Louis M. Bubala III (Nevada Bar No. 8974)
KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Facsimile: (775) 327-2011
Email: lbubala@kcnvlaw.com

Rick Eichstaedt (*Pro Hac Vice*)
WHEAT LAW OFFICES
25 West Main Avenue, Suite 320
Spokane, Washington 99201
Telephone: (509) 251-1424
Email: rick@wheatlawoffice.com

Attorneys for the Burns Paiute Tribe

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BARTELL RANCH LLC, *et al.*, Plaintiffs, *vs.* ESTER M. McCULLOUGH, *et al.*, Defendants,	***Lead Case:*** Case No.: 3:21-cv-00080-MMD-CLB
WESTERN WATERSHEDS PROJECT, *et al.*, Plaintiffs, *vs.* UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	***Consolidated with:*** Case No.: 3:21-cv-00103-MMD-CLB **BURNS PAIUTE TRIBE'S REPLY IN SUPPORT IN RENO-SPARKS INDIAN COLONY, *et al's* MOTION FOR PRELIMINARY INJUNCTION**

Federal Defendants (collectively, "BLM") do not deny that it failed to engage in pre-decisional consultation with the Burns Paiute Tribe ("Tribe") and Reno-Sparks Indian Colony

("RSIC") on potential impacts to cultural resources from the Thacker Pass Project ("Project"). Instead, BLM points the finger back at the Tribes arguing that it was relieved of its obligations because the Tribe in 2005 indicated that it did not want to consult on a Resource Management Plan, that it had a history of not consulting with the Tribe and RSIC, that there was "public notice" of the Project, and that the BLM is affording the Tribe and RSIC an opportunity to consult on a ARPA permit. These arguments all fail and ignore the BLM's own consultation requirements, the BLM's consultation history, and the law.

ARGUMENT

I. RSIC AND THE TRIBE IS LIKELY TO SUCCEED ON THE MERITS.

a. The BLM's shortcomings violate NHPA requirements to employ reasonable and good faith efforts in government-to-government consultation.

The National Historic Preservation Act ("NHPA") Section 106 and its implementing regulations require federal agencies to make extensive, reasonable, and good faith efforts in government-to-government consultation with any Indian Tribe "that attaches religious and cultural significance" to a property whose characteristics may be adversely impacted by a federal undertaking. *See* 54 U.S.C. § 302706(b)(1) (setting out tribal consultation requirements under NHPA); *see also* 36 C.F.R. § 800.2(ii)(A) (establishing reasonable and good faith requirements). Agencies are required to make reasonable and good faith efforts to achieve meaningful consultation with Tribes, and to give special consideration to the information received. 36 C.F.R. § 800.4(b)(1); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010).

Here, the minimal record of tribal consultation in this case fell short of the level and quality required under Section 106 and demonstrate that the Tribe and RSIC are likely to succeed on the merits. In fact, BLM provided this Court with no evidence that required consultation

occurred prior to issuing the Project's Environmental Impact Statement ("EIS"), Record of Decision ("ROD"), and Memorandum of Agreement with the Nevada SHPO. As a result, BLM could not and did not meet its legal responsibilities to identify historic resources because the agency lacked the independent expertise and information to identify historic sites that are significant to the Tribes.

1. BLM had notice of Burns Paiute and RSIC interest in the area.

BLM argues that it had "no notice that RSIC or the Burns Paiute Tribe may have had a relationship with places of cultural or religious significance in Thacker Pass until well after approving the Project." *See* Defs' Opp. to Mot. for Prelim. Inj., ECF No. 65 at 10. BLM further states that its consultation "was properly informed by its decades-long history of consulting with tribes regarding other projects in the area." *Id.* at 23.

However, BLM has consulted with the Tribe and RSIC in the recent about sensitive cultural resource issues in the area,. For example, in 2013, BLM consulted with the Tribe, RSIC, and a number of other Tribes about "human remains and associated funerary objects" that were removed from Elephant Mountain Cave in Humboldt County (the same county where the Project is located). Notice of Inventory Completion, 78 Fed. Reg. 59958, 59959 (Sept. 30. 2013). According to the notice, the BLM Nevada State Office invited the Burns Paiute Tribe and RSIC to consult in the development of a "detailed assessment of the human remains and associated funerary objects." 78 Fed. Reg. at 59959. The BLM concluded that a number of Tribes, including the Burns Paiute and RSIC have connection to human remains found in the area:

> Multiple lines of evidence—guided by tribal consultations—including geographic, oral tradition, archeological, genetic, and aboriginal land claims, demonstrate a shared group identity between these human remains and some of the modern-day tribes of the Northern Paiutes. … Today, the culturally affiliated tribes of the Northern Paiutes are: … Burns Paiute Tribe (previously listed as the

> Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon); … Reno-Sparks Indian Colony, Nevada; … (hereafter referred to as "The Tribes").

78 Fed. Reg. at 59959-60. BLM knows of the important connection of these Tribe to the area.

BLM's only excuse for ignoring the Burns Paiute Tribe appears to be statement from 2005, where the Tribe indicated it "would defer consultation to the tribes that had reservations closer to the study area" regarding the development of the Winnemucca Resource Management Plan ("RMP"). *See* Defs' Opp. to Mot. for Prelim. Inj., ECF No. 65 at 12-13. However, that request was solely limited to "the mailing list for the RMP/EIS." ECF No. 65-3 at 63. This was not an invitation to eliminate any future consultations. In fact, the RMP process demonstrates that BLM knew that a much broader range of Tribes could have interests in the area—for instance, for its ethnographic assessment associated the RMP, BLM reached out to 22 tribes or tribal entities, including RSIC and the Burns Paiute Tribe. ECF No. 65-3 at vii-viii.

It is important to note that RMPs do not authorize any ground-disturbing activities. *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 733-34 (1998). Accordingly, Tribes are often reluctant to consult at the RMP development stage. This is recognized by the BLM's own consultation guidance, BLM Handbook 1780-1 Improving and Sustaining BLM-Tribal Relations ("BLM Tribal Handbook"),[1] which states, "Tribes are often reluctant to reveal information about places of religious and cultural importance until they perceive a definite threat to those places. For that reason, tribes may not want to tell the BLM about specific sacred sites and other traditional places at the land use planning level when the agency does not yet know about specific impacts to particular geographical locations." BLM Tribal Handbook at IV-6.

[1] Available at https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf.

2. Mere notice to the public does not satisfy consultation requirements.

BLM argues that it satisfied its obligations to consult because there was public notice of the Project. *See* Defs' Opp. to Mot. for Prelim. Inj., ECF No. 65 at 26. Notice to the public does not amount to consultation. Tribal consultation cannot be treated as a pro forma requirement, but rather must be meaningful. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (directing federal agencies to have "an accountable process to ensure meaningful and timely input by tribal officials") *see also Quechan Tribe*, 755 F. Supp. 2d at 1118-19 ("pro-forma" recitals are not "meaningful consultation" as required by Section 106). Court have been clear that merely sending a letter or providing public notice is not sufficient. *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 860 (10th Cir. 1995) (mailing letters requesting information and addressing meetings was not sufficient to meet the reasonable efforts requirements).

The requirement is reflected in the agency's own policy that requires that consultation involve direct communication:

> The BLM considers consultation to mean direct two-way communication between the agency and an American Indian or Alaska Native tribal government regarding proposed BLM actions. The purpose of consulting is to obtain substantive tribal input and involvement during the decision making process. Sometimes the consultation process itself, through sharing and discussing cultural and natural resource information, can enrich and reinvigorate tribal knowledge and appreciation for historic properties, resources, and sites located on public lands.
>
> …
>
> The Department Tribal Consultation Policy notes that sending a letter to a Tribe and receiving no response does not constitute a sufficient effort to initiate tribal consultation.

BLM Tribal Handbook at III-2; *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1970) (meaningful opportunity must be afforded where the federal government has established an expectation through policy).

Simply providing public notice does not satisfy BLM's consultation obligations.

3. Consultation on the ARPA permit is not a substitute for consultation under NHPA.

BLM argues that any shortcomings with the NHPA consultation process is remedied by consultation under ARPA. *See* Defs' Opp. to Mot. for Prelim. Inj., ECF No. 65 at 31-32. Again, this argument is without merit. If more than one federal statute applies to a situation, compliance with one law will not excuse non-compliance with the other -- all laws must be complied with. *Randolph v. JMBS, Inc*., 368 F.3d 726 (7th Cir. 2004).

NHPA and ARPA are not interchangeable. ARPA permits are granted for scientific data recovery, 16 U.S.C. § 470cc, while NHPA seeks "avoid, minimize, or mitigate the adverse effects [of a project] on the historic properties." 36 C.F.R. § 800.6(a). BLM policy recognizes this difference and cautions against trying to combine efforts:

> BLM must be careful to keep the distinct legal purposes of these Acts separate, so as to eliminate any confusion for the various participants and those tracking agency compliance. Losing focus on the requirements of individual laws and their reasons for obtaining the Indian tribal input can result in omissions, mistakes, inappropriate expectations on the part of Indian tribes, and inadvertent noncompliance on the BLM's part.

BLM Tribal Handbook at X-6. Unlike ARPA, NHPA consultation must occur early in the planning processes. 36 C.F.R. § 800.1(c). The consultation process must be completed prior to the issuance of a decision. *Id*. Guidance emphasizes that "Section 106 review should be complete prior to issuance of a federal decision, so that a broad range of alternatives may be considered during the planning process."[2]

This Court recognized the difference in ARPA and NHPA consultation, stating, "The Court also finds persuasive the Tribes' argument that the alternative consultation offered by

[2] Advisory Council on Historic Preservation, *Integrating NEPA and Section 106*, *available at* https://www.achp.gov/integrating_nepa_106.

Federal Defendants under the 'ARPA' process is not a perfect substitute for the consultation rights they are entitled to under the NHPA." July 28, 2021 Order, ECF No. 44 at 4.

On a practical level, the offered ARPA consultation is flawed. The Burns Paiute Tribe was not invited to "consult" until very recently, was provided a very short time to "consult" with BLM, and was not provided necessary information, including mapping. *See* Second Teeman Decl. ¶¶ 8, 10-13. The sharing of GIS information as part of consultation is the norm with other BLM offices. *Id.* ¶ 4. Consultation typically on these types of projects typically involves months not weeks.[3] *Id.* ¶ 11.

Here, the delay in completing the NHPA consultation process "restrict[ed] the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c). A subsequent ARPA permit consultation does not remedy this.

II. RSIC AND THE BURNS PAIUTE TRIBE WILL SUFFER IRREPARABLE HARM IN GROUND DISTURBING ACTIVITIES PROCEED.

Despite BLM argument to the contrary, there can be no question that the present case involves the irreparable harm that the NHPA is designed to prevent, that is, the harm that results when important determinations are made by agencies without good faith consultation. *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007) ("The irreparable harm consists of the added risk... when governmental decisionmakers make up their minds without having before them an analysis... of the likely effects of their decision...."); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1441 (C.D. Cal. 1985) (concluding injunctive

[3] Even if this Court is convinced that the ARPA consultation can substitute for the NHPA process, the Tribe urges the Court to enjoin action by the BLM for a period sufficient to allow for a meaningful consultation process.

relief is appropriate because "irreparable harm to the cultural and archeological resources [of the Tribe] as a result of the Development is possible").

Moreover, the Tribes' procedural harms are cognizable because the Tribes have also shown tangible harms to their cultural patrimony and cultural sites. *See, e.g.*, ECF No. 62-1 at 6-7. Violations of procedural rights can constitute irreparable harm when coupled with other concrete harms. *E.g., Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *Quechan*, 755 F. Supp. at 1120.

The potential disruption of burial sites caused by ground disturbance would be harmful to any group of people. *See, e.g., Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 731 (Iowa 2010) ("our legal tradition considers human remains very special and unique"); *Currier v. Woodlawn Cemetery*, 90 N.E. 2d 18, 19 (N.Y. 1949) ("The quiet of the grave, the repose of the dead, are not lightly to be disturbed."). Destruction of sites and human remains constitutes damage that cannot be compensated by any type of monetary award. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (irreparable harm is suffered when "the injury can[not] be adequately atoned for in money, or when the district court cannot remedy [the injury] following a final determination on the merits.").

Lastly, BLM have infringed the Tribes' procedural consultation rights, which cannot be simply cured retroactively through additional procedures, including the ARPA consultation. *Quechan*, 755 F. Supp. 2d at 1120.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR AN INJUNCTION.

The balance of the equities and the public interest heavily favor an injunction delaying ground disturbing activities. Ground disturbing activities will cause irreparable harm to the Tribe's cultural patrimony. On the other side of the scale, no public interest can be advanced by

an agency's unlawful conduct, as "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). (citations omitted). "To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* (quotation omitted). BLM does not have a valid interest in advancing agency actions in a manner that failed to follow prescribed review and consultation procedures.

Conversely, ensuring compliance with these federal laws serves a significant public interest in these circumstances in particular: specifically, where a Tribe seeks to remedy the failure of the Federal Government to consult with the Tribe as a sovereign nation. That is, "in enacting NHPA Congress has adjudged... the rights of Indian tribes to consultation to be in the public interest." *Quechan Tribe*, 755 F. Supp. 2d at 1122.

The public interest will be served by an injunction that protects cultural resources and prevents further irreparable harm that will otherwise continue until the Court is able to fully review the merits of the Tribal-Intervenors' claims. *See, e.g., Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (granting Tribe's request for injunctive relief because the Court is "mindful of the advancement of the public interest in preserving the [Tribe's cultural] resources.").

CONCLUSION

BLM does not dispute that it did not consult with the Burns Paiute Tribe and RSIC. Instead, it simply provides a number of excuses to try to avoid responsibility. This failure to consult is an irreparable procedural injury to the Tribes and any ground disturbing activities that impacts graves and cultural resources would irreparably harm the Tribes. Accordingly, this

Court should grant RSIC's motion and preliminary enjoin any ground disturbing activities authorized by the BLM pending a final decision on the merits in this proceeding.

Dated this 19th day of August 2021.

WHEAT LAW OFFICE

By:/s/*Rick Eichstaedt*
RICK EICHSTAEDT

Attorney for Burns Paiute Tribe