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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona, Plaintiff, v. Debra Haaland in her official capacity as the United States Secretary of the Interior; United States 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, Defendants.	NO. 3:24-cv-08154-DJH **INTERVENOR ARIZONA LITHIUM LIMITED'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** **(Oral Argument Requested)**

INTRODUCTION

After nearly three years of investigation, scientific research and coordination with 12 tribes, Federal Defendants, including the United States Bureau of Land Management ("BLM"), issued a Final Environmental Assessment ("EA") in June 2024 allowing

Arizona Lithium Ltd. ("AZL") to continue exploratory drilling for lithium, a key element supporting electric vehicles. Despite having been an active participant in the process, Plaintiff—the Hualapai Tribe—has filed a Motion for Temporary Restraining Order Followed by a Preliminary Injunction ("TRO") to enjoin the exploratory drilling because it is on land adjacent to a spring known to the Hualapai Indian Tribe ("Hualapai") as Ha'Kamwe'.

AZL and BLM recognize the importance of the spring for Plaintiff and have taken significant measures to protect it. Monitors from the Hualapai, Hopi and Chemeheuvi tribes have been consistently present for drilling activities at AZL's invitation and request. There is no competent evidence that BLM got its analysis wrong or that the spring is in any danger of being compromised. Instead, the BLM approval addresses concerns about potential impacts to the spring and AZL agreed to restrict activities around the spring and to implement significant safeguards.

AZL thus requests this Court deny Plaintiff's request for a TRO because Plaintiff cannot satisfy the requisite elements, including demonstrating likelihood of success on the merits, to obtain the drastic and extraordinary remedy of an emergency injunction.

FACTUAL BACKGROUND

AZL is a company engaged in the discovery and harvesting of materials—lithium—to support this country's transition to electric vehicles and battery storage. (Declaration of Paul Lloyd ("Lloyd Dec."), attached to AZL's Motion to Intervene as Exhibit D, ¶¶ 4-6.) AZL's exploratory drilling in 2018 and 2019 revealed that the near surface clays on federal land near Wikieup, Arizona contain high concentrations of lithium. (*Id.*, ¶ 11.) AZL thus sought permission to conduct limited exploratory drilling for lithium deposits, known as the Sandy Valley Exploration Project (Phase 3) ("Project").

AZL first applied to conduct the third phase of the Project on September 20, 2019. (*Id.*, ¶ 12.) During the spring and summer of 2021, BLM accepted public comments about the Project. (*See* June 5, 2024 Phase 3 Sandy Valley Exploration Project Decision

Record ("Decision Record"), attached to Lloyd Dec. as Exhibit 2, at 2.) The BLM engaged the Hualapai for additional coordination, consultation, and input after the comment period, resulting in changes to the proposed plan and acceptance of the Hualapai as a Cooperating Agency. (*Id*. at p. 3).

For three years, the BLM assessed AZL's application for this third phase of exploratory drilling on federal land. (*Id*., ¶¶ 12-13.) The Hualapai had significant input throughout the application process including as a Cooperating Agency, meaning that the BLM specifically consulted with them regarding the BLM's EA prior to publication. (*Id*., ¶ 13.)

On April 15, 2024, after more than three years of working with BLM on the permitting process, AZL submitted a revised Plan of Operations for Mineral Exploration to Paul Misiaszek at BLM-KFO, which provided extensive details about the plan of proposed drilling and operations. (*See* April 15, 2024, Plan of Operations, attached as Exhibit 1 to Lloyd Dec.) On June 5, 2024, Amanda Dodson, Field Manager at KFO approved the Project and issued a Finding of No Significant Impacts ("FONSI") report, after determining that the Project "is not a major federal action and will not significantly impact the quality of the human environment." (*See* June 5, 2024, Finding of No Significant Impacts ("FONSI"), attached to Lloyd Dec. as Exhibit 3.) As part of the FONSI, the BLM identified public involvement leading to its decision and land use plan conformance. (*Id*. at 3.)

After providing notice to the Hualapai, the BLM issued its approval for the Project on June 6, 2024. (Lloyd Dec., ¶ 18.) The BLM's final approval includes significant restrictions to eliminate or reduce the potential of impacts and to protect cultural resources, including Ha'Kamwe'. AZL supports these measures and has repeatedly sought to engage with the Hualapai to deploy monitoring protocols to better understand the hydrogeology of the area. (Lloyd Dec., ¶ 19.)

The EA and Decision Record detail extensive mitigation measures and precautions AZL committed to undertake as part of the Project, including comprehensive instructions

concerning such items as daily tribal monitoring of the work being performed, extensive surface reclamation and re-vegetation protocols, and scheduling staging activities to minimize traffic. (*See* Decision Record, attached to Lloyd Dec. as Exhibit 2, at 6-10.) In all, the EA identified twenty-seven committed environmental protection measures and best management practices and three specific mitigation measures. (*Id.*)

Out of respect for the land and in recognition of past environmental and cultural transgressions of others against tribes in the region, AZL partnered with the Navajo Transitional Energy Company ("NTEC"), a Navajo Nation owned energy company with a track record of environmentally respectful and safe mining with an emphasis on supporting and valuing tribal communities. (*Id.*, ¶ 20.) As part of the process of establishing the Project, AZL invited twelve tribes who have expressed an interest in Big Sandy lands to observe AZL's exploratory activities. (*Id.*, ¶ 21.) Of those twelve tribes, three tribes accepted AZL's invitation to attend those activities. (*See* Declaration of Ivan Martirosov ("Martirosov Dec."), attached hereto as **Exhibit A**, at ¶¶ 18-19.) Since receiving approval from BLM, AZL has provided anticipated schedules of drilling activities and the Hualapai, Hopi and Chemehuevi tribes have each sent monitors to oversee the drilling and bulk sampling program. (*Id.*, ¶ 19.)

Throughout the exploratory process, AZL and NTEC have advised the Hualapai's Tribal Historic Preservation Officer and the Hualapai, Hopi and Chemeheuvi monitors at the site of AZL's activities and schedule as promised. (Martirosov Dec., ¶¶ 17-23.) Drilling activities were originally scheduled for mid-July but postponed to early August. (*Id.*, ¶ 13.). At the time Plaintiff filed this TRO (afterhours on August 16, 2024), it was well aware that AZL had expended significant time and resources to meet its stated schedule. (*Id.*, ¶ 33; *see also* Lloyd Dec., ¶¶ 26-28.)

LEGAL ARGUMENT

I. A Preliminary Injunction Is An Extraordinary Remedy, Which is Unjustified Here.

"A preliminary injunction is an extraordinary remedy never awarded as a right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (citation omitted). To obtain this

extraordinary remedy, Plaintiff must carry the "heavy burden of making a 'clear showing' that it was entitled to a preliminary injunction." *Ctr. for Competitive Politics v. Harris*, 784 F. 3d 1307, 1312 (9th Cir. 2015). The "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

A plaintiff seeking a preliminary injunction must show: "(1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm if the preliminary injunction is not granted; (3) the balance of equities tips in its favor; and (4) an injunction is in the public's interest." *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20, 22). In the Ninth Circuit, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of a preliminary injunction," albeit only "so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cattrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). Under either test, a plaintiff must "establish that irreparable harm is likely, not just possible," *id*. at 1131, and a deficiency in any one of the required elements precludes extraordinary relief. *Winter*, 555 U.S. at 24.

Under this standard, it is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* be issued; rather, a court must determine that an injunction *should* issue. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010). Thus, an injunction should issue only where a plaintiff makes a clear showing and presents substantial proof that an injunction is warranted, *Mazurek*, 520 U.S. at 972, and does more than merely allege imminent harm sufficient to establish standing. *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011). Here, Plaintiff has failed to satisfy this burden.

II. Plaintiff Is Not Likely to Succeed on the Merits of Its Claims.

Plaintiff correctly cites to the standard for success on the merits, which is that Plaintiff must show a "fair chance of success" on the merits of showing BLM's actions were arbitrary and capricious. Plaintiff has succeeded in presenting evidence that Ha'Kamwe' is a sacred and meaningful place to the Hualaipai. What is missing, however, is scientific evidence supporting Plaintiff's contention that Ha'Kamwe' will suffer harm as a result.

As explained further below, the Phase 3 Project Approval restricts the depth AZL is allowed to drill and requires cessation of activities if groundwater is encountered, ensuring drilling cannot impact groundwater. Over the course of exploratory drilling, no groundwater has ever been encountered. (Martirosov Dec., ¶¶ 47-48.) Even though not required under the EA, BLM went so far as to put in place Plaintiff's expert's own recommendation to "include a contingency plan describing methods to isolate, plug, and permanently seal artesian groundwater discharges from proposed boreholes." (*See* Declaration of Thomas Delehanty ("Delehanty Dec."), Attachment 6 at 2.) Plaintiff therefore has already received the relief it is seeking, which is protection for its spring.

Neither the facts nor the law support the granting of a TRO or preliminary injunction.

A. <u>BLM Correctly Followed Well Established Law Related to NHPA Evaluation.</u>

The National Historic Preservation Act of 1966 ("NHPA") requires the agency "take into account the effect of the undertaking on any...site...or object that is included in ... the National Register [of Historic Places]." 16 U.S.C. § 470f. The BLM, prior to issuing its decision, carefully assessed the effects on cultural and historical sites and artifacts in compliance with the NHPA. A cultural resource study was conducted pursuant to BLM requirements. In addition, the BLM received comments and information directly from the Hualapai related to Ha'Kamwe'. The BLM considered impacts on historic properties in at least three documents: (1) a Cultural Resource Survey ("CRS"), (2) the Decision Record, and (3) a site-specific EA.

Plaintiff cites to the Ninth Circuit for the proposition that "NEPA and NHPA review should be integrated closely," insinuating that the area of potential effects ("APE") should match the effects analyzed in the National Environmental Policy Act ("NEPA") document. (Dkt. 11 at 7.) This misconstrues the Ninth Circuit's meaning. Instead, the courts have made clear that an agency's compliance with NHPA is not limited to the CRS, but requires a review of all the documents and information indicating the agency's consideration of impacts on historic properties. *See Sierra Club v. Clark,* 774 F.2d 1406, 1410 (9th Cir.1985) (finding totality of review, and conditions in permit, illustrated compliance with NHPA despite failure to confer with State Historic Preservation Office); *Dine Citizens Against Ruining our Environment v. Bernhardt*, 923 F. 3d 831, 847-848 (10th Cir. 2019) (finding that all documents where the agency assesses cultural resources are necessary to determine NHPA compliance). In *Dine Citizens Against Ruining our Environment*, for example, the plaintiff argued that the APE was insufficient and did not include the totality of impacts on cultural resources. The court, however, refused to accept that compliance with NHPA was limited to the CRS. Instead, the court found that in addition to the CRS, the BLM had analyzed cultural impacts in the EA and "Record of Review" that included "areas far outside the standard direct-effects APE to identify cultural properties." *Id*. at 848 (rejecting Plaintiffs' NHPA claim).

Here, the CRS identifies a number of sites that require avoidance during the drilling campaign, the EA notes the temporary visual and auditory effects, and the Decision Record provides restrictions and limitations that mitigate the potential for impacts to these issues as well as protect groundwater. Section 3.2.1.2 of the EA provides a clear and direct demonstration of the BLM's assessment of the cultural resources at issue in Plaintiff's claim and BLM's requirement to mitigate impacts:

> To minimize impacts to *Ha'Kamwe'* the previously proposed well to use as a water source for the project activities has been removed from the updated exploration plan. Additionally, a staging area near *Ha'Kamwe'* has also been removed from the updated exploration plan. Analysis of water resources has determined that the water

> source for *Ha'Kamwe'* is located in a deeper aquifer, which the proposed drilling activities are not anticipated to reach (refer to Section 3.2.5 for detailed information). Though not expected, if water is intersected during core hole drilling the hole shall be plugged using cement grout (preferable) or bentonite clay via tremie pipe and abandoned in accordance with Arizona Administrative Code R12-15-816. If artesian water is encountered drilling would immediately cease and the hole abandoned by using cement grout via tremie pipe. Overall, the removal of the well and staging area would reduce impacts and operator presence in the immediate vicinity of *Ha'Kamwe'*.
>
> Given the temporary nature of the visual, noise, and vibration effects from the proposed drilling activities, the removal of use of the well and the staging area, and the reclamation requirements, the BLM has determined that there would be no permanent alteration to the characteristics that qualify Ha'Kamwe for inclusion in the National Register of Historic Places.

(*See* EA, as attached to Lloyd Dec. as Exhibit 4, at 16.)

This is exactly the review that *Sierra Club* contemplates and accepts. Ultimately, the BLM ensured that historic and cultural properties were given proper consideration in compliance with NHPA. Plaintiff's claim that BLM violated NHPA fails on the merits.

B. No Evidence Supports Plaintiff's Assertion that the BLM Failed to Consider Reasonable Alternatives.

Plaintiff next asserts that the BLM failed "to consider a reasonable range of alternatives" and that the failure to include such "an assessment of these alternatives is arbitrary and capricious and contrary to the record." (Dkt. 11 at 10.) However, the extensive and thorough analysis performed by the BLM belies such an assertion.

The BLM's requirement to assess "alternatives" pursuant to NEPA "was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities…." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). NEPA does not require "an agency to examine every conceivable alternative, but

only those that are reasonable." *Friends of Earth v. Coleman*, 513 F.2d 295, 297 (9th Cir. 1975).

Here, no reasonable alternatives were provided to the BLM for consideration. Despite the BLM assessing AZL's application for a third phase of exploratory drilling for three years and the Hualapai having significant input throughout the process, "[n]o alternative actions [were] proposed." (EA at 10.) Moreover, the BLM concluded that "[a]ny possible alternative actions would be limited given the narrow focus of the exploration drilling program" and no "alternative actions…were identified that would have fewer impacts than the Proposed Action." (*Id*.). In this manner, the BLM satisfied its NEPA requirements. *See Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 988 (9th Cir. 1985) (stating NEPA does not demand full discussion of alternatives whose implementation is deemed remote and speculative).

Plaintiff has submitted no scientifically backed evidence to support the existence or viability of adequate alternatives. As previously noted, prior to issuing its decision, the BLM carefully assessed the effects on cultural and historical sites and artifacts in compliance with the NHPA. The BLM set forth nearly thirty environmental protection measures and best management practices, in addition to three specific mitigation measures. (Decision Record at 6-10.) Given the limited nature of the exploratory drilling phase contemplated in the Project, the BLM was well within its discretion to conclude that no alternatives would have fewer impacts than the proposed—and ultimately accepted—program. As such, Plaintiff's argument predicated on the BLM's lack of consideration of reasonable alternatives fails on the merits.

C. BLM Properly Considered The Impacts of the Project on Water Resources.

The BLM adequately considered and discussed the impact of the Phase 3 Project on water resources. Data indicates there may be connectivity between a deep aquifer and Ha'Kamwe', but data gaps exist. More than that, the EA and the Decision Record adopt the Hualapai's requested measures to protect against any potential effects on water resources and the BLM required those measures in approving AZL's Phase 3 Project.

Drilling has now begun and no groundwater has been encountered, even in the shallow aquifer, which is consistent with past exploratory drilling. (Martirosov Dec., ¶ 48). Plaintiff's claim on this issue fails on the merits.

"A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors." *Bartell Ranch LLC v. McCullough*, 558 F. Supp. 3d 974, 982 (D. Nev. 2021) (citing *Asarco, Inc. v. U.S. Env't Prot. Agency*, 616 F.2d 1153, 1159 (1980)). The function of the district court is only to determine whether as a matter of law the evidence in the administrative record permitted the agency to make the decision it did. *Id.* (citing *Occidental Eng'g Co. v. I.N.S.,* 753 F.2d 766, 769-70 (9th Cir. 1985)). "The role of the courts in reviewing compliance with NEPA 'is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.'" *Utahns v. United States DOT*, 305 F.3d 1152, 1163 (10th Cir. 2002) (internal citation omitted).

The BLM's EA and the Hualapai's hydrology memorandum are consistent in that neither concludes that it is certain Ha'Kamwe' will be affected by the Project. The Hualapai's hydrology memorandum concludes that "monitoring data have shown that Ha'Kamwe' can be affected by groundwater withdrawals" in deep wells, not that Ha'Kamwe' will be affected by Phase 3 drilling. The Hualapai's hydrology memorandum also concludes that "it is likely that the exploration boreholes could . . . cause[] unabated artesian flow of groundwater . . . which could then drain the entire aquifer system." (See Delehantry Dec., Attachment 6 at 2). The BLM's Project approval requires specific and immediate mitigation measures so that there cannot be "unabated artesian flow of groundwater" as alleged in the Hualapai hydrology memorandum.

Further, the study the BLM relied upon thoroughly identified the aquifers and the groundwater system. It identified the aquifers' depths and the confining layers between them. The existence of a competing study that differently defines the aquifers does not

undermine the BLM's ability to take a hard look at water resources. Rather, it identifies an evidentiary dispute, which BLM addressed by adding depth limits for drilling and requirements to stop drilling if groundwater is encountered. *Bartell Ranch LLC*, 558 F. Supp. 3d at 982 (explaining that the function of the district court is only to determine whether, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did).

Moreover, the BLM included a number of restrictions and requirements to mitigate potential impacts. The BLM adopted the Hualapai's recommendations that if groundwater is encountered, drilling must immediately cease, the hole must be plugged in accordance with Arizona State Department of Water Resources' specifications, and the hole must be abandoned. (Martirosov Dec., ¶¶ 45-46). The Delehanty Declaration takes a statement out of a highly technical memorandum with no context and interprets it to mean that the Project will impact Ha'Kamwe'.

The Delehanty Declaration attaches the Hualapai's hydrology memorandum; however, Mr. Delehanty is an attorney, not a qualified expert witness in hydrology and he is not permitted to testify to ultimate facts. *See* FRE 702. What Mr. Delehanty fails to include from that hydrology memorandum, which is written by Winfield G. Wright (who did not submit an under-oath submission to this Court), is the authors' recommendation that to avoid impacts to Ha'Kamwe', "the final EA needs to include a contingency plan describing methods to isolate, plug, and permanently seal artesian groundwater discharges from proposed boreholes." (*See* Delehanty Dec., Attachment 6 at 2.) This is exactly what BLM has required. (Martirosov Dec., ¶¶ 45-46.) The BLM included conditions in the Decision Record to address the Hualapai's concern. (Decl. Martirosov ¶ 49.) This process required by the BLM mitigates against a drill going through one aquifer and continuing into a deeper aquifer potentially commingling the aquifers, and prevents against impacts to the availability of water flowing to Ha'Kamwe'.

Again, notably, groundwater was not encountered during the earlier Phase 1 and 2 exploratory drilling, which included holes deeper than the deepest hole authorized in the

Phase 3 drilling. (Martirosov Dec., ¶ 47.) And, to further protect the water resource, AZL agreed to purchase water from the municipal supply of nearby Wikieup, in lieu of using the Project's proposed well in the Exploration Plan, because the Hualapai identified that the use of the Project's proposed well might impact Ha'Kamwe'. (Martirosov Dec., ¶ 44.)

Plaintiff's argument that the BLM failed to adequately respond to the Hualapai's hydrology study is inaccurate. The BLM's requirement that any bore holes that encounter groundwater must be plugged and abandoned is the very recommendation in the Hualapai study. The BLM addressed the water resource issue and mitigated it. Plaintiff is unlikely to succeed on the merits that the BLM failed to take a "hard look" at the impacts to water resources.

III. Plaintiff Cannot Demonstrate Imminent, Irreparable Harm.

Plaintiff must show a "likelihood of irreparable injury – not just a possibility – in order to obtain preliminary relief." Winter, 555 U.S. at 21. To do so, they must "demonstrate immediate threatened injury," and cannot "merely allege imminent harm…." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted).

As an initial matter, there is no presumption of irreparable harm from a violation of a procedural statute like the NHPA. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Plaintiff must prove irreparable harm and generalized, sweeping assertions that exploratory drilling operations associated with the Project might cause irreparable harm at some point in the future do not satisfy the immediacy requirement, particularly in light of AZL's commitment (in compliance with the BLM Project approval) to environmental protection measures, best management practices, and mitigation measures.

Plaintiff alleges various potential harms, including that "[n]oise and vibrations from drilling activity will harm cultural and traditional uses" and that "[d]rilling will also harm plants and wildlife that the Tribe and its members use and value." (Dkt. 11 at 14.) But it has not demonstrated with any specificity that those harms are likely to occur.

Rather, with respect to noise and vibrations, a natural hill buffer exists between Cholla Ranch and the Project site, which will reduce the auditory and visual impact of any drilling efforts. (Martirosov Dec., ¶ 39.) Even standing right next to the drill, the noise levels "do not exceed 100 decibels, and range on average between 80-90 decibels," which is comparable to "a noisy restaurant." (*Id*.) AZL has also committed that drilling will occur only at night between the hours of 7:00 p.m. and 7:00 a.m., which "will minimize the visual and auditory effects given that it does not occur during typical waking hours." (*Id*., ¶ 41.) And, finally, the BLM's approval protects against noise impacts. The EA requires that any noise and visual impacts will be temporary and that such impacts be reduced by "minimizing idling equipment/generators, minimizing equipment maintenance and repairs and [requiring] the sites will be free of debris and remain as organized as possible during all phases of operation." (*Id*., ¶ 42 (citing to EA at 9).)

With respect to plants and wildlife, the BLM concluded that the Project "will not significantly impact the quality of the human environment." (FONSI at 6.) The BLM requires "[e]nvironmental awareness training" for "all personnel prior to conducting any on-site work" and such training "will include information on the protection of wildlife, including Sonoran Desert tortoise (*Gopherus morafkai*) and migratory bird nests, and procedures to be implemented in case they are encountered during Project activities." (Decision Record at 8.) Specific additional mitigation measures have been implemented to address impact to plants, including saguaros, and to limit any disruptions to cultural practices. (*Id*. at 9-10.)

Finally, Plaintiff's delay in seeking relief also cuts against any finding of irreparable harm. *See Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehab. Servs*., 31 F.3d 1536, 1543-44 (10th Cir. 1994); *Tough Traveler, Ltd. v. Outbound Prods*., 60 F.3d 964, 968 (2d Cir. 1995). Plaintiff has been aware of the BLM's approval of the Project since June 6, 2024. Yet Plaintiff waited more than two months to file for a TRO

and, during that time, monitored the deployment of equipment and personnel to the Project site rather than promptly seeking its relief. (*See* Lloyd Dec., ¶¶ 18, 28.)

Ultimately, Plaintiff has not established a likelihood of imminent, irreparable harm arising from the actions it seeks to enjoin. Because it has failed to carry its burden on this element, its motion should be denied.

IV. The Public Interest and Balance of Equities Disfavor an Injunction.

Plaintiff must prove that a preliminary injunction would serve the public interest. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). 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) (citation omitted). Absent the necessary showing on the first two elements, a court "need not dwell on the final two factors" and, "when considered alongside the [movant's] failure to show irreparable harm, the final two factors do not weigh in favor of a stay." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778-79 (9th Cir. 2018).

Here, Plaintiff has not met even a minimal burden to show that it will have a likelihood of success on the merits. Federal Defendants and AZL have spent considerable time and effort listening to and addressing Hualapai concerns. AZL and its contractors will continue to do so. There is no evidence other than impermissible speculation and conjecture that drilling will affect Ha'Kamwe'.

To the contrary, public interests may be thwarted by preventing lithium extraction. As Plaintiff's counsel has consistently advocated—electric vehicles are the key to solving the climate crisis. *See* https://earthjustice.org/feature/electric-vehicles-explainer. Nearly all plug-in hybrid electric vehicles and hybrid electric vehicles use lithium-ion batteries. *See, e.g.*, https://afdc.energy.gov/vehicles/electric-batteries#:~:text=Most%20plug%2Din%20hybrids%20and,lithium%2Dion%20batteries%20like%20these. Plaintiff has not satisfied its burden and the equities weigh in favor of denial of the requested TRO and preliminary injunction.

V. The Court Should Deny Plaintiff's Request for Waiver of Bond Until Plaintiff Presents Admissible Evidence.

While Plaintiff is asking this Court to interrupt a well-planned, expensive and lengthy process that will bring economic development to a historically economically depressed community, *see* EA at 16-17, it is simultaneously asking this Court—without citation to a declaration or any other document—not to impose a bond due to its economic hardship. Adjudicating and responding to a TRO is a significant burden on the Court and the parties, particularly to the responding party who has mere hours to answer a motion Plaintiff had weeks to prepare. *See, e.g.*, Declaration of Loretta Jackson, attached to TRO (noting that it is dated July 31, 2024).

There have been no disclosures about the Hualapai or the entities representing the Hualapai's financial condition. *See e.g. Western Watersheds v. Zinke*, 336 F. Supp. 1204 (D. Idaho 2018) (requiring bond when non-profit plaintiff failed to offer evidence that "imposition of anything other than a nominal bond would constitute an undue hardship" and recognizing some non-profits have millions of dollars in assets); *Save Our Sonoran Inc. v. Flowers*, 408 F.3d 113 (9th Cir 2005) (upholding payment $50,000 bond by non-profit in NEPA case).

AZL has gone through considerable expense to deploy equipment and personnel to the project site and will incur significant expenses if its operations are enjoined. (Lloyd Dec., ¶ 28; Martirosov Dec., ¶ 33.) While this court may ultimately decide not to impose a bond, Plaintiff must at a minimum follow basic civil procedure and provide admissible evidence to support its own request for waiver.

CONCLUSION

Plaintiff has not carried its burden of demonstrating any of the elements required to obtain a TRO or preliminary injunctive relief. For the reasons stated above, AZL requests this Court deny Plaintiff's motion.

DATED this 20th day of August, 2024.

THORPE SHWER, P.C.

By */s/ William L. Thorpe*
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2024, the foregoing document was electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing, to the following CM/ECF registrants:

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EXHIBIT A

Declaration of Ivan Martirosov

I, Ivan Martirosov, pursuant to 28 U.S.C. §1746, declare as follows:

1. I am over 21 years of age and am fully competent to make this declaration. The facts contained in this declaration are based on my personal knowledge and are true and correct to the best of my knowledge.

2. I make this declaration in support of AZL's Motion to Intervene.

3. I am the project manager overseeing the execution of the Phase 3 Sandy Valley Exploration Project ("Phase 3 Project") on behalf of the Navajo Transitional Energy Company ("NTEC"). NTEC is AZL's subcontractor. I started as NTEC's project manager on July 29, 2024.

4. I received a Bachelor of Science degree in business and economics from Iowa State University in 2012. I also have a Bachelor of Engineering from Gubkin State University in Moscow, Russia.

5. Prior to my current role, I spent 10 years in various roles in project management. At EuroChem I served in management roles for the mining division, wherein I developed business and economic models for open pit and underground mines, developed life of mine models, and directed strategy for production, development, and new project implementation. In my roles previous roles I supervised construction and engineering sub-contractors and equipment suppliers for numerous mine projects.

6. In my capacity as project manager for NTEC, which is AZL's mining contractor, I am responsible for the Big Sandy project and its implementation in the Project Development Department.

7. Upon beginning my job at NTEC, I reviewed the BLM's Phase 3 Sandy Valley Exploration Project ("Project") approval and related documents. I immediately began participating in discussions and correspondence with the BLM and with the Hualapai Tribe and reviewed previous correspondence with the BLM and the Hualapai Tribe that occurred prior to my hiring. I also spoke with my immediate predecessor about

the history of the project and communications with the Hualapai and other tribes that occurred before my arrival.

8. I was on the Project site for four days during the week of August 12th. During this time I met with all the contractors on site, oversaw the bulk drilling program, and walked all the proposed drill pad sites. From the BLM land, I have seen the Cholla Ranch and have a good understanding of the landscape. While on site I also met with the tribal monitors, including monitors from the Hualapai, Hopi and Chemehuevi tribes.

AZL's Recurring Communications with the Hualapai Tribe Since 2022

9. AZL began communicating with the Hualapai Tribe in 2022. The communications involved various notifications and our schedule, suggestions on meetings, and collaboration on ground water monitoring.

10. Based on my review of the documents, discussion with my colleagues and discussion with the Hualapai, I understand that the Hualapai engaged the BLM throughout the three years that the BLM processed the Phase 3 Project permit application, including being a cooperating agency in the NEPA process.

11. In fact, the Hualapai's engagement led to a number of additional requirements in AZL's approved permit. *See* Decision Record, pp. 6-10, attached as Exhibit 2 to Declaration of Paul Lloyd.

12. In addition, AZL requested that the BLM include additional measures such as limits on the number of drill holes, restrictions on depth of drilling, and including tribal monitors to ensure a robust and protective exploration permit. These efforts resulted in an exploration permit that includes many provisions beyond a typical exploration permit. *See* Decision Record, pp. 6-10, attached as Exhibit 2 to Declaration of Paul Lloyd.

13. At the end of June, NTEC provided the Hualapai with a construction schedule indicating that operations under the Phase 3 Project would begin in mid-July. (Mobilization to begin the exploratory drilling operations experienced delays and started August 1, 2024.)

14. On August 5, 2024, I had a phone call with Hualapai Tribal staff member Ka-Voka Jackson to discuss the Phase 3 drilling operations. During the meeting, I offered to meet with the Hualapai Tribal Council to discuss the Tribe's concerns. During the meeting and in a follow up letter, the Hualapai Tribe requested that AZL and NTEC not commence any ground-disturbing activities until AZL and NTEC management met with them the following week.

15. On August 8, 2024, AZL responded that it was available to meet the Hualapai on Monday, August 12, 2024. I was also available to attend. AZL (and its contractors) agreed that it would cease additional grading, road preparation, or placement of drill pads from August 10, 2024 through August 19, 2024 to promote our conversations, as per our request. AZL's letter to the Hualapai stated that it would not prepare more drill pads until the two parties spoke, but did state that it would continue with exploratory drilling on the drill pads that were already prepared because AZL has reclamation requirements it must comply with, including time requirements within which reclamation must occur.

16. The Hualapai did not respond to AZL's letter and we did not meet on August 12, 2024. Despite not meeting, AZL (and its contractors) abided by its offer to cease additional grading, road preparation, or placement of drill pads until August 19, 2024.

AZL Created an On Site Tribal Monitoring Program

17. AZL has communicated to NTEC the importance of transparency of its actions to tribal communities throughout the course of this project. For that reason, AZL voluntarily sought out the presence of tribal monitors to observe the Phase 3 drilling. This is acknowledged in the Final EA. *See* Final EA, including Appendix D *Final Exploration Plan*, attached as Exhibit 4 to Declaration of Paul Lloyd.

18. AZL invited 12 tribes to be tribal monitors on-site during Phase 3 Project activities.

19. Three tribes—the Hualapai Tribe, the Hopi Tribe, and the Chemehuevi Tribe—accepted the invitation to do on site monitoring as of August 18, 2024.

20. Prior to ground disturbing, NTEC, the BLM, the Hualapai Tribe, the Hopi Tribe, and the Chemehuevi Tribe conducted a pre-construction meeting to discuss site safety, communication protocols, discovery treatment procedures, and the schedule for drilling. This happened on August 12, 2024. Tribal monitors were present during the previous week as well to oversee the ground preparation work and biological monitoring.

21. To date, members of the Hualapai Tribe, the Hopi Tribe, and the Chemehuevi Tribe have been on site to observe the Phase 3 Project work.

22. Two members of the Hualapai Tribe were on site as the core drill holes closest to Cholla Ranch were prepared. These members were also on site when the bulk sampling drilling occurred. All three bulk sample holes have been drilled and will be reclaimed by August 20, 2024.

23. I have had conversations with the two Hualapai monitors who have observed drilling operations. Each has expressed an extensive curiosity and willingness to learn about the project and drilling operations in particular. While the Hualapai monitors initially believed that they were there to observe mining, they came to understand that the operation was exploratory drilling, distinctive of mining. At all times, our conversations were open and respectful. .

The Project Drill Holes are Progressing Away from Ha'Kamwe'

24. BLM advised AZL on August 1, 2024, that it had submitted adequate financial assurances as required under the Phase 3 Project. Immediately, the surveyors were mobilized on site.

25. Operations under the Phase 3 Project began on Thursday, August 1, 2024. The initial step in those operations involved staking the proposed drill pads and access roads. Shortly after the staking of the holes, biological surveying crews accessed all the roads and pads.

26. The biological experts came to the site and completed the biological surveying on August 1 and 2, 2024. This surveying is ongoing and will continue as the work progresses to subsequent drill holes.

27. Next, the earthwork contractor came on site to determine the access to the first drill pads.

28. The first core hole will be drilled on the week of August 19, 2024 and is identified as NZ12 in the approved Phase 3 drilling program.

29. The drill hole for NZ12 will be drilled with a 3.5 inch diameter to a designated total depth of 360 feet as per the Plan of Exploration. *See* Final EA, including Appendix D *Final Exploration Plan*, attached as Exhibit 4 to Declaration of Paul Lloyd.

30. Drill hole NZ12 is one of the drill holes nearest to Ka'Hamwe'. Currently, five drill pads have been prepped for exploration drilling, and these first five drill holes are the holes that are closest to Ka'Hamwe'.

31. We will have completed the entirety of our bulk sampling as of August 18, 2024. We drilled three bulk sampling sites between August 13, 2024 and August 18, 2024. The bulk sampling consists of drilling three bore holes, each 100 feet in depth, filling the holes, and reclaiming the area. By the end of the day on August 18, 2024, the drill that conducts the bulk drilling should be offsite. On Monday, August 19, 2024, reclamation of the bulk sampling sites will be underway. A true and correct copy of a photo of depicting the bulk sampling site in the background and a core sampling site in the foreground with a green drill rig is attached hereto as **Exhibit 1**.

32. The three bulk sampling bore holes were closely spaced together within a 30-foot by 20-foot bulk sampling site, resulting in a maximum of 0.014 acres of surface disturbance for the site. *See* Final EA, including Appendix D *Final Exploration Plan*, attached as Exhibit 4 to Declaration of Paul Lloyd.

33. AZL, through NTEC, has incurred considerable expense to deploy equipment and personnel to the project site, with the monthly anticipated costs reaching

around $670,000 for the month of August alone. AZL will incur significant expenses of more than $21,000 per day if its operations are enjoined.

Phase 3 Drilling Program's Minimized Effects Due to Consultation with Tribes

34. The BLM modified the Project to reduce impacts to groundwater and impacts to the visual setting and auditory impacts at Ha'Kamwe' and surrounding areas based on consultation with Tribes and public comments. *See* Final EA, attached as Exhibit 4 to Declaration of Paul Lloyd.

Auditory and Visual Effects of Drilling are Minimal Due to Topography and the Nature of the Equipment Used

35. In particular, to reduce impacts to the visual setting and auditory impacts to Tribal uses near Ha'Kamwe' and the surrounding areas, AZL agreed to relocate the Project staging area. *See* Final EA, attached as Exhibit 4 to Declaration of Paul Lloyd.

36. Further, the topography of the area precludes someone at Cholla Ranch, where Ha'Kamwe' is located, from being able to see the drill holes that have been completed and will be drilled this upcoming week.

37. Cholla Ranch is northeast of the project boundary. The Ranch sits west of a hill that has an airstrip on top of it. The Ranch is at a lower elevation than the airstrip. The drill holes that have been completed and that are currently being conducted are down the west side of the airstrip hill. Those drill holes are at a lower elevation than Cholla Ranch. The airstrip serves as a natural buffer between the drill holes west of the Ranch and the Ranch.

38. Due to the existence of the hill between Cholla Ranch and the drill holes, from my observation of hiking the area while remaining on federal land, the only component of the Phase 3 drilling that is visible from the Ranch is truck traffic and the movement of equipment on roads. The drilling equipment is not visible from Cholla Ranch. I have not been advised by the Hualapai monitors or anyone else that the drilling equipment is visible, audible, or otherwise perceptible from the Ranch.

39. In addition to the natural hill buffer between Cholla Ranch and the Phase 3 Project, the noise levels during operations, when standing right next to the drill do not exceed 100 decibels, and range on average between 80-90 decibels. This decibel is comparable to a noisy restaurant or heavy traffic. Core drilling utilizes the DR032 drill rig. A core drill machine drills around the circumference of a 3.5 inch diameter hole, spinning as it goes down to isolate and remove the 3.5 inch diameter core from the hole that was drilled. The core drill machine is not a hammer drill.

40. Given my job experience, I am familiar with the Occupational Safety and Health Administration (OSHA) rules on noise exposure. OSHA allows 8 hours of exposure to 90 decibels but only 2 hours of exposure to 100 decibel sound levels. Workers on the Project site are not required to have noise protection because the equipment and noise level during operations range from 80-90 decibels. None of the other equipment, operates at a decibel level that exceeds the drill rigs. Further, the drilling does not last for 8 continuous hours.

41. The drilling of these core holes will occur at night between the hours of 7:00 PM to 7:00 AM. This night work will minimize the visual and auditory effects given that it does not occur during typical waking hours.

42. Further, the BLM's approval protects against noise impacts. The approval ensures that any noise and visual impacts will be temporary. The EA also requires that noise and visual impacts be reduced by "minimizing idling equipment / generators, minimizing equipment maintenance and repairs and the sites will be free of debris and remain as organized as possible during all phases of operation." *See* Final EA, attached as Exhibit 4 to Declaration of Paul Lloyd.

Groundwater Impacts were Analyzed and Minimized

43. During the Phase 3 Project we are undertaking measures to prevent effects to water resources.

44. AZL agreed to purchase water from the municipal supply of Wikieup and remove the potential use of the well in the Phase 3 Exploration Plan, because the tribes

identified that the use of the Project's proposed well might impact Ha'Kamwe'. *See* Final EA, attached as Exhibit 4 to Declaration of Paul Lloyd.

45. BLM has required that if water is intersected during core hole drilling, we must immediately plug the drill hole using cement grout or bentonite clay via tremie pipe and abandon it in accordance with Arizona law. If artesian water is encountered, we must immediately stop drilling and abandon the hole using cement grout via tremie pipe. The odds of this occurring are very unlikely, but there is a plan in place if this does occur. *See* Final EA, including Appendix D *Final Exploration Plan*, attached as Exhibit 4 to Declaration of Paul Lloyd.

46. Both core hole and bulk sample holes will be plugged in accordance with Arizona State Department of Water Resources' specifications. *See* Final EA, including Appendix D *Final Exploration Plan*, attached as Exhibit 4 to Declaration of Paul Lloyd.

47. Phase 1 and 2 exploratory drilling at the site consisted of 49 holes, including holes that were deeper than the deepest hole of the Phase 3 drilling. No groundwater was encountered during Phases 1 or 2. Based on my knowledge and review of relevant documents, no groundwater is expected to be encountered in Phase 3. Precautionary measures are in place should it be encountered. *See* Final EA, including Appendix D *Final Exploration Plan*, attached as Exhibit 4 to Declaration of Paul Lloyd.

48. All bulk sample material from bulk sample drilling was dry and the extracted material is loose clay that looks similar to dirt. No water was encountered when conducting the bulk sampling. A true and correct copy of a photo of depicting the bulk sampling drilling is attached hereto as **Exhibit 2**.

49. As we continue to conduct drilling, we will comply with the Decision Record's requirements to immediately cease drilling if any groundwater is encountered and to properly abandon the hole in accordance with the Arizona Department of Water Resources' requirements to protect the groundwater resource.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 18, 2024.

Signed by:
B9226C2DAF0E414...

Ivan Martirosov

THORPE SHWER, P.C.

EXHIBIT 1

Exhibit 2