Section 4(f) Evaluation prior to making a final Section 4(f) approval. *Id.* And “if new
16 conditions, information, or regulations that change the boundaries of Section 4(f) properties
17 within the corridors arise before Tier 2 studies, FHWA may evaluate alternatives outside the
18 2,000-foot-wide corridor.” *Id.*

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21 Second, the Tier 1 review does not make a determination from which rights or
22 obligations flow. *Bennett*, 520 U.S. at 178. While FHWA’s Tier 1 evaluation provides an initial
23 overview of the Proposed Facility’s potential impacts to Section 4(f) resources, the ROD notes
24 that once ADOT “refine[s] the corridor to a specific roadway alignment” it will “identify and
25 assess potential impacts and uses of Section 4(f) properties,” “evaluate measures to avoid or
26 minimize impacts to Section 4(f) properties,” “identify and commit to measures to mitigate
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1 adverse impacts to Section 4(f) properties,” and “complete a Final Section 4(f) Evaluation prior
2 to making a final Section 4(f) approval.” Def. Ex. 3, ROD at 19. No rights or obligations flow
3 from “the potential to require the use of resources protected under Section 4(f)” *Id.* Rather,
4 ADOT will “complete the Draft and Final Section 4(f) Evaluation(s) as required” during Tier 2,
5 when it “will focus on examining ways to avoid or minimize uses of the Section 4(f) properties
6 in the development of alignment alternatives” *Id.* at 20.

8 Not unlike the ROD and final EIS in *Openlands v. U.S. Department of Transportation*,
9 124 F. Supp. 3d 796, 810 (N.D. Ill. 2015), the ROD here “expressly states that the Agencies’
10 determinations as to all 4(f) properties are preliminary” *Openlands* concerned FHWA’s
11 environmental review of a proposed interstate tollway that ran from Will County, Illinois to Lake
12 County, Indiana. *Id.* at 798. Among the plaintiffs’ claims was a challenge to FHWA’s
13 evaluation of the project’s impacts to Section 4(f) resources. *Id.* at 809-10. Concluding that the
14 agencies’ Section 4(f) determinations were preliminary and not final, the court found it
15 convincing that “opportunities to minimize harm at subsequent stages [were] not precluded by
16 decisions made in Tier One,” “Section 4(f) approval [would] be finalized in Tier Two,” and “[a]
17 preliminary Section 4(f) approval would be subject to a reevaluation if new or more detailed
18 information bec[ame] available during the Tier Two NEPA studies.” *Id.* at 810 (citations
19 omitted).

22 FHWA’s Section 4(f) analysis here is no less preliminary than the analysis the agency
23 provided at Tier 1 in *Openlands*. As discussed above, opportunities to minimize harm at
24 subsequent stages were not precluded by decisions made in FHWA’s Tier 1 analysis because
25 ADOT is now tasked with Tier 2 analysis that includes examining ways to minimize harm to
26 Section 4(f) properties and identifying appropriate mitigation. These are the very same
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1 outstanding determinations the court noted in *Openlands* before finding that FHWA’s Section
2 4(f) evaluation was merely preliminary and not final agency action.

3 The Court should thus dismiss Plaintiffs’ Section 4(f) claim for failure to plead final
4 agency action.
5

6 **B. Plaintiffs’ Fish and Wildlife Coordination Act Claim is Not Ripe**

7 The Court should dismiss Plaintiffs’ Fish and Wildlife Coordination Act claim because
8 Plaintiffs seek judicial review of a deferred rather than final agency action (*i.e.*, selection of the
9 West Option). *See* Def. Ex. 3, ROD at 12 (“The Preferred Alternative . . . carries forward two
10 options (west option and east option) for further study in Pima County . . .”). The agency’s
11 deferment of the decision as to whether to select the West or East Options through Pima County
12 renders Plaintiffs’ claim unripe.
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14 “To determine ripeness in an agency context, [the Court] must consider: (1) whether
15 delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would
16 inappropriately interfere with further administrative action; and (3) whether the courts would
17 benefit from further factual development of the issues presented.” *Cottonwood Env’tl. Law Ctr.*
18 *v. U.S. Forest Serv.*, 789 F.3d 1075, 1083 (9th Cir. 2015) (citation omitted).
19

20 First, the facts demonstrate that Plaintiffs would suffer no hardship were the Court to
21 delay review of Plaintiffs’ Fish and Wildlife Coordination Act claim. That the Proposed Facility
22 in Pima County is presently unfunded means that ADOT cannot actually select the West Option
23 that Plaintiffs’ claim assumes the agency has already selected. *See* Def. Ex. 3, ROD at 17 (“At
24 the time of this ROD, no funding has been identified to plan, design, purchase right-of-way, or
25 construct any part of I-11, including any Tier 2 analysis.”). Even if the Proposed Facility were
26 funded, ADOT would not only have to resume but also reevaluate the NEPA analysis FHWA
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1 performed in light of its specific freeway design. *Id.* (“The Tier 2 process would include NEPA
2 analysis to inform the selection of a specific alignment within the 2,000-foot-wide selected
3 corridor alternative, site-specific environmental analyses and mitigation measures, and
4 preliminary design.”). Should ADOT determine that the West Option best meets the Proposed
5 Facility’s purpose and need, complete coordination under the FWCA, and officially select that
6 alternative, Plaintiffs can then file their Fish and Wildlife Coordination Act claim.
7

8 Second, assuming ADOT secures Tier 2 funding, Plaintiffs file a motion for preliminary
9 injunction, and the Court grants said motion, the Court’s interference would mean that ADOT
10 could not resume its evaluation of the respective environmental impacts of the West and East
11 Options in Pima County. FHWA’s Tier 1 NEPA analysis more broadly addresses the 2,000-
12 foot-wide corridor but it cannot possibly address the precise potential environmental impacts of a
13 freeway that ADOT has not yet designed. Def. Ex. 1, Declaration ¶ 4. ADOT could not resume
14 its environmental review, let alone begin freeway design, were the Court to interfere with Tier 2
15 advancement now. Whether the agency ultimately selects the West or East Option, that route
16 represents a significant and inextricable part of the proposed I-11 Corridor in Arizona. *See* Def.
17 Ex. 3, ROD at 13 (Figure 6).
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20 Third, ADOT’s review of and expansion upon FHWA’s analysis regarding any potential
21 impacts to the Tucson Mitigation Corridor could only stand to benefit the Court and its own
22 review of the agencies’ decision-making. This is assuming, of course, that ADOT not only
23 secures funding for the resumption of such environmental review but that it also selects the West
24 Option after such review.
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26 None of the three ripeness factors supports the survival of Plaintiffs’ Fish and Wildlife
27 Coordination Act claim. Thus, the Court should dismiss this claim.
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CONCLUSION

For these reasons, Defendants respectfully request that the Court grant their Motion for Partial Dismissal and dismiss Plaintiffs’ Section 4(f) and Fish and Wildlife Coordination Act claims.

Respectfully submitted on August 5, 2022.

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