Julie Cavanaugh-Bill (State Bar No. 11533)
Cavanaugh-Bill Law Offices
Henderson Bank Building
401 Railroad Street, Suite 307
Elko, NV 89801
(775) 753-4357
julie@cblawoffices.org

William Falk (Utah Bar No. 16678)
2980 Russet Sky Trail
Castle Rock, CO
(319) 830-6086
falkwilt@gmail.com

Terry J. Lodge (Ohio Bar No. 29271)
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 205-7084
tjlodge50@yahoo.com

Attorneys for Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BARTELL RANCH LLC, et al., Plaintiffs, v. ESTER M. MCCULLOUGH, et al., Defendants, and LITHIUM NEVADA CORPORATION, Intervenor-Defendant.	Case No.: 3:21-cv-80-MMD-CLB (**LEAD CASE**) **INTERVENING PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO RECONSIDER**
WESTERN WATERSHEDS PROJECT, et al., Plaintiffs, RENO SPARKS INDIAN COLONY, et al.,	Case No.: 3:21-cv-103-MMD-CLB (**CONSOLIDATED CASE**)

Intervenor-Plaintiffs,

and

BURNS PAIUTE TRIBE,

Intervenor-Plaintiff.

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

LITHIUM NEVADA CORPORATION,

Intervenor-Defendant.

Reno-Sparks Indian Colony (RSIC) and Atsa Koodakuh wyh Nuwu/People of Red Mountain (People of Red Mountain) (together "Intervening Plaintiffs") respectfully submit these points and authorities in reply to Federal Defendant Bureau of Land Management's (BLM) and Intervening Defendant Lithium Nevada Corporation's (Lithium Nevada) Response to Intervening Plaintiffs' Motion to Reconsider this Court's Order Denying the Intervening Plaintiffs' Motion for Preliminary Injunction.

I. The Intervening Plaintiffs' theory of standing is well-established and commonly accepted in Ninth Circuit and Supreme Court jurisprudence.

The Intervening Plaintiffs' theory of standing is simple: The Administrative Procedure Act (APA), through the the National Historic Preservation Act (NHPA), bestows on any member of the public, who can demonstrate a sufficiently concrete interest in the historic properties affected by a federal agency's undertaking, standing to

ensure that the federal agency follows the proper procedures in making decisions that affect the historic property at issue.

This theory involves satisfying Article III standing through the procedural standing test often articulated as "To establish procedural standing, the plaintiff must show: (1) that it has been accorded a procedural right to protect its concrete interests, and (2) that is has a threatened concrete interest that is the ultimate basis of its standing. *Churchill County v. Babbitt,* 150 F.3d 1072, 1078 (9th Cir. 1998). "The requisite weight of proof for each element of the test [for standing] is lowered...for 'procedural standing.'" *Id.* "Procedural standing is standing based on a plaintiff's procedural injury. A plaintiff may claim 'procedural standing' when, for example, it seeks 'to enforce a procedural requirement the disregard of which could impair a concrete interest of the plaintiffs." *Id.*

BLM argues that "RSIC and the People cannot establish 'procedural standing' to assert claims of insufficient consultation with other tribes" and states one of the Ninth Circuit's articulations of the procedural standing test. But that is false. "A plaintiff alleging procedural harm can demonstrate injury in fact by showing (i) the agency violated certain procedural rules, (ii) those rules protect a concrete interest of the plaintiff, and (iii) it is 'reasonably probable' that the challenged action threatens that concrete interest." *Navajo Nation v. Dep't of the Interior,* 876 F.3d 1144, 1160 (9th Cir. 2017).

The Intervening Plaintiffs have clearly alleged that BLM violated certain procedural rules. However, BLM confuses the Intervening Plaintiffs' concrete interest which those Plaintiffs allege has been harmed. The Intervening Plaintiffs' concrete interest is in the preservation of historic properties – an interest that Congress explicitly

created when enacting NHPA -- in using and enjoying Thacker Pass as their ancestors have done for millennia. Intervening Plaintiffs further have a concrete interest in ensuring that the BLM follows the procedures described in the NHPA's implementing regulations so that BLM possesses adequate knowledge of the historic properties in Thacker Pass before allowing Lithium Nevada to destroy those properties. Rounding out the Ninth Circuit's test, it is reasonably probable that BLM's failure to follow the procedural rules threatens the Intervening Plaintiffs' concrete interest.

"Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). A plaintiff seeking to demonstrate, as the Intervening Plaintiffs seek here, that they have been denied the benefits of information exchange from consultation, has standing generally and "need not allege any additional harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549, 194 L.Ed.2d 635 (2016)

Conveniently, BLM leaves out the rest of the Ninth Circuit's procedural standing analysis. In fact, in the case BLM cites, *Navajo Nation v. Dept. of the Interior*, the Ninth Circuit repeated the well-established rule statement: "Where plaintiffs allege a 'procedural injury' – that is, that the government's violation of a procedural requirement could impair some separate interest of the plaintiffs' – the 'normal standards for…[the] immediacy' of injury are relaxed." Id. at 1160 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555 at 572 n. 7 (1992)).

Instead of citing the entirety of the Ninth Circuit's procedural standing analysis – an entirety which clearly supports the Intervening Plaintiffs' position on standing – BLM

jumps right into a prudential standing analysis in the very next sentence when it states "[i]t is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.". ECF 105 at 7-8 (quoting *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002)).

In fact, in *Coalition of Clergy*, after the Ninth Circuit stated the rule that BLM quotes, the Court characterized that rule as "prudential, rather than constitutional." But, the Supreme Court foreclosed application of traditional prudential standing principles in the APA context with the ruling in *Federal Election Comm'n v. Akins*, 524 US 11, 20 (1998) when it ruled that in reviewing claims under the APA, "prudential standing is satisfied when the injury asserted by a plaintiff arguably falls within the zone of interests to be protected or regulated by the statute in question." Regardless, the Intervening Plaintiffs rely on no one's rights but their own.

A. The procedural right the Intervening Plaintiffs assert is the right to ensure BLM followed the NHPA's implementing regulations.

The Intervening Plaintiffs have been accorded at least one procedural right: the right to ensure BLM followed the procedures described in the NHPA's implementing regulations, 36 CFR 800 *et seq*, before BLM allows land the Intervening Plaintiffs are strongly connected to to be destroyed.

This right originates in the APA.Originally, sovereign immunity jurisprudence precluded most citizens from challenging agency actions. So, Congress enacted the Administrative Procedure Act (APA) with an "evident intent" to "make agency action presumptively reviewable." *Clarke v. Securities Industry Assn.,* 479 U.S. 388, 399-400 (1987). For a long time, at least since 1970, "Where statutes are concerned, the trend is

toward enlargement of the class of people who may protest administrative action." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 US 150, 154 (1970).

Under the APA, "a person...adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The Supreme Court has interpreted this section of the APA as imposing a standing requirement that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute...in question." *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 US 150, 153 (1970).

It is here, in its procedural rights analysis, where Lithium Nevada misquotes precedent. ECF 106, pg. 5. Lithium Nevada writes: "Accordingly, APA claims cannot be asserted when 'the plaintiff is not the 'subject of the contested regulatory action," (citing *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). But, the whole quote from *Ashley Creek* states:

> But when, as here, the plaintiff is not the 'subject of the contested regulatory action, the test denies a right of review *if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' Id.* (emphasis added to highlight how much of the rule statement Lithium Nevada left out)

It's obvious why Lithium Nevada wishes the part of the rule statement it left out did not exist. It's because the Intervening Plaintiffs' interests are much more than marginally related to the purposes implicit in the statute and it can be reasonably assumed that Congress intended to permit the suit.

The Supreme Court held in *Lexmark v. Static Control*, 134 S, Ct. 1377, 1387 (2014): "Whether a plaintiff comes within 'the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." And, in *Lexmark*, the Supreme Court looked to the "detailed statement of [the Lanham Act's] purposes" to determine the interest protected by the Lanham Act. *Lexmark*, at 1389.

Congress also provided a "detailed statement" of the NHPA's purposes. When Congress enacted NHPA, it declared that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage," that "historic properties significant to the Nation's heritage are being lost or substantially altered often inadvertently, with increasing frequency," and that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." Section 1 of the NHPA, Pub L. No. 89-665, as amended by Pub. L. No. 96-515.

Furthermore, the Ninth Circuit has ruled that:

> Congress enacted NHPA based on its findings that 'historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.' NHPA was enacted to 'encourage the public and private preservation of all usable elements of the Nation's historic built environment.

Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1158 (9th Cir. 1998) (internal

citations to the NHPA omitted).

The Intervening Plaintiffs are part of the American people. In some senses, restricting the People of Red Mountain's standing, because many of them are members

of the Fort McDermitt Tribe and the Fort McDermitt Tribe is not a party, reduces the People of Red Mountain to only tribal members. They are tribal members, of course. But, they are also part of the American people, part of the public whose interests Congress enacted the NHPA to protect. A similar logic applies to RSIC. Yes, they are a federally recognized tribe. But, their rights are not restricted to their rights as a federally-recognized tribe. RSIC is also part of the American people -- the public who have demonstrated particularized harm from the planned project. Regardless, Intervening Plaintiffs allege that BLM is on the verge of substantially altering historic properties significant to the Nation's heritage, inadvertently. The use of the word "inadvertently" is apt here because BLM failed to uncover evidence of the September 12, 1865 that it possibly would have learned about had it followed the NHPA's procedures. *This is precisely why procedural standing exists.*

Congress says that "the preservation of this irreplaceable heritage is in the public interest;" the Intervening Plaintiffs are members of the public with an interest in the specific heritage that Thacker Pass represents. They satisfy the zone of interests test, and it's not even close.

B. Viewing the Intervening Plaintiffs' standing theory through the lens of other contexts shows how commonly accepted this theory is.

The Intervening Plaintiffs' standing theory in this case is a completely uncontroversial theory in other contexts. Consider how often environmental nonprofits sue federal agencies like the Bureau of Land Management for failing to consult with other federal agencies like the United States Fish and Wildlife Service under the Endangered Species Act, for example. In that context, it's not the Fish and Wildlife Service's rights at issue. It's the environmental nonprofit's members' rights to ensure

that the law is followed that are at issue. Here, the Intervening Plaintiffs are not complaining about the Fort McDermitt, Summit Lake, or Winnemucca Indian Colony tribes' rights anymore than environmental nonprofits complain about the Fish and Wildlife Service's rights. They claim that the required information exchange of adequate consultation has not taken place. A plaintiff suffers sufficiently concrete and particularized "informational injury" where the plaintiff alleges that: "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell* ("*Friends of Animals II*"), 828 F.3d 989, 992 (D.C.Cir. 2016) (citation omitted). Consequently, a "plaintiff seeking to demonstrate that it has informational standing generally need not allege any additional harm beyond the one Congress has identified." *Id*.

The NHPA required that BLM consult with Fort McDermitt, Summit Lake, and the Winnemucca Indian Colony because these "Indian tribes...possess special expertise in assessing the eligibility of historic properties…" 36 CFR § 800.4(c)(1). In this way, Fort McDermitt, Summit Lake, and the Winnemucca Indian Colony are similar to experts in the Fish and Wildlife Service, which possesses special expertise in assessing effects to endangered species. The tribes are presumed to be most familiar with the physical environment of their lands. And like other laws requiring federal agencies to consult with experts in different situations while considering different agency actions, under NHPA, BLM was required to consult with these tribal experts. BLM did not do this and consequently the Intervening Plaintiffs (and all Americans) were deprived of a

procedural right to see BLM follow Congressionally-mandated procedures, and they are threatened with the loss of at least 57 historic properties.

It is not left to the Fish and Wildlife Service to sue BLM for failing to consult with FWS when applicable laws require that BLM do so. Similarly, the Intervening Plaintiffs do not have to be Fort McDermitt, Summit Lake, or the Winnemucca Indian Colony to sue BLM for failing to consult with those Tribes as required by NHPA. If only those tribes identified by BLM as being affected by a project were afforded standing to challenge BLM's consultation efforts, then all BLM would have to do -- as it did here -- is rush through a project's approval before all affected tribes learn of the project, and then hide behind prudential standing jurisprudence to limit those tribes' ability to challenge BLM's bad faith deprivation of their involvement in the process to project approval. Surely this is not what Congress intended in enacting the APA and NHPA.

The NHPA does not protect historic properties for only the Fort McDermitt, Summit Lake, and Winnemucca Indian Tribes. It protects historic properties for all Americans. This is not to say that federal courts have opened the door to just anyone to sue federal agencies for procedural violations of laws like the NHPA. The Intervening Plaintiffs understand this Court has an interest in denying some would-be plaintiffs standing on prudential grounds. Someone who has never been to Thacker Pass should not have standing to challenge BLM's section 106 procedural failures when considering historic properties in Thacker Pass. But that's not the circumstance here. Regardless, the prudential standing the Court has applied to the Intervening Plaintiffs has been specifically invalidated by the Supreme Court.

When federal agencies fail to follow Congressionally-mandated procedures while making decisions about property, and those decisions harm a person's concrete interest in that property, that person should be allowed to seek court review of the federal agency's failure to follow those procedures. If a person cannot seek court review of these failures, Congressionally-mandated procedures become nothing more than suggestions that federal agencies are free to follow or to ignore as they see fit. The Executive Branch then gains an improper power to disregard the Legislative Branch and American democracy collapses.

II. BLM should have found the massacre information the Intervening Plaintiffs offer so criticizing Intervening Plaintiffs for not finding this information sooner is ironic.

The BLM and Lithium Nevada criticize the Intervening Plaintiffs for not finding the new evidence of the massacre site earlier. But that criticism is grossly misdirected. The BLM is a massive federal agency, with massive resources at its disposal, employing many professional archaeologists and historians. BLM was legally obligated to find this publicly available information; the Intervening Plaintiffs were not. Meanwhile, the Intervening Plaintiffs were misled by the BLM.

FRCP 60(b)(2) states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for…newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." And, the time to move for a new trial FRCP Rule 59(b) is 28 days. The Intervening Plaintiffs moved for relief from this Court's Order Denying the Intervening Plaintiffs' Motion for Preliminary Injunction, and the new evidence of the massacre was discovered, within 28 days.

LR 59-1(a) further clarifies:

Changes in legal or factual circumstances that may entitle the movant to relief also must be stated with particularity. The court possesses the inherent power to reconsider an interlocutory order for cause, so long as the court retains jurisdiction. Reconsideration also may be appropriate if (1) there is newly discovered evidence that was not available when the original motion or response was filed, (2) the court committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.

Considering the totality of the facts here, the Court may properly reconsider the new evidence the Intervening Plaintiffs have offered. The BLM was legally obligated to find the massacre information early in the Thacker Pass permitting process. According to the BLM, it has been researching cultural resources in the area for years. The BLM has been, and is currently, representing to the Tribes and to the American public in a number of documents including the Draft EIS, Final EIS, Federal Register notices, and the HPTP that the Thacker Pass mine "does not have the potential to directly or indirectly affect any resources of Native American religious importance." FEIS, 4-120. The BLM has, numerous times, stated that consultation with the Tribes has been initiated and is ongoing. However, the BLM Handbook on Tribal Relations defines 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 decisionmaking process." H-1780-1, III-2. This contrasts sharply with what happened here: BLM sent two certified letters to the Tribes, provides no record of tribal responses, and deemed the NHPA Section 106 process concluded.

Originally, the Intervening Plaintiffs took the BLM at its word. If BLM really had done all the research and consultation it claims it did, the Intervening Plaintiffs would have been left with no reason to have to locate the evidence they have provided in the

course of this lawsuit. The BLM and Lithium Nevada have had years to turn up this evidence. They can ill object when the Intervening Plaintiffs, with nowhere near the agency's resources or expertise, produce profound evidence of this massacre in a matter of weeks, starting with the BLM's own archives.

III. Conclusion

The Intervening Plaintiffs have successfully established Article III standing through the Ninth Circuit's and Supreme Court's procedural standing analysis. The Intervening Plaintiffs meet the zone of interests test that the Supreme Court has ruled fulfills prudential standing in the APA context. And, the Intervening Plaintiffs have brought the new evidence about the September 12, 1865 massacre in Thacker Pass in time for this Court to reconsider its Order denying the Intervening Plaintiffs' Motion for Preliminary Injunction. Therefore, this Court should grant the Intervening Plaintiffs' Motion for Reconsideration.

Respectfully submitted,

By: /s/ Terry J. Lodge
Terry J. Lodge, Esq. (Ohio Bar No. 29271)
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 205-7084
tjlodge50@yahoo.com

Julie Cavanaugh-Bill (State Bar No. 11533)
Cavanaugh-Bill Law Offices
Henderson Bank Building
401 Railroad Street, Suite 307
Elko, NV 89801
(775) 753-4357
julie@cblawoffices.org

William Falk, Esq (Utah Bar No. 16678)
2980 Russet Sky Trail

Castle Rock, CO 80108
(319) 830-6086
falkwilt@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on Friday, October 1 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/Terry J. Lodge
Terry J. Lodge, Esq. (Ohio Bar No. 29271)