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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BARTELL RANCH LLC, *et al.*,  
Plaintiffs,  
v.

ESTER M. MCCULLOUGH, *et al.*,  
Defendants.

WESTERN WATERSHEDS PROJECT,  
*et al.*,  
Plaintiffs,  
v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, *et al.*,  
Defendants.

Case No. 3:21-cv-80-MMD-CLB  
Related Case No. 3:21-cv-103-MMD-CLB  
(Consolidated)

**FEDERAL DEFENDANTS'  
CONSOLIDATED SURREPLY IN  
OPPOSITION TO PLAINTIFF-  
INTERVENORS' MOTION FOR  
PRELIMINARY INJUNCTION**

1 Federal Defendants file this consolidated surreply in opposition to Plaintiff-  
 2 Intervenor's motion for a preliminary injunction pursuant to the parties' agreement and the  
 3 Court's Order of August 24, 2021<sup>1</sup> to address evidence raised in the replies filed by the Burns  
 4 Paiute Tribe, the Reno-Sparks Indian Colony (RSIC), and Atsa koodakuh wyh  
 5 Nuwu/People of Red Mountain (the People).

6 In its Reply, the Burns Paiute Tribe argues that, because BLM invited the Burns  
 7 Paiute Tribe to consult in connection with human remains and funerary objects removed by  
 8 a third party from Elephant Mountain Cave, BLM "knows of the important connection of"  
 9 the Burns Paiute Tribe to Thacker Pass.<sup>2</sup>

10 The repatriation of remains from the Elephant Mountain Cave was conducted under  
 11 the Native American Graves Protection and Repatriation Act (NAGPRA), 28 U.S.C. § 3001  
 12 *et seq.*, which casts a broader consultation net than the National Historic Preservations Act.  
 13 Specifically, it requires an agency to "consult with known lineal descendants and Indian tribe  
 14 officials" from, among others, Indian tribes "that are, or are likely to be, culturally affiliated  
 15 with the human remains, funerary objects, sacred objects, or objects of cultural patrimony"  
 16 or "that have a demonstrated cultural relationship with the human remains, funerary objects,  
 17 sacred objects, or objects of cultural patrimony." 43 C.F.R. § 10.5(a). The remains and  
 18 objects found in the Elephant Mountain cave were located in Northern Paiute territory as  
 19 demarcated by the Indian Claims Commission, and evidenced a relationship to Northern  
 20 Paiute tribes. So, to satisfy its requirements, NAGPRA obligated BLM to contact tribes—  
 21 including the Burns Paiute Tribe and RSIC—that have Northern Paiute members. *See* 78  
 22 Fed. Reg. at 59959-60. Neither the Burns Paiute Tribe nor RSIC responded. *Id.* at 59959.

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 25 <sup>1</sup> ECF No. 79. Consistent with that Order, the portion of this surreply addressing the Burns  
 26 Paiute Tribe's Reply, combined with Lithium Nevada's surreply addressing the same, will be  
 27 less than four pages; and the portion addressing RISC's and the People's Reply is less than  
 28 five pages.

<sup>2</sup> ECF No. 71 at 3–4 (citing Notice of Inventory Completion, 78 Fed. Reg. 59958, 59959  
 (Sept. 30, 2013)).

1 In short, that BLM contacted the Burns Paiute Tribe in connection with remains  
 2 discovered in the Elephant Mountain Cave—which is located over 50 miles from Thacker  
 3 Pass—under the requirements of NAGPRA does not have any bearing on whether BLM  
 4 understood the Burns Paiute Tribe to deem Thacker Pass an area of religious or cultural  
 5 significance under the National Historic Preservation Act. This is especially true in light of  
 6 BLM’s unrebutted evidence that the Burns Paiute Tribe did not inform the Winnemucca  
 7 Field Office that it considered Thacker Pass to fall within its aboriginal territory before June  
 8 27, 2021.<sup>3</sup>

9 RSIC and The People also raise two pieces of evidence for the first time in their Reply.  
 10 Neither supports a demonstration of likelihood of success on the merits or a showing of  
 11 irreparable harm.

12 First, RSIC points to several notices from BLM informing RSIC of various projects  
 13 in Nevada despite “inexplicably fail[ing]” to notify RSIC about the Thacker Pass Project.<sup>4</sup>  
 14 But BLM’s decision to invite RSIC to consult on those projects, but not on the Thacker Pass  
 15 Project, is highly explicable, reasonable, and in good faith. Unlike Thacker Pass, each of the  
 16 project notices invoked by RSIC concerns a project that falls within or overlaps the territory  
 17 that RSIC informed BLM, in 2015, that it considered culturally significant.<sup>5</sup> Specifically, the  
 18 following notices concerned projects that fall entirely within, or appear to fall within, that  
 19 territory:

- 20 (1) July 6, 2020 Public Scoping Notice for Environmental Assessment of the
- 21 Baltazor Geothermal Development Project;
- 22 (2) October 1, 2020 Pre-scoping Notice for Utilization Plan and Plan of
- 23 Development proposed by Ormat Technologies Inc. for Gerlach, NV area;
- 24
- 25

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26 <sup>3</sup> See Decl. of Mark Hall ¶ 4, ECF No. 65-26.

27 <sup>4</sup> RSIC Reply at 3–4, ECF No. 73 (quoting Decl. of Michon Eben ¶ 18, ECF No. 73-2).

28 <sup>5</sup> See Fed. Def. Ex. 28, ECF No. 72-2.

- (3) May 21, 2021 Environmental Assessment Notice for the North Valley Geothermal Development Project at the San Emidio Geothermal Field; and
- (4) July 21, 2021 Notice of completed Environmental Assessment for the Pueblo Fire House and Public Recreation project.

The following notices addressed projects with broader project areas that at least overlap with that territory:

- (1) August 31, 2020 Environmental Assessment analyzing environmental impacts of protecting and restoring swift-moving waters, slow moving waters, and associated riparian habitats; and
- (2) April 20, 2021 and August 2, 2021 notices concerning the Environmental Assessment for the Calico Complex wild horse and burro gather plan.

Finally, given that RSIC has identified areas of religious and cultural significance within the boundaries of the Winnemucca Field Office, BLM informed RSIC on February 2, 2021 of a notice of staff changes—specifically, those of the Native American coordinator and Humboldt River Field Manager in BLM, Winnemucca Office.

Second, RSIC argues that BLM must have been aware that RSIC attaches religious or cultural significance to Thacker Pass based on field notes from a 1868 survey indicating an attack on an “Indian camp” located in the Quinn River valley approximately 8.5 miles east of Thacker Pass itself.<sup>6</sup> But the camp described “[a]long the line between” sections 22 and 23 of Township 44N Range 36E is located outside of the Project area on private land—which BLM does not regulate. It does fall within the broader, *indirect* area of potential effects that BLM determined for the Project.<sup>7</sup> That area “encompass[es] the local viewshed,” that is, areas that will be visually impacted by the Project.<sup>8</sup> By contrast, the excavations required

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<sup>6</sup> See RSIC Reply at 6–7.

<sup>7</sup> See Federal Defendants’ Exhibit 14, HPTP at 3 Fig. 2, ECF No. 65-14.

<sup>8</sup> *Id.*, HPTP at 1.

1 by the HPTP in connection with the Phase 1 data collection will occur only in areas of *direct*  
 2 effect.<sup>9</sup> In fact, no excavation under the HPTP is planned to occur within sections 22 or 23  
 3 of Township 44N Range 36E. Accordingly, no excavation under the HPTP would impact  
 4 the site of the camp identified in the 1868 field survey, if any artifacts remain there, or its  
 5 immediate vicinity.

6 Finally, even if the 1868 survey field notes put BLM on notice of a massacre occurring  
 7 almost 10 miles from Thacker Pass, nothing in those notes indicates that RSIC itself  
 8 considered the area one of religious or cultural importance. It, too, falls outside the territory  
 9 that RSIC informed BLM, in 2015, that it considered culturally significant.<sup>10</sup> And RSIC did  
 10 not indicate its significance—even in a general way—despite participating in the 2006  
 11 ethnographic study.

12  
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 14 Respectfully submitted this 25th day of August, 2021.

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26 <sup>9</sup> *Id.*, HPTP at 5-6; Second Hall Decl. ¶ 7. *See also* HPTP at 3 Fig. 2 (describing areas of direct  
 27 and indirect effect).

28 <sup>10</sup> *See* Fed. Def. Ex. 28, ECF No. 72-2.