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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HUALAPAI INDIAN TRIBE OF THE HUALAPAI INDIAN RESERVATION, ARIZONA, *Plaintiff*, vs. DEBRA HAALAND, in her official capacity as the United States Secretary of the Interior; UNITED STATE BUREAU OF LAND MANAGEMENT; RAY SUAZO, in his official capacity as State Director of the United States Bureau of Land Management; and AMANDA DODSON, in her official capacity as Field Office Manager of the United States Bureau of Land Management Kingman Field Office, *Federal Defendants.*	Case No. 3:24-cv-08154-DJH **FEDERAL DEFENDANTS' RESPONSE TO HUALAPAI TRIBE'S MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY A PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT**

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[2] The appendices to the Manera Report are not included in the exhibit.

INTRODUCTION

The Court should reject Plaintiff Hualapai Indian Tribe's request for a temporary restraining order and preliminary injunction halting implementation of the Sandy Valley Exploration Project, Phase III. Hualapai claims the Project's lithium exploration activities pose an imminent threat to a nearby sacred hot spring known as Ha'Kamwe', but the Bureau of Land Management's ("BLM") analysis of the Project reveals that it will have minimal, if any, impact on the spring. Specifically, BLM determined that the Project will not affect the aquifer that feeds Ha'Kamwe' and devised mitigation measures to address the unlikely scenario in which water is encountered. BLM also communicated with the Tribe throughout the Project's development and appropriately determined that the Project's temporary effects would not impair the characteristics that qualify Ha'Kamwe' for inclusion in the National Register of Historic Places. Hualapai is thus unlikely to succeed on the merits of its National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") claims and offers little more than speculation to support its assertion of irreparable harm. Further, an injunction would not be in the public interest because the Project is an important part of the United States' green energy transition. The Court should therefore deny Hualapai's motion.

BACKGROUND

Phase III of the Sandy Valley Exploration Project is a small-scale exploratory drilling action aimed at assessing the existence of lithium deposits in parts of the Big Sandy Basin near Wikieup, Arizona. *See* Ex. 1, Final Env't Assessment ("EA"), 1. Planning for the Project started in 2019 when Arizona Lithium Ltd. ("AZL")[3]—owner of the relevant mining claims on BLM land—submitted an application to continue its exploration. *Id.* This third phase of exploration follows two prior phases in 2019. *See* Ex. 2, EA App. C, Fig. 2A. The prior, completed phases involved drilling a total of 53

[3] The EA states that Big Sandy, Inc., submitted the exploration plan. EA 1. Big Sandy is a subsidiary of AZL. AZL was also formerly known as Hawkstone Mining, Ltd.

boreholes and "helped to better define the areas where lithium resources exist." EA 1.

BLM initiated consultation with Hualapai regarding Phase III on June 6, 2020. Ex. 3, June 6, 2020, Ltr. BLM's request conveyed BLM's determination that the Area of Potential Effect ("APE") to cultural resources was 613 acres. *Id.* at 1. It sought to consult with Hualapai and other tribes "for all areas that would potentially be subject to surface disturbance or other potentially adverse effects." *Id.* Hualapai requested, and BLM promptly provided, a GIS shapefile of the APE and archaeological survey, among other things. Ex. 4, June 22, 2020, Email; Ex. 5, July 2, 2020, Email. And BLM conducted a site visit with Hualapai on March 19, 2021. Ex. 6, Site Visit Rep. Following that meeting, ACHP and Arizona SHPO suggested that "BLM organize a group consulting parties meeting." Ex. 7, May 6, 2021, Emails.

BLM held such a meeting with Hualapai, Fort Mojave, Arizona SHPO, and ACHP on May 28, 2021, to "discuss the BLM's definition of the undertaking, [APE], the BLM's efforts to identify historic properties, and the BLM's finding of No Historic Properties Affected." Ex. 8, June 17, 2021, Ltr. BLM noted that the Project involves sampling rather than mining, that the "exploration plan proposes no permanent infrastructure and would involve a handful of workers," and that all disturbed areas would be reclaimed. *Id.* BLM determined that "because the exploration plan is temporary in nature and does not propose any permanent infrastructure, . . . this undertaking would not cause visual, audible, atmospheric, or cumulative impacts to a historic property." *Id.* BLM's definition of the APE as the area where the ground would be disturbed was guided by "the limited scope and magnitude of the undertaking." *Id.* BLM thus did not extend the APE beyond the area of actual ground disturbance. BLM and the SHPO "agreed that the undertaking may proceed under the" Arizona Protocol Agreement. *Id.*[4]

[4] BLM developed a State Protocol Agreement with the Arizona SHPO to guide BLM planning and decision making as it pertains to historic properties and historic preservation in Arizona. Ex. 9. The Agreement "provide[]s BLM Arizona with a substitution for the standard procedures associated with Section 106 of the NHPA as well as a process for consistent compliance with th[ose] procedures." *Id.*

Pursuant to its NEPA obligations, BLM published a draft EA for the Project in April 2021. EA 3. After an initial 30-day comment period, BLM extended the period by 60 more days to July 10, 2021. *Id.* Hualapai submitted two comment letters during this period. *See, e.g.,* Ex. 10, July 2021 Comments. Most of Hualapai's comments focused on the Project's proximity to Ha'Kamwe' (also called "Cofer Hot Springs"), which is located on tribal land near the Project area's northern part. *See* EA App. C, Fig. 3. Hualapai also expressed concerns about noise, vibrations, and visual impacts interfering with use of the spring and the possibility that drilling could affect the spring's flow.

As part of BLM's coordination with Hualapai, on February 9, 2024, BLM and Hualapai entered into a Memorandum of Understanding ("MOU") making the Tribe a cooperating agency under NEPA. Ex. 11, MOU. Under the MOU, BLM agreed to provide Hualapai with a preliminary version of the final EA so Hualapai could provide comments on sections relating to certain resources. MOU 2.

BLM provided the preliminary final EA to Hualapai shortly after, and Hualapai provided comments on March 13, 2024. Ex. 12, March 2024 Hualapai Comments. Hualapai's letter also contained attachments, including a hydrology report completed by Southwest Hydro-Logic ("SWLG") and accompanying memorandum. Ex. 13, SWLG Memo. and Rep. BLM responded to Hualapai's comments and the SWLG Report's conclusions by updating the EA to require more rigorous procedures to plug boreholes if water is encountered during drilling. Ex. 14, April 2024 A. Dodson Emails re. Plugging.

BLM published the Final EA in June 2024. As the EA explains, the Project involves exploration over a 613-acre area divided into a northern portion with 100 new boreholes and a southern portion with 31 new boreholes. EA 4; *see also* EA App. C, Fig. 2A. Boreholes for extracting core samples would be 3.5 inches in diameter, reach no deeper than 360 feet, and utilize fresh water and biodegradable polymer for coring. *Id.* at 5. The Project also involves drilling three 3-foot diameter holes to extract a bulk sample, but these holes will not exceed 100 feet in depth. *Id.* at 6. After drilling, BLM requires holes to be backfilled and plugged and all disturbed land be reclaimed. EA 5–6. Activities

are expected to disturb a total of 21 acres and will last roughly 18 months. *Id.* at 4–5.

Beyond adding rigorous plugging procedures, the EA describes other Project changes aimed at addressing Hualapai's concerns related to Ha'Kamwe'. First, the EA requires AZL and Navajo Transitional Energy Co. ("NTEC")—the Project manager—to allow Hualapai and other interested tribes to monitor ground disturbing activities with the goal of observing whether cultural materials or water are inadvertently encountered. EA 6–7. Second, whereas the draft EA envisioned drilling a well to provide water for drilling and dust suppression, the final EA requires that all water be trucked in from off-site, eliminating any need to withdraw groundwater within the Project area. *Id.* at 3, 5. Third, the EA consolidates the Project's staging areas away from Ha'Kamwe' in response to concerns about visual and auditory impacts. *Id.* at 3. Finally, the EA refines the access routes to drill sites to reduce overland travel disturbance. *Id.* In short, the Project aims to "gain maximum information" about potential lithium deposits "while minimizing surface disturbance and occupation." *Id.* at 5. BLM approved the Project and issued a Finding of No Significant Impact ("FONSI") on June 5, 2024. Ex. 15, ROD and FONSI.[5]

LEGAL STANDARDS

I. The Preliminary Relief Standard

"Preliminary injunctive relief is an 'extraordinary remedy never awarded as of right.'" *Stensrud Inc. v. Unknown Parties*, 2024 WL 894674, at *2 (D. Ariz. Mar. 1, 2024) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Alternatively, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction" if the

[5] If, after exploration, AZL ultimately proposes a lithium mine, it would be required to submit a mining plan of operations, which would be analyzed through the NEPA process, triggering a separate Section 106 undertaking. June 17, 2021, Ltr.

remaining requirements are also satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).[6] "[C]ourts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, and should be particularly mindful, in exercising their sound discretion, of the public consequences in employing the extraordinary remedy of injunction." *Stensrud*, 2024 WL 894674, at *2 (cleaned up).

II. Review Under the Administrative Procedure Act

Because neither NEPA nor the NHPA contain a private right of action, Hualapai's claims under both statutes are reviewed under the APA, 5 U.S.C. §§ 701-706. *See WildEarth Guardians v. Provencio*, 923 F.3d 655, 664 (9th Cir. 2019). To prevail in an APA challenge, a plaintiff must show that an agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review is "deferential and narrow, and the court is not to substitute its judgment for the agency's judgment," *Friends of Animals v. Haaland*, 997 F.3d 1010, 1015 (9th Cir. 2021), or "fly-speck" the agency's NEPA analysis, *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 984 (9th Cir. 2022). Under this standard, "[a]gency action should be affirmed 'so long as the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Id.* at (quoting *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 675 (9th Cir. 2016)).

ARGUMENT

I. Hualapai Are Not Likely to Succeed on The Merits.

The Court should deny Hualapai's request for a temporary restraining order and preliminary injunction because it fails to meet the "threshold," dispositive requirement of demonstrating its NEPA and NHPA claims are likely to succeed or raise serious questions on the merits. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

[6] Federal Defendants do not concede the validity of *Cottrell*'s reasoning that the Ninth Circuit's "sliding scale" test for issuing a preliminary injunction survives *Winter*.

A. Pursuant to NEPA, BLM Took a Hard Look at the Project's Impacts.

BLM's analysis for the Project satisfies NEPA's hard look standard by reasonably assessing impacts related to groundwater conditions in the Project area and incorporating mitigation methods to preserve water resources. Under NEPA, the question for a reviewing court is whether the agency's analysis "contains a reasonably thorough discussion of the significant aspects of the [federal action's] probable environmental consequences." *Audubon Soc'y of Portland*, 40 F.4th at 984 (cleaned up). NEPA thus requires agencies to take a "hard look" at a project's environmental impacts, but the "detail that NEPA requires . . . depends upon the nature and scope of the proposed action." *Ctr. for Sierra Nevada Conservation v. U.S. Forest Serv.*, 832 F. Supp. 2d 1138, 1159 (E.D. Cal. 2011) (quotation omitted). And a project may use mitigation measures to "aid in timely identification of threats and the need for preventative measures or project modifications." *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1015 (9th Cir. 2006). When such measures are incorporated "throughout the plan of action," the project's "effects are analyzed with those measures in place." *Id.*

Courts in this district have applied these principles to uphold the groundwater analysis for exploratory drilling actions similar to this Project. *Concerned Citizens & Retired Miners Coalition v. United States Forest Service* ("*CCRMC*"), for example, upheld a plan to drill 16 wells up to 2,000 feet deep and 41 additional boreholes at the site of a planned mine facility. 279 F. Supp. 3d 898, 908–09, 936 (D. Ariz. 2017). The court held that, "[g]iven the relatively small scale of the project," the agency's reliance on "data collected from two studies of similar nearby basins" to establish baseline groundwater conditions satisfied NEPA. *Id.* at 934. The court further concluded that the benefits of the project's mitigation measures—including using "well-recognized techniques of well casings and fill material" to "prevent[] cross contamination of groundwater layers"—were "obvious" and did not require further support. *Id.* at 937–38.

Patagonia Area Research Alliance v. United States Forest Service rejected a similar challenge to the NEPA analysis for an exploratory drilling project that would

reach depths of up to 6,500 feet. 2023 WL 5723395, at *2 (D. Ariz. Sept. 5, 2023), *aff'd in part, appeal dismissed in part*, 2024 WL 2180192 (9th Cir. May 15, 2024); *id.*, Plaintiff-Appellants' Reply Brief, 2023 WL 10365059, at *23. The plaintiffs asserted that "groundwater exchange between aquifers" that could compromise "the sole source of drinking water for the Town of Patagonia." *Patagonia*, 2023 WL 5723395, at *2. Nonetheless, the court determined that the Forest Service's reliance on a single 2001 study of the same basin sufficed under NEPA and no new study was warranted. *Id.* at 6. The court also noted the EA's reasonable features to "mitigate the risk of groundwater exchange between aquifers." *Id.*

The Court should follow *CCRMC* and *Patagonia* and uphold BLM's analysis here. BLM based its analysis of groundwater conditions on a 2000 study of the southern Big Sandy Basin, referenced as "Manera 2000" in the EA. EA 20–22; Ex. 16, Manera Rep. This study involved drilling four test holes one-to-three miles south of Ha'Kamwe' to analyze the area's lithology, followed by more wells to test the aquifer. *See* Manera Rep. 12 (Figure 3). The data revealed layers with distinct porosities: (1) a shallow "upper aquifer" characterized by recent stream and floodplain alluvium; (2) a layer of low-porosity clay, known as the "Wikieup Formation," 240 to 640 feet in depth; (3) a "middle aquifer" characterized by sand, gravel, and some clay reaching 1,375 feet deep; (4) a 10-15 barrier of basalt rock; and (5) a "lower aquifer" extending to an indeterminate depth. EA 20; EA App. C, Figure 4; *see also* Manera Rep. 13–14. Only the lower aquifer was found to be pressurized and produced an artesian water flow. EA 21; *see also* Manera Rep. 11, 20–21. The report determined that the lower aquifer likely provides Ha'Kamwe's water given chemical and temperature similarities, though the EA notes the upper aquifer may contribute. EA 21; Manera Rep. 14.

In addition to the Manera Report, the EA considers the data from the prior phases of exploration, which involved drilling dozens of holes nearby the hot spring that encountered no water. EA 22; *see also* EA App. C, Fig. 2A. And the EA notes that the recharge area for the lower aquifer has recently been experiencing draught conditions,

further lowering the chances of striking water. EA 21. Based on this information, the EA concludes that the drilling—which will only reach depths of 360 feet—will not encounter the pressurized aquifer that supports Ha'Kamwe'. EA 22.

Even though the Project's chances of encountering water are low, the Project incorporates measures to eliminate any potential impacts to Ha'Kamwe'. First, AZL and NTEC must "provide the opportunity to the plaintiff Tribe . . . to monitor for and observe the presence and depth of water and soils associated with spring deposits" during drilling. EA 6. Second, if a hole does encounter water, it must be plugged and abandoned in accordance with Arizona law. EA 9. If a hole encounters artesian water, drilling must *immediately* cease and the hole must be plugged using cement grout via tremie pipe to ensure pressure is maintained. *Id.* These mitigation measures along with BLM's analysis are consistent with the EAs upheld in *CCRM* and *Patagonia* and satisfy NEPA. *See* 279 F. Supp. 3d at 934–36; 2023 WL 5723395, at *6.

Hualapai's arguments to the contrary are unavailing. Hualapai starts by asserts that the Manera Report is somehow "inapplicable" to the Project at hand but does not explain how the study's purpose bears on its scientific accuracy—geology is not project-dependent—or how the area's stratigraphy could have changed since 2000. ECF No. 11, Mot. for Temp. Rest. Order and Prelim. Inj., 12. To the contrary, because the test holes used in the Manera Report were just a few miles from Ha'Kamwe' and the Project site, it is likely more informative than the two studies of "similar nearby basins" supporting the NEPA analysis that was upheld in *CCRMC*. *See* 279 F.Supp.3d at 934.

Nor is Hualapai correct that its own groundwater study—the SWHL Report—was ignored by BLM or undermines the Manera Report. Mot. 12–13. Hualapai claims that the SWHL Report proves that the EA's reference to multiple aquifers is "factually flawed," *id.* at 8, but, as the memo attached to the report acknowledges, this boils down to a dispute over "hydrologic nomenclature." SWHL Rep., Memo. at 2. After all, the SWHL Report itself *relies on* the study underlying the Manera Report (which it refers to as "Caithness Big Sandy") to conclude that the geologic "layers" in the Project area have

"different degrees of porosity and lithification." *Id.* at 6. Elsewhere the SWHL Report even adopts the multi-aquifer terminology by referring to a "spring aquifer" and "basin-fill aquifer." *Id.* at 18.

And, contrary to Hualapai's assertion, BLM did not ignore the SWHL's conclusion that BLM needed to "prepare for the possibility of encountering the over-pressured artesian aquifer" by identifying "methods to isolate, plug, and permanently seal artesian groundwater discharges." *Id.*, Memo. at 2. To achieve this, the SWHL Report recommends "using downhole tremie pipes to deliver grout to the bottom of the boreholes in order to prevent vertical migration of groundwater." *Id.* at 17. This is *exactly* the procedure that BLM added as a requirement in response to Hualapai's March 2024 comments. April 2024 Emails. Hualapai offers no reason to doubt that this measure—which its own expert recommends—would be effective. In short, the SWHL Report does not "challenge the scientific basis" of the EA, Mot. 8; rather, it merely constitutes an additional scientific study that BLM appropriately considered and responded to. *See W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1048 (9th Cir. 2013) (declining to "substitute [the court's] judgment" for that of BLM where the agency considered studies but "did not draw the same conclusions" as the plaintiff).

Finally, Hualapai's insistence that BLM should have conducted an independent hydrological study lacks merit. *Patagonia* rejected a similar demand as "impractical" given the limited scope of the exploratory drilling project at issue. 2023 WL 5723395, at *6; *see also* 40 C.F.R. § 1506.6(b); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012) ("The purpose of an EA is not to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment."). To the extent there is ambiguity about whether the upper aquifer contributes at all to Ha'Kamwe', any risk this poses is mitigated by the EA's plugging procedures. EA 9. Indeed, Hualapai offers no explanation of how striking non-pressurized water in the upper aquifer and plugging the hole could even impact flows at Ha'Kamwe'. Hualapai thus fails to show likelihood of success on its NEPA claim.

B. BLM's Consideration of Alternatives Did Not Violate NEPA.

Hualapai's claim that BLM unlawfully failed to consider a viable middle ground alternative for the Project is likewise unlikely to succeed. "Under NEPA, an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 978-79 (9th Cir. 2006) (quotation omitted). An agency therefore need not consider "alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *Id.* (cleaned up). Moreover, "an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). And an agency may reject alternatives if it "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Hualapai's alternatives argument fails for multiple reasons. First, Hualapai has failed to carry its burden to demonstrate its proposed alternatives are viable. "Those challenging the failure to consider an alternative have a duty to show that the alternative is viable." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) (citation omitted). Specifically, a plaintiff must show how its proposed alternative "would appropriately meet the . . . objectives" of the project, *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 2023 WL 7410730, at *10 (D. Alaska Nov. 9, 2023), and "was necessary to foster informed decisionmaking and public participation," *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013).

Hualapai has not demonstrated (here or to BLM) that its vague proposals would be consistent with the Project's objectives or necessary to informed decisionmaking. To the contrary, Hualapai's proposal to reduce the amount of exploratory drilling, Mot. 10, "begs the question," *Alaska Survival*, 705 F.3d at 1087, of how BLM could achieve the Project's purpose of "provid[ing] [AZL] an opportunity to explore its valid existing mining claims" while limiting its ability to conduct the exploration necessary to assess potential deposits. *See* EA 2. It is also unclear how, after BLM "remov[ed] redundant

routes" from the draft EA, EA 3, BLM could further reduce vehicle activity while allowing access to all drill sites, *See* EA App. C, Figures 2B & 2C (mapping access to drill sites). In fact, the EA states that "new access roads" would "consist of overland travel between drilling sites . . . using existing two-track road washes," EA 4, meaning "[n]o new access roads would be constructed," *id.* 11. Hualapai's roads proposal is thus irrelevant. And to the extent Hualapai proposes "stricter controls on noise, light, vehicular traffic, and vibrations," Mot. 10, BLM *did* consider these issues after they were raised in comments and modified the Project by, for example, moving the staging area and reducing roads, EA 3. Hualapai fails to explain how more, undefined controls could be consistent with the Project's goals or necessary for informed decisionmaking.[7]

Second, BLM's decision to consider two alternatives for a Project with such a narrow scope was reasonable. The Ninth Circuit has repeatedly recognized that considering just a no-action alternative and a preferred alternative can be adequate when the agency has prepared an EA. *See, e.g., N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d at 1153–54; *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021–23 (9th Cir. 2012); *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 602 n.11 (9th Cir. 2010).

Here, the EA explains that "[n]o alternative actions were evaluated in detail because none were identified that would have fewer impacts than the Proposed Action." EA 10. This makes sense given Hualapai's failure to provide any specific proposals in its 2021 comments. The EA also states that the possible options for the Project were "limited

[7] Hualapai also waived this argument by failing to propose any specific alternatives in its 2021 comments during the NEPA process. *See* July 2021 Comments 11; *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004) (respondents "forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives" by not identifying "any rulemaking alternatives beyond those evaluated in the EA"). While Hualapai made more specific suggestions in its March 2024 letter, those comments were provided as a cooperating agency under the MOU. March 2024 Comments 6. The MOU invited Hualapai to comment on specific sections of the preliminary final EA, but did not solicit new proposed alternatives at the final stage of NEPA review. MOU 2.

given the narrow focus of the exploration drilling program." *Id.* In other words, BLM recognized that this is a small-scale Project with a specific goal assessing if lithium deposits on AZL's claims could support a mine. *See Abbey*, 719 F.3d at 1046 ("[A] project's scope and purpose define the reasonable range of alternatives that must be analyzed," and "[a]n agency has considerable discretion to define the scope" of its own NEPA analysis). More limited drilling was thus infeasible, and BLM properly excluded such alternatives. Hualapai is unlikely to succeed on its NEPA claims.

C. Federal Defendants Complied with the NHPA.

Hualapai does not meet its burden of proving that BLM's NHPA analysis was arbitrary. BLM assessed "the temporary nature of the visual, noise, and vibration effects from the proposed drilling activities" and requirements that protect Ha'Kamwe's water, reduce noise, and ensure that disturbed land is reclaimed and determined that Phase III of exploration would not alter the "characteristics that qualify Ha'Kamwe' for inclusion in the National Register of Historic Places." EA 16. BLM thus limited its NHPA analysis to the ground that will actually be disturbed. EA 16. *Id.* BLM's definition of the APE of Phase III exploration is entitled to substantial deference and Hualapai fails to establish that BLM's decisionmaking was arbitrary.

The NHPA "is a procedural statute requiring government agencies to 'stop, look, and listen' before proceeding with agency action." *Te-Moak*, 608 F.3d at 610. It does not prohibit harm to historic properties but creates obligations "that are chiefly procedural in nature." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005). The NHPA requires federal agencies to "make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register . . .; [and] assess the effects of the undertaking on any eligible historic properties found." *Wildearth Guardians*, 923 F.3d at 676. The first step in this process is to "[d]etermine and document" an undertaking's APE. 36 C.F.R. § 800.4(a)(1). "The APE is 'the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such

properties exist.'" *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 846 (10th Cir. 2019). The APR "is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 C.F.R. § 800.16(d). "Establishing an area of potential effects requires a high level of agency expertise, and as such, the agency's determination is due a substantial amount of discretion." *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1091 (10th Cir. 2004). The Court must assume that BLM exercised that discretion appropriately unless Hualapai meets its burden of showing that BLM arbitrarily defined the APE. *Id.* at 1091; *see also Wildearth Guardians*, 923 F.3d at 677. Hualapai falls far short of meeting that burden.

BLM was not arbitrary to determine that limited, temporary noise and visual effects from a third phase of exploration located farther from Ha'Kamwe' than prior phases would not adversely affect the characteristics that qualify Ha'Kamwe' for inclusion in the National Register. *See* EA 16. Hualapai identifies no case that suggests, much less holds, that an agency's NHPA analysis must include properties that might experience limited, temporary noise and visual impacts that will not permanently alter their characteristics. *Solenex, LLC v. Haaland*, 626 F.Supp.3d 110, 127-28 (D.D.C. 2022) (constructing well pads and extracting oil); *Colo. River Indian Tribes v. Marsh*, ("*CRIT*") 605 F. Supp. 1425 (C.D. Cal. 1985) (constructing "156-acre residential and commercial development"); *Comanche Nation v. United States*, 2008 WL 4426621, at *1 (W.D. Okla. Sept. 23, 2008) (constructing a building); *Crutchfield v. U.S. Army Corps of Eng'rs*, 154 F. Supp. 2d 878, 880 (E.D. Va. 2001) (wastewater treatment plant construction).

Hualapai stakes much, Mot. at 8, on a May 31, 2024, letter from the Advisory Council on Historic Preservation ("ACHP") requesting BLM to reconsider its definition of the APE. But ACHP participated in consultation with Hualapai and Arizona's state historic preservation officer ("SHPO") regarding the APE in May 2021. June 17, 2021, Ltr. And ACHP recognized that "it is not incumbent upon the BLM to reconsider" its definition of the APE in May 2024—three years after that consultation. ECF No. 11-7 at 2. The record on determining the APE closed well before the ACHP letters that Hualapai

rely upon. *Cf. Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1211 (9th Cir. 2008). And Hualapai has not demonstrated that ACHP's late request is entitled to any deference. *Grand Canyon Tr. v. Williams*, 2013 WL 4804484, at *10–11 (D. Ariz. Sept. 9, 2013). ACHP's late request that BLM reconsider the APE does not render BLM's prior consideration unreasonable or in bad faith.

Hualapai is also incorrect that BLM's definition of the APE left Hualapai unable to "consult to resolve or mitigate the Project's adverse effects." Mot. at 8-9. To the contrary, BLM consulted with the Tribe regarding its concerns about groundwater, auditory, and visual issues and modified the proposed action in response under NEPA. EA 3.[8] Hualapai does not even suggest that it would have provided different information or that the consultation process would have been different under a different statute. *Te-Moak Tribe*, 608 F.3d at 609-610. Hualapai thus does not meet its burden of establishing that BLM's NHPA analysis was arbitrary, particularly given the substantial discretion accorded to BLM in defining the APE.

II. Hualapai Has Not Demonstrated Irreparable Harm from the Project.

Because Hualapai fails to demonstrate likelihood of success on the merits or raise serious questions, the Court "need not consider the other factors" of the preliminary injunction analysis. *See Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019). Even so, Hualapai has not met its burden to "establish that irreparable harm is likely, not just possible." *All. For the Wild Rockies*, 632 F.3d at 1131 (citing Winter, 555 U.S. at 22).

Hualapai does not show that the planned exploratory drilling is likely to cause irreparable harm in the imminent future, during the pendency of this litigation, or at any

[8] Hualapai is incorrect, Mot. at 7, that BLM was arbitrary to adopt a different scope for its NEPA and NHPA analysis. Section 106 considers effects on historic property's listing characteristics, while NEPA requires consideration of any effect (regardless of whether it would impact a listing characteristic). The different statutes "mandate[] separate and distinct procedures." *Preservation Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). Even the case Hualapai cites, Mot. at 7, notes that "the obligations imposed by NHPA are 'separate and independent from those mandated by NEPA,'" *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994).

point in the Project's lifetime. Notably, despite claiming elsewhere that the Project will "impair the spring," Mot. 12, Hualapai's brief makes no mention of irreparable harm to water flow at Ha'Kamwe'. *Id.* at 13–14. This makes sense in light of the EA's monitoring and plugging requirements and confirmation that prior phases of exploratory drilling even closer to the spring did not encounter water, EA 6–7, 9, 22.

Instead, Hualapai claims that exploration will damage or destroy cultural or religious sites. Mot. at 13-14 (citing *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104, 1120 (S.D. Cal. 2010) and *CRIT*, 605 F.Supp. at 1440). But in *CRIT*, the permit at issue would have led directly to construction of "approximately 447 lots for single-family homes, mobile homes, and commercial facilities" that irreparably destroyed resources. 605 F. Supp at 1428. And *Quechan* concerned the construction of a "large solar energy project" that included "support buildings, roads, a pipeline, and a power line." 755 F. Supp. 2d at 1107. "[T]he massive size of the project and the large number [hundreds] of historic properties and incomplete state of the evaluation virtually ensured some loss or damage." *Id.* at 1120. In contrast, the undertaking here is mineral exploration that will temporarily impact a small amount of land near a single cultural property without disturbing the ground of that cultural property. And tribal monitors may observe ground disturbing activities to provide assurance that ground disturbances will avoid cultural resources. EA 7.[9] The likelihood of destruction that was present in *CRIT* and *Quechan* is simply absent here.

Nor does Hualapai establish that the planned drilling will likely harm Ha'Kamwe', the surrounding area, or Hualapai's lifeways. The first two phases of exploratory drilling were closer to the hot spring than the exploration that is currently being challenged. EA App. C, Fig. 2A. Tellingly, Haulapai does not provide any evidence that the prior drilling "destroyed" Ha'Kamwe' or the surrounding landscape. *Cf.* Mot. at 1. Indeed, none of Hualapai's seven declarants even mention the 2019 exploration, much less identify

[9] Hualapai, Chemehuevi, and Hopi, have sent monitors. Ex. 17, Aug. 5, 2024 Email.

negative effects associated with it. *See* ECF No. 11-2–11-7. While the present phase involves drilling 100 boreholes in the part of the Project area near Ha'Kamwe' rather than the 42 holes drilled previously, EA App. C, Fig. 2A, it is otherwise comparable to the prior phases of exploration. EA 1-2. If that drilling disrupted activities at the springs in the way Hualapai fears, the motion provides no evidence of it.

And while Hualapai's declarants fear potential threats posed by noise, vibrations, vehicle traffic, and effects on plants and wildlife, they provide little evidence to substantiate these concerns. Mot. 14. Indeed, Hualapai falls far short of meeting its burden of proving that they will be harmed by noise from a "180-horsepower or less" engine operating farther away from Ha'Kamwe' than previous exploratory drilling.[10] Hualapai does not establish how the noise from a 180-horsepower drill will carry to Ha'Kamwe', much less how the minimal additional noise from such a drill will impair cultural uses. Nor does Hualapai offer any explanation as to how much vibration would lead to irreparable harm.

To the contrary, the EA indicates that vibrations and noise will be minimal. BLM responded to Hualapai's comments by relocating and consolidating the staging areas away from Ha'Kamwe'. EA at 3. BLM further required that staging and water storage be located "to reduce overall project traffic" and maintained to reduce "noise and visual impacts." *Id.* at 8-9. And BLM required that workers travel at "reduced speeds" of less than 25 miles per hour. EA 8.

Hualapai's allegations regarding purported harm to "traditional and cultural uses" are even more speculative. Mot. at 14. Hualapai does not identify any cultural observance planned during the drilling period that will be interrupted, and the facts indicate that Hualapai's speculative fears have little foundation. First, BLM required that Hualapai be allowed to monitor ground disturbing activities, in part, to avoid the possibility of cultural

[10] The average car has more horsepower. https://www.jdpower.com/cars/shopping-guides/what-is-the-average-horsepower-of-a-car.

disruption. EA 15. Second, NTEC is managing Phase III exploration. Ex. 18, July 5, 2024, Ltr 1. NTEC "is a tribally owned entity of the Navajo Nation" with a stated goal of "responsible project development that demonstrated environmental sustainability, safety, responsible mining, . . . robust and well-planned reclamation[, . . . and] transparent dialogue with Native American communities." *Id*. NTEC stated its commitment to implementing the EA's coordination provisions to avoid disruption to traditional cultural practices. *Id*. at 3.[11] Hualapai does not suggest that it has attempted to coordinate any cultural practices to avoid disruption, much less that NTEC has ignored any such request.

To the extent Hualapai's declarants express concern about plants and animals, *see, e.g.*, Craynon Dec. ¶ 11, they are speculative and disconnected from the Project's design. The EA provides for "noxious weed controls, . . . certified weed-free . . . reseeding" and monitoring of reclaimed areas. EA 7. BLM also requires that "surface disturbances will be limited as much as possible" and that plants, including cacti, will be transplanted. *Id.* BLM likewise required robust protection for wildlife, including birds and tortoises. EA 8. And Hualapai's speculation that drilling will create dust that will harm plants, Mot. 14, is similarly contradicted by BLM's requirement that Arizona Lithium transport water to the project area "for as-needed dust suppression." EA 5, 21-22.

Indeed, Hualapai's allegations regarding injury from exploratory drilling are undercut by Hualapai's openness to using the Cholla Canyon Ranch that surrounds Ha'kamwe' for "developing a water source" and "agri-business such as hemp farming" on those lands. Ex. 19, Draft Hualapai Master Plan §§ 1.5.10 & 2.5.10 (Apr. 30, 2024). In other words, Hualapai is open to using water that might otherwise recharge Ha'Kamwe' and adding agri-business related traffic. This belies Hualapai's argument that it will be irreparably injured by limited exploratory drilling and noise.

Hualapai's draft master plan instead strongly suggests that Hualapai views

[11] NTEC is also committed to "responsible development of US-based lithium resources" as a "crucial component of the United States energy transition." *Id.*

mining—rather than exploration—as the threat to Ha'kamwe'. Id. at 2.5.10 ("The tribe's current use of the ranch and any plans for greater usage, are under threat by a potential lithium mine located on adjoining public lands, for which exploratory drilling is underway by a third-party developer to prove the richness of the lithium ore."). But no such harm is imminent, as a mining plan would require additional NEPA and NHPA review. June 17, 2021, Ltr. Hualapai does not meet its burden of establishing a likelihood that phase III of exploration will imminently, irreparably injure it.

III. The Balance of Equities and Public Interest Favor Federal Defendants.

To the extent the Project poses any risk to Hualapai, any speculative harm is outweighed by the negative impacts of enjoining the Project. When the government is a party, the analyses of the public interest and balance of equities "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Courts thus must weigh the public's interest in allowing the government action to proceed against the plaintiff's alleged harm. *McNair*, 537 F.3d at 1005.

The Project at issue here is one part of the United States' larger effort to transition to renewable sources of energy. As the website for Earthjustice, Hualapai's attorneys, explains, a "clean energy transition" to electric vehicles ("EVs") would be beneficial because "EVs are much better for the climate than gas-powered cars" and "require fewer natural resources."[12] But the batteries for electric vehicles require lithium.[13] Here, Hualapai seeks to delay exploration needed to determine whether the lithium deposit in the Project area can and should be mined. Such delays are not in the public interest.

This is especially so in light of the United States' limited domestic lithium supply. As one recent article explained, demand for lithium is "expected to explode in the coming decades," but, "[d]espite having some of the world's biggest lithium deposits, the United

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[12] Are Electric Vehicles Really Better for the Environment? Yes. Available at: https://perma.cc/8WHP-CNBF.

[13] Electric vehicles are not just the wave of the future, they are saving lives today. Available at: https://earthjustice.org/feature/electric-vehicles-explainer.

States is home to just one operational lithium mine."[14] Given the speculative nature of Hualapai's alleged harm and the benefits of better defining the lithium deposits in this area, the equities favor denying the motion.

CONCLUSION

Because Hualapai have not shown a temporary restraining order or preliminary injunction is warranted, the Court should deny its motion.

Respectfully submitted this 19th day of August, 2024.

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[14] Christina Lu, *Washington Wants a White Gold Rush*, FOREIGN POLICY (Jun. 26, 2024), https://foreignpolicy.com/2024/06/26/us-lithium-mining-energy-security-china/.