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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

Confederated Tribes of the Goshute Reservation, Appellant, vs. Bureau of Land Management, Respondent.	IBLA # _____ Appeal from April 7, 2015 Record of Decision by Elko District Manager Jill Silvey to Approve Final Environmental Impact Statement (DOI-BLM-NV-E030-2013-006-EIS) and Plan of Operations (NVN-91032) for the Long Canyon Mine Project.

PETITION FOR STAY

Pursuant to 43 C.F.R. § 4.21, the CTGR hereby petition for a stay of the challenged BLM final decision. The CTGR respectfully request the IBLA to stay this contested decision until the appeal is resolved. A stay of the BLM's decision and approval of the Project is necessary to prevent irreparable harm to the CTGR and the environment. This Petition is filed contemporaneously with the CTGR Notice of Appeal and Statement of Reasons and Declaration of Paul Echo Hawk in Support. These documents and attached exhibits support the Petition for Stay and are incorporated herein by this reference.

I. LEGAL STANDARD FOR A STAY

To prevail on a petition for stay, the appellant must show sufficient justification based on the following four standards: (A) the likelihood of immediate and irreparable harm if the stay is not granted, (B) the relative harm to the parties if a stay is granted or denied, (C) the likelihood of appellant's success on the merits, and (D) whether the public interest favors granting a stay. 43 C.F.R. § 4.21(b). Furthermore, under *Wyoming Outdoor Council*, *et al*., (153 IBLA 379, 388 (2000)), the IBLA has previously held that:

> In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation.

Maintaining the status quo during pendency of appeal "can be of considerable importance since the effectiveness of any relief may be compromised if actions objected to are allowed to go forward during the period of adjudication." *W. Wesley Wallace*, 156 IBLA 277, 278 (2002).

A. Likelihood of Immediate and Irreparable Harm to CTGR

The primary issue in this case is the destruction of thousands of cultural artifacts and hundreds of cultural sites. In a letter to the BLM, CTGR Chairwoman Greymountain detailed a few of the large finds that tribal monitors had come across during their work within the Project Area, and the significance of those finds:

> Massive numbers of cultural resources have been discovered within the Project Area that were somehow inconceivably missed during previous inventories . . . . Just recently, over 6,000 tribal artifacts were newly discovered in just one very small part of the Project Area. Perhaps even more astounding was the recent discovery of more than 900 well-defined stone tools of historic and prehistoric periods that were identified in part by tribal monitors. When tribal monitors walked into a grove of Pinyon-Juniper trees, they found ancient pottery everywhere. It was unrecorded,

> undocumented, conveniently missed. These finds are staggering. They are unprecedented. And they are only a fraction of what has been discovered recently, and only a fraction of the discoveries that increase each day when the tribal monitors are working at the Project site. In fact, so many new and significant discoveries have been made with the assistance of tribal monitors that it is undeniably clear that the Project's cultural resource inventories (and seven previous site-specific cultural resource studies) grossly misrepresent and underestimate the significance, context, and scale of important tribal cultural resources within the Project Area.

Exhibit 2 at 4.

The destruction of those cultural resources and cultural sites can never be reclaimed. It is purely irreparable. Those resources and sites hold significant components of Goshute history and cultural. The removal of thousands of artifacts from the Project Area through data recovery mitigation permanently destroys the artifact-land-tribal connection that is an essential part of who tribal people are and how they know their cultural history. So, along with the destruction of resources and sites, the destruction of Goshute history and culture is purely irreparable.

In sharp contrast, the gold in the project area is not going anywhere. There is no compelling reason to rush forward with the open-pit mining activity that will permanently alter the landscape and destroy invaluable tribal cultural resources.

CTGR Chairwoman Greymountain attested to the irreparable aspects of the cultural resources and cultural sites:

> [W]e want to work cooperatively with the BLM not just in our fiduciary relationship but also in the spirit of how truly significant this archaeological site really is. While the BLM has seen thousands of days when mine projects have been approved, it is truly a rare and incredible day when we find an archaeological site of this depth and magnitude. Just as we have said from the onset of this Project EIS, the site is a monumental cultural area of profound significance. When we are faced with a rare and monumental discovery, we must rise to the occasion. We must spend the time and energy to properly reveal this great archaeological site. The gold at the Project Area will not disappear in the

> meantime. But if the BLM were to permit this Project prior to properly documenting and mitigating this great historical site, then a great part of Goshute history would be lost forever, and with it a significant part of American history would be lost forever. This site is a national treasure. It is an historical asset that can never be replaced if destroyed.

Exhibit 2 at 8. Even when cultural artifacts are collected and shipped off to far-away, limited-access holding facilities as part of "data recovery" mitigation, the CTGR loses forever a significant part of their ancient resources, history, and culture.

Not only will the harm to CTGR be irreparable, the harm will be immediate. Once the BLM issues a Notice to Proceed to Newmont, they will begin a rapid process of "construction monitoring" and "data recovery." During that process, cultural resource monitors will collect cultural resources resting on the ground surface. They will perform data recovery by recording standardized information about the artifacts (e.g., location, GPS data, photographs, artifact classification, etc.) in the BLM-approved context, or the "Caucasion perspective" of Goshute ancestral resources. They will then remove those resources from the Project Area and ship them to federal curation and testing facilities. Some of the artifacts will undergo geochemical analysis to determine artifact age, source, or other information. The thousands of individual artifacts will be kept inside the federal facility in a sort of "curation warehouse." This curation facility is located in or about Boise, Idaho, which is a six-hour, 366-mile drive from the Goshute Reservation. If space is available after geochemical analysis of artifacts, some may be sent to another curation facility in or near Reno, Nevada, which is a seven-hour, 455-mile drive from the Goshute Reservation.

If a stay is not granted, the BLM would be allowed to proceed with mine Project that has been developed and approved in contravention of federal law. This will cause

potentially irreparable harm to the public lands involved. An exacting standard of what constitutes the minimum harm has been previously ruled: "harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure." *Davis v. Mineta*, 302 F.3d at 1115; *see also Amoco Prod. Co. v. Village of Gambrel*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable . . . therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment").

The Supreme Court has acknowledged that environmental harm, which includes harm to cultural resources, cultural sites, and areas of Native American traditional and religious conern, is typically permanent or irreparable, and that the "balance of harms usually favors issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Federal courts have also repeatedly affirmed that noncompliance with NEPA and other environmental laws generally causes irreparable injury, not only by threatening permanent harm to the environment but also by injuring the rights of affected members of the public to participate and be fully informed of the agency's decision-making process under NEPA. See, e.g., *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984); *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

B. Relative Harm to the Parties

The relative harm to the parties favors the issuance of a stay. Little to no harm to BLM will result from a stay. While the BLM may allege that a stay would result in economic harm to Newmont, that harm would only be temporary. The millions of ounces

of gold in the Pequop Mountains are not going to disappear; the gold will remain whilst the appeal is resolved. And the economic benefits to Newmont will resume after the appeal has been resolved.

Any temporary economic harm in this case is not considered irreparable. *See South Fork Band Council*, 58 F.3d at 728 (economic injuries to mining operations temporary); *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006) ("there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operations"); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) ("loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment"). Where a threat exists of irreparable environmental harm, "more than pecuniary harm must be demonstrated" to avoid a preliminary injunction. *N. Alaska Envtl. Ctr. V. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (irreparable environmental harm outweighed competing harm to miners despite potential for "real financial hardship"). *Save Our Sonoran*, 408 F.3d at 1124-1125 (affirming preliminary injunction because, while developer "may suffer financial harm," without injunction "unlawful disruption to the desert is likely irreparable").

On the other hand, the harm to CTGR is permanent and irreparable. There will be no way for the CTGR to regain the site-specific historical, cultural, and spiritual connection to the Project Area once the mine is constructed. And as detailed under the previous subsection, "Likelihood of Immediate and Irreparable Harm to CTGR," all that will remain of that cultural history and resources will be destroyed through construction

and operation, and through the removal of artifacts from the site and placement into far-away holding facilities.

C. CTGR is Likely to Succeed on the Merits

The CTGR's likelihood of success on the merits also favors granting a stay. At a minimum, the CTGR have raised "fair ground for litigation and thus for more deliberative investigation," *Wyoming Outdoor Council, et al*., 153 IBLA at 388 (showing that the decisions and ROWs should be stayed pending resolution of their appeal).

Under NEPA, "injury . . . occurs when an agency fails to comply with that statute" and "[t]he injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making." *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006). "Injury in fact necessary for standing 'need not be large; an identifiable trifle will suffice.'" *Sierra Club*, 645 F.3d at 988 (quoting *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008)).

Here, the CTGR satisfy the injury-in-fact requirement, but in a significant not trifle way. The environmental harm that the Project will cause is the permanent destruction and removal of thousands of tribal cultural artifacts, and the destruction of hundreds of cultural sites. That destruction threatens the use and enjoyment of the area by tribal members of the CTGR because they attached historical, cultural, and spiritual value to the Project Area.

Furthermore, the NHPA and its operating regulations require the BLM to follow the procedural requirements under Section 106 **before** approving the Project. Failing to do so, which the CTGR has clearly demonstrated, is grounds for a stay and remand of the BLM's decision. See *Mid States Coal. for Progress v. Surface Transp. Bd*., 345 F.3d 520,

555 (8th Cir. 2003) (remanding Surface Transportation Board decision approving new rail line for failure to complete Section 106 process prior to granting railroad construction authority).

D. Public Interest Favors Granting the Stay

Finally, the issuance of a stay would serve the public interest. The 'public interest' is a concept that must be interpreted to encompass both potential impacts and the legal requirements of an agency undertaking an action. "The public interest favors maintaining the status quo until the merits of a serious controversy can be fully considered." Citing *Valdez v. Applegate*, 616 F.2d 570, 572-573 (10th Cir. 1980).

Upholding federal environmental law is an inherent part of the public interest. *See Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1177 (9th Cir. 2006) (public's interest in preserving the environment favors injunctive relief); *ONRC v. Goodman*, 505 F.3d 884, 897-99 (9th Cir. 2007) (same). The public interest favors following the statutory requirements of NEPA, NHPA, and other laws, regulations and policies mentioned under the Statement of Reasons. Those federal regulations, statutes, and principles have been instituted in furtherance of the public interest. To allow the BLM to approve the Project without following those Federal requirements would unduly harm the public interest in the values protected by these law and regulations, and in lawful governance itself.

The Ninth Circuit has repeatedly recognized that injunctive relief is appropriate for noncompliance with environmental laws, including NEPA and NHPA violations. *See Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1207, 1208, 1211 (9th Cir. 1998); *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800 (9th Cir. 1999); *National Parks Conservation Assoc. v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001); *Earth Isalnd Institute*

v. USFS, 351 F.3d 1291 (9th Cir. 2003); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033-34 (9th Cir. 2007).

Essential to both NHPA and NEPA is the requirement to consider how Federal projects may affect the public interest. *See United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993). Those requirements obligate the BLM to follow procedural requirements fully, not to pre-approve the Project before NHPA and NEPA were completed so the BLM could give Newmont "an early 50th anniversary present" (Exhibit 11), and not to adopt the notions that federal mining laws "trump" other federal laws (Exhibit 9). Moreover, the public interest in federal lands stretches far beyond Elko County, Nevada. The public interest is national. A part of that national public interest, brought forth here by the CTGR, is the historical, cultural and spiritual value of the Project Area.

Thus, the public interest favors obtaining adequate review through this administrative appeal, and waiting for the final disposition of the appeal before conducting any construction activity of the mine Project.

PRAYER FOR RELIEF

For the foregoing reasons, there were clear and repeated showings that BLM's process to approve the Project was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)), or "without observance of procedure required by law" (§ 706(2)(D)); *see also Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 375–376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Kleppe v. Sierra Club,* 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). Accordingly, the ROD approving the FEIS and Plan of Operations must be set aside.

CONCLUSION

Based on the foregoing, the CTGR respectfully requests the IBLA to issue an order granting the Petition for Stay.

DATED: May 5, 2015.

ECHO HAWK LAW OFFICE

Paul C. Echo Hawk

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May 2015, I caused to be served a true and correct copy of the foregoing in accordance with applicable rules by the method indicated below, and addressed to the following:

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Regional Solicitor Pacific Southwest Region U.S. Department of the Interior 2800 Cottage Way, Room E-2753 Sacramento, CA 95825-1890 Tel: 916-978-5690 Fax: 916-978-5694 janell.bogue@sol.doi.gov	___U.S. Mail ___Overnight Mail ___Email ___Federal ECF	X Overnight Mail ___Hand Delivered ___Telecopy (Fax)
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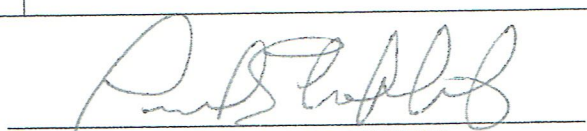

for ECHO HAWK LAW OFFICE