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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,)	Case No.: 3:21-cv-80-MMD-CLB
)	(LEAD CASE)
Plaintiffs,)	
)	
v.)	RENO-SPARKS INDIAN
)	COLONY'S ET AL.
ESTER M. MCCULLOUGH, et al.,)	REPLY IN SUPPORT OF
)	MOTION FOR PRELIMINARY
Defendants,)	INJUNCTION
and)	
)	
LITHIUM NEVADA CORPORATION,)	
)	
Intervenor-Defendant.)	

WESTERN WATERSHEDS PROJECT, et al.,)	Case No.: 3:21-cv-103-MMD-CLB
)	(CONSOLIDATED CASE)
Plaintiffs,)	
)	
RENO SPARKS INDIAN COLONY, et al.,)	

Intervenor-Plaintiffs,

and

BURNS PAIUTE TRIBE,

Intervenor-Plaintiff.

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants,

and

LITHIUM NEVADA CORPORATION,

Intervenor-Defendant.

The Bureau of Land Management, Winnemucca District (“BLM”) failed to adequately consult the Reno-Sparks Indian Colony (RSIC), Burns Paiute Tribe (“BPT”), Atsa Koodakuh wyh Nuwu/People of Red Mountain (together “Plaintiff-Intervenors”), other Indian Tribes, and the general public before issuing the Thacker Pass Lithium Mine Project Record of Decision (ROD) and Plan of Operations (PoO). Despite this failure, BLM and Lithium Nevada Corp. (“Lithium Nevada”) seek to proceed with mechanical trenching operations, hand excavations, and artifact removal on land to which local Tribes attach cultural and religious significance, Plaintiff-Intervenors’ ancestors were massacred on, Plaintiff-Intervenors regularly pray, hunt, and gather on, and is home to over 1000 cultural resource sites and 56 historic properties eligible for inclusion on the National Register of Historic Properties.

1 In their responses to the Plaintiff-Intervenors' Motion for Preliminary Injunction,
 2 BLM and Lithium Nevada claim that Plaintiff-Intervenors cannot establish serious
 3 questions going to the merits because BLM's efforts to identify Indian tribes to consult
 4 with were reasonable and in good faith, as required by the National Historic
 5 Preservation Act (NHPA) and its implementing regulations.

6 Their claims are undermined, first, by BLM's and Lithium Nevada's insinuations
 7 that no massacre happened in Peehee mu'huh *when a simple search through BLM,*
 8 *Nevada's online Land Records service yields a primary source document from 1868*
 9 *stating that there was, in fact, a massacre in, or very near, the project area on*
 10 *September 12, 1865 and that "skulls and other remains [could] be found scattered"*
 11 *across the area.* See Attachment 1, Field Notes of the Subdivision lines in Township 44,
 12 North Range 36 East, Mount Diablo Base and Meridian.

13 Their claims are undermined by the fact that the BLM, Winnemucca District
 14 Office provided regular notice to RSIC of other projects within the Winnemucca District
 15 contemporaneously with the Thacker Pass project, but inexplicably failed to provide
 16 notice of the Thacker Pass project. RSIC Cultural Resources Manager and Tribal
 17 Historic Preservation Officer Michon Eben states:

18 "One reason I do not believe BLM's efforts to identify Indian tribes to consult with
 19 were reasonable and in good faith is because over the last two years, the BLM
 20 Winnemucca District Office has sent me many notices about other projects and agency
 21 actions within the Winnemucca District, but they did not send me notice for the Thacker
 22 Pass Project. The BLM Winnemucca District Office has sent me the following notices:

23 *July 6, 2020: Public Scoping Notice for Environmental Assessment of the Baltazor*
 24 *Geothermal Development Project. August 31, 2020: Environmental Assessment*
 25 *analyzing environmental impacts of protecting and restoring swift-moving waters, slow*
 26 *moving waters, and associated riparian habitats. October 1, 2020: Pre-scoping Notice*
 27 *for Utilization Plan and Plan of Development proposed by Ormat Technologies Inc. for*
 28 *Gerlach, NV area. February 2, 2021: Notice of staff changes within BLM, Winnemucca*

1 Office. *April 20, 2021*: Preliminary Environmental Assessment Notice for wild horse and
2 burro management within the Calico Complex. *July 21, 2021*: Notice of completed
3 Environmental Assessment for the Pueblo Fire House and Public Recreation project.
4 *August 2, 2021*: Notice of completed Environmental Assessment for the Calico Complex
5 wild horse and burro gather plan.” Attachment 2, Eben Declaration, ¶ 18.

6 Note that BLM, Winnemucca was sending RSIC and Ms. Eben regular notices of
7 lesser projects and BLM actions at the same time BLM says it was conducting NHPA
8 consultation on the Thacker Pass project. Ms. Eben has been employed with RSIC for
9 16 years and is well-known to BLM, Winnemucca. BLM’s failure to notify RSIC and Ms.
10 Eben when BLM was providing notice for more minor projects and actions causes
11 serious questions about BLM’s reasonableness.

12 Their claims are also undermined by BLM’s disregard for numerous guidelines in
13 its own handbooks and manuals, caselaw, and the NHPA implementing regulations
14 themselves which remind BLM that “consultation with Indian tribes... should be
15 conducted in a manner sensitive to the concerns and needs of the Indian tribe.” Finally,
16 BLM’s act of fast-tracking this project during COVID-19, when Tribal and public
17 participation was severely limited, evidences bad faith.

18 BLM and Lithium Nevada, even though BLM has not consulted with Plaintiff-
19 Intervenors to learn how the Historic Properties Treatment Plan would harm them,
20 argue that Plaintiff-Intervenors will not be irreparably harmed by the archaeological digs.
21 Plaintiff-Intervenors have strong connections to their ancestors and their traditional
22 culture. Using heavy machinery to cut trenches in land where their ancestors are buried,
23 digging a constellation of holes in land where their ancestors were massacred, and
24 removing their ancestors’ possessions to warehouses and museums would irreparably

1 harm the Plaintiff-Intervenors. Attachment 2, ¶ 9-10; ECF 45-1, ¶ 24; ECF 45-2, ¶ 6, 8,
2 12, 23.

3 **I. Plaintiff-Intervenors demonstrate serious questions going to the**
4 **merits.**

5 The Supreme Court's authoritative statement on the Preliminary Injunction
6 standard remains: "A plaintiff seeking a preliminary injunction must establish that he is
7 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
8 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
9 in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7,
10 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). After *Winter*, the Ninth Circuit clarified
11 that it still follows the "sliding scale" approach to preliminary injunction motions where a
12 plaintiff may satisfy the first and third prongs by showing "serious questions going to the
13 merits" of the case and that a balance of hardships tips sharply in plaintiff's favor. *All. for*
14 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Plaintiff-Intervenors
15 need only show that there are serious questions going to the merits. Plaintiff-Intervenors
16 meet this standard.

17 Plaintiff-Intervenors challenge BLM's failure to comply with the NHPA in issuing a
18 Record of Decision for the Thacker Pass Lithium Mine Project without making a
19 reasonable and good faith effort to identify Indian tribes that should have been
20 consulted with because they attach religious and cultural significance to Peehee
21 mu'huh; without providing Indian tribes who attach religious and cultural significance to
22 Peehee mu'huh a reasonable opportunity to identify their concerns about historic
23 properties, advise on the identification and evaluation of historic properties, articulate
24 their views on the undertaking's effects on such properties and participate in the

1 resolution of adverse effects; without seeking and considering the views of the public in
2 a manner that reflects the nature and complexity of the undertaking, and for issuing a
3 ROD before a draft Memorandum of Agreement with the Nevada State Historic
4 Preservation Officer (SHPO) was made available for public comment.

5 There are serious questions going to the merits about whether BLM made a
6 reasonable and good faith effort to identify Indian tribes that should have been
7 consulted with because they attach religious and cultural significance to Peehee
8 mu'huh.

9 The Reno-Sparks Indian Colony, Fort McDermitt Paiute and Shoshone Tribe,
10 Summit Lake Paiute Tribe, Burns Paiute Tribe of Oregon, Duck Valley Shoshone-Paiute
11 Tribe, Lovelock Paiute Tribe, Battle Mountain Band Colony of the Te-Moak Tribe of
12 Western Shoshone, Winnemucca Indian Colony, Cedarville Rancheria, Ft. Bidwell
13 Indian Community, Fallon Paiute-Shoshone Tribe, and the Pyramid Lake Paiute Tribe
14 all attach religious and cultural significance to Pehee mu'huh. But, BLM only notified
15 Fort McDermitt, Summit Lake, and the Winnemucca Indian Colony about the Thacker
16 Pass project.

17 BLM claims that it discovered no evidence that a massacre occurred in Thacker
18 Pass through its previous analyses of the area. However, Plaintiff-Intervenors searched
19 the Nevada, BLM's Land Records (available online at
20 <https://www.nv.blm.gov/LandRecords/find.php?town=0440N&range=0360E>; last
21 accessed by counsel on Wednesday, August 18 at 2:45 pm) and found the Field Notes
22 of the Subdivision lines in Township 44, North Range 36 East, Mount Diablo Base and
23 Meridian, prepared on October 16th, 1868. The Thacker Pass Mine Plan Boundary

1 includes Township 44 North, Range 36 East, Sections 7,8, 14 through 23, and 29. See
2 FEIS 1.1.

3 The Field Survey contains evidence of a massacre in or near the Mine Plan
4 Boundary:

5 “Along the line between Sec. 22, 23, and between the creek and the meadow, I found the
6 remain of an extensive Indian Camp. It was at these camps that Captain [illegible] Payne,
7 with Co. E, 1st Nevada Cavalry, attacked, and whipped a body of Indians on Sept. 12
8 1865. There are many Indian skulls and other remains to be found scattered over this
9 portion of the Township. I found some also opposite here on the east side of the River.”
10

11 BLM’s and Lithium Nevada’s argument that Plaintiff-Intervenors have not
12 established serious questions going to the merits hinges on claims that BLM’s
13 consultation efforts related to Thacker Pass date back to at least 2006. Even now, BLM
14 appears unprepared to undertake serious exchanges with Native Americans to
15 understand the historic significance of Peehee mu’huh.

16 Plaintiff-Intervenors will address each opportunity below. But, first Plaintiff-
17 Intervenors note that BLM and Lithium Nevada have conspicuously failed to cite the
18 guidance of their own internal BLM Handbooks and Manuals in the course of fast-
19 tracking the current project and issuing a ROD, all in violation of the National Historic
20 Preservation Act.

21 BLM Handbook 1780-1, *Improving and Sustaining BLM-Tribal Relations*, for
22 example, creates serious questions about whether BLM’s failure to consult with Indian
23 Tribes who attach cultural or religious significance to Peehee mu’huh is reasonable or in
24 good faith. Consider that the Handbook under a heading “Preparing and Initiating Tribal
25 Consultation” explains that the second step after clearly identifying a clear purpose for
26 consultation and identifying with whom consultation should take places is “...to review

1 the record of what is known about the relevant concerns of tribes who may wish to
2 consult.” BLM Handbook 1780-1, pg. III-8. Here, BLM possesses the very record that
3 proves a massacre occurred in Peehee mu’huh and, yet, BLM challenges Plaintiff-
4 Intervenors’ assertions about the massacre. It was unreasonable for BLM to overlook
5 this record. It is now bad faith not to take that massacre into consideration.

6 The Handbook, in a chapter describing BLM’s responsibilities under FLPMA,
7 which includes preparing RMPs, warns BLM:

8 “Tribes are often reluctant to reveal information about places of religious and cultural
9 importance until they perceive a definite threat to those places. For that reason, tribes
10 may not want to tell the BLM about specific sacred sites and other traditional places at
11 the land use planning level when the agency does not yet know about specific impacts to
12 particular geographical locations.” pg. IV-6.
13

14 BLM should have anticipated, from its own guidelines and educational materials,
15 that Tribes likely would not want to tell BLM about specific sacred sites like Peehee
16 mu’huh in connection with nonspecific, district-wide plans like the RMP or Vegetation
17 Management Plan.

18 An entire section of BLM Handbook 1780-1 deals specifically with “Lack of Tribal
19 Response.” The section begins by reminding BLM that the Tribes have no obligation to
20 consult with BLM, the obligation is on BLM to consult with the Tribes:

21 “Applicable government-to-government consultation authorities do not require
22 participation by Indian tribes or other specific consultation parties outside the relevant
23 Federal agency. Nor do those authorities establish specific timetables for when tribes
24 must engage in consultation.” BLM Handbook 1780-1, III-14.
25

26 BLM and Lithium Nevada argue that because no one told them about the
27 massacre site and sacredness of Peehee mu’huh in connection with other projects, that
28 they were justified in failing to contact more than the three Tribes they sent letters to.
29 Meanwhile, BLM has previously reported that Peehee mu’huh “has been subjected to

1 unauthorized collection of artifacts” (otherwise known as looting). ECF 65-4, 3-4. Again,
2 BLM Handbook 1780-1, especially in light of the aforementioned BLM land records,
3 creates serious questions about whether this justification is reasonable or in good faith:

4 “Native Americans may be reluctant to share sensitive information regarding resource
5 locations and community-held values with agency officials for several reasons. First,
6 historical relations among native people and others have led to a distrust of the Federal
7 Government and the non-Indian public, especially related to the respect for Native
8 American religion. Second, secrecy is often a central tenet of Native American religious
9 beliefs. Third, many Native Americans fear that sharing information with outsiders could
10 result in the abuse of sacred sites and the disruption of religious ceremonies ” BLM
11 Handbook 1780-1, II-I.
12

13 The relations the previous projects BLM references had to the current Thacker
14 Pass lithium mine proposal are tenuous at best. Because some of the tribes provided a
15 list of massacre sites in an ethnography prepared in 2006 in connection with a
16 Resource Management Plan (RMP) and no one identified Thacker Pass as a massacre
17 site, BLM argues that it was justified in only sending a series of letters to three tribes
18 and counting that as “meaningful consultation” for the current proposal.

19 BLM also argues that Plaintiff-Intervenors had four other opportunities to inform
20 BLM of an interest in cultural properties affected by development in the Thacker Pass
21 area. The first opportunity, which BLM claims “covered the same footprint” as the
22 Thacker Pass project, was a 2009 Environmental Assessment for the Kings Valley
23 Lithium Exploration Project.

24 It is misleading to claim that this 2009 project covered the same footprint. That
25 project only encompassed 1,210 acres with 75 acres of mineral exploration. ECF 65-4,
26 1.1. The current project would directly disturb nearly 6,000 acres with a total footprint
27 close to 18,000 acres. And, the current project is not simple mineral exploration, but a
28 massive open-pit lithium mine. Additionally, the only “consultation” BLM lists for this

1 2009 EA is a letter sent to the Fort McDermitt Paiute and Shoshone Tribe and a
2 telephone conversation where former chairman Dale Barr stated that the Tribe had no
3 concerns about the Project.

4 There is a problem with offering this telephone conversation as a justification not
5 to engage RSIC, Burns Paiute Tribe, or Atsa Koodakuh wyh Nuwu/People of Red
6 Mountain in NHPA, Section 106 consultation on the current Thacker Pass project. This
7 2009 EA, standing alone, was a violation of NHPA for precisely the same reasons the
8 current Thacker Pass Record of Decision is: BLM didn't notify many tribes who attach
9 religious and cultural significance to Thacker Pass. RSIC, Burns Paiute Tribe, and Atsa
10 Koodakuh wyh Nuwu/People of Red Mountain did not bring up their concerns about this
11 project because they did not know about it.

12 BLM claims that at no time during any of the other four consultation opportunities
13 did any tribe apprise BLM of any cultural, religious, or historical interest in the site of the
14 Thacker Pass Project. This is simply untrue. During consultation for the 2012 Montana
15 Mountains EA, the Fort McDermitt Paiute and Shoshone Tribe told BLM that "[t]he tribe
16 is opposed to any fire breaks being bladed through archaeological sites." ECF 65-5, pg.
17 53. Regardless, the 2012 Montana Mountains EA was for fuel treatments which is a
18 completely different kind of disturbance than an open-pit mine. Furthermore, this 2012
19 Montana Mountains EA also suffers from the same deficiency as the current Thacker
20 Pass ROD. Only the Summit Lake and Fort McDermitt Tribes were consulted.

21 The March 2014 Western Lithium Corporation Kings Valley Clay Mine also
22 involved a much smaller project area than the current Thacker Pass proposal. Despite
23 BLM once again claiming that the Kings Valley Clay Mine proposal had the same

1 footprint as the current proposal, the Kings Valley Clay Mine was only going to affect
2 796 acres. ECF 65-6, pg. 13. Once again, only the Summit Lake and Fort McDermitt
3 Tribes were consulted. BLM does not claim RSIC, Burns Paiute Tribe, or Atsa
4 Koodakuh wyh Nuwu/People of Red Mountain knew about the project.

5 The 2017 Programmatic District-Wide Vegetation Management Plan EA, again,
6 was for a completely different type of action than an open-pit mine. Of note, however,
7 the Fallon Paiute and Shoshone Tribe, who should have been consulted about the
8 current Thacker Pass proposal, wanted to be informed of any potential adverse impacts
9 to cultural resources. ECF 65-7, pg. 104.

10 **II. Mechanical trenching, digging hundreds of holes in, and taking**
11 **artifacts from sacred Peehee mu'huh would irreparably harm**
12 **Plaintiff-Intervenors.**
13

14 BLM and Lithium Nevada also claim that Plaintiff-Intervenors will not be
15 irreparably harmed in the absence of preliminary relief. However, RSIC Cultural
16 Resources Manager and Tribal Historic Preservation Officer, Michon Eben stated in her
17 first Declaration that “gouging seven, 40-meter-long, several-meter-deep trenches and
18 hand-digging as many as 525 holes into land hallowed by the massacre of our
19 ancestors severely disrespects our culture and traditions, causes us extreme emotional
20 and spiritual distress, and is a desecration of the worst kind.” ECF 45-1, ¶. 22. She also
21 stated that historic properties in Peehee mu'huh “would be irreparably harmed by the
22 BLM’s current Thacker Pass Historic Properties Treatment Plan. In addition, this type of
23 desecration will have physiological, psychological and tangible effects on the Paiute and
24 Shoshone people’s cultural connected to Peehee mu'huh.” *Id.* ¶, 25.

1 Atsa Koodakuh wyh Nuwu/People of Red Mountain Secretary Daranda Hinkey
2 stated: “To build a lithium mine over Peehee mu’huh, where our ancestors were
3 massacred, where our ancestors’ bones, blood, and flesh form a part of the soil, would
4 be like building a lithium mine over Pearl Harbor, Arlington National Cemetery, or the
5 Gettysburg battlefield.” ECF 45-2, ¶ 8. Hinkey also stated: “Driving heavy machinery
6 over our ancestors is deeply offensive to us and causes us extreme psychological and
7 spiritual anguish. Scratching up our ancestors’ possessions, even if only with shovels,
8 hurts and angers us.” ECF 45-2, ¶ 12.

9 Plaintiffs-Intervenors previously rebutted the argument that ARPA is an adequate
10 substitute for NHPA consultation in their Reply in Support of their Motion to Intervene.
11 They incorporate those arguments by reference, here.

12 Lithium Nevada argues that if Intervenors reject the offer for ARPA consultation,
13 their asserted harm from lack of consultation is of their own making and such
14 inequitable conduct should preclude injunctive relief. The intervenors have not rejected
15 the ARPA consultation. On July 28, 2021, RSIC wrote to BLM, Winnemucca requesting
16 ARPA consultation and a draft ARPA permit. RSIC was clear that in requesting this
17 consultation it was not conceding that ARPA consultation is an adequate substitute to
18 NHPA. Attachment 3, July 28, 2021 Letter.

19 On August 3, RSIC requested a meeting with the BLM Winnemucca archaeology
20 team and representatives of Atsa Koodakuh wyh Nuwu/People of Red Mountain to
21 discuss ways to avoid or mitigate potential harm or destruction such as excluding sites
22 from the proposed Thacker Pass permit area. Attachment 4, August 3, 2021 Letter.

1 On August 12, BLM District Archaeologist and Native American Coordinator
 2 Shannon E. Deep delivered a letter (signed by Kathleen Rehberg) to RSIC “requesting
 3 that consultation regarding the ARPA permit occur before August 22, 2021 via written
 4 submission or via an in-person or virtual meeting.” Attachment 5, BLM Aug. 12
 5 Response. But the Thacker Pass HPTP, is based on cultural resource inventories that
 6 are nearly 7000 pages long. BLM well knows there are over 1000 cultural resource sites
 7 and 56 historic properties in Peehee mu’huh. Giving RSIC – to whom BLM owes a
 8 fiduciary duty – 10 days to respond to this much information is the quintessence of bad
 9 faith.

10 On August 18, RSIC responded to this letter explaining that 10 days was not
 11 enough time to adequately review the HPTP and the cultural resources inventories, and
 12 renewed its request for an in-person meeting to discuss the HPTP as well as an in-
 13 person walking trip of the project site to discuss ways to avoid or mitigate potential
 14 harm. Attachment 6, August 18, 2021 Letter.

15 Respectfully submitted this 19th Day of August,

16
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

By: /s/William Falk
William Falk (Utah Bar No. 16678)

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