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**Admitted Pro Hac Vice*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona,

Plaintiff,

v.

Debra Haaland, et al.,

Defendants,

and

Arizona Lithium, Ltd.,

Intervenor Defendants.

No. CV-24-08154-PCT-DJH

REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY A PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT (ORAL ARGUMENT SCHEDULED FOR SEPT. 17, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

Statutes

Other Authorities

The briefing and hearing on this motion have crystallized two key facts that establish the need for injunctive relief protecting Ha'Kamwe' while the case proceeds. First, the Bureau of Land Management ("BLM") concedes that the upper portion of the Big Sandy Aquifer may provide some of Ha'Kamwe's water, meaning the Project's drilling will perforate a potential source of the spring's flows. This concession shows that the Tribe is likely to succeed on its claims that BLM erred by excluding Ha'Kamwe' from analysis under the National Historic Preservation Act ("NHPA") and that BLM failed to take a hard look at the Project's hydrological effects under the National Environmental Policy Act ("NEPA"). As this Court found, it also establishes a significant risk of irreparable harm to the Tribe and its members, as the spring's flows and temperature are essential to its sacred character and cultural significance.

Second, by defining the area of potential effect ("APE") to exclude Ha'Kamwe', BLM's NHPA analysis ignored the agency's own findings that the Project will cause "visual effects," "noise and vibration," and "disruption to cultural practices" at the spring. Fed. Defs.' Resp. Ex. 1 at 15 (Doc. 15-1) ("EA"). Despite the contradiction with the EA, the Tribe's insistence that the spring should be part of the Section 106 process, and the Advisory Council on Historic Preservation ("ACHP") informing BLM that its analysis was faulty, BLM refused to broaden the scope of analysis. That failure further demonstrates the Tribe's likelihood of success on its NHPA claim and further establishes a likelihood of irreparable harm.

On the equities, Federal Defendants and Arizona Lithium Ltd. ("AZL") (collectively "Defendants") point to little more than speculative benefits from future, as-yet-unproposed lithium mining. However, that speculation does not outweigh the significant likelihood that the Project will irreparably harm the Tribe's practices and property. Having already granted the Tribe's request for a temporary restraining order (Doc. 32), the Court should grant the Tribe's request for a preliminary injunction until the case is resolved.

A. The Tribe Is Likely to Succeed on the Merits.

1. BLM Violated the NHPA by Erroneously Excluding Ha'Kamwe' from the APE and then Concluding that No Historic Properties Would Be Affected.

Under the NHPA, when a federally approved project could adversely impact a historic property like Ha'Kamwe', the federal agency must engage in a formal consultation process with the Tribe to resolve or mitigate the project's impact on those properties.[1] Pl.'s Mot. at 5-6 (Doc. 11). Critically, this process depends on an accurate depiction of the APE. The NHPA defines "effects" broadly as an "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 C.F.R. § 800.16(i). Here, Federal Defendants do not dispute that the Project will affect Ha'Kamwe', including, at a minimum, through noise, light, vibrations, and similar impacts. EA at 20–22; *see also* TRO Hearing Tr., 29:24 – 30:24 (conceding that the Project will cause "noise or visual impacts"). Federal Defendants also acknowledge that an aquifer that may feed Ha'Kamwe' could be affected by the drilling. EA at 21; Fed. Defs' Resp. at 7 (Doc. 15). Nonetheless, Federal Defendants failed to include Ha'Kamwe' in the APE, undermining the required NHPA consultation and mitigation process.

Federal Defendants attempt to excuse this error by arguing that it is permissible to wholly ignore the effects on Ha'Kamwe' in its NHPA process, even as they acknowledged them in its NEPA process because the statutes have "separate and distinct procedures." Fed. Defs.' Resp. at 14, n. 8 (quoting *Preservation Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982)). Yet, the NHPA demands that agencies consider the effects on "any historic propert[ies]" of projects they approve. 54 U.S.C. § 306108; 36

[1] BLM's failure to recognize the Tribe's expertise with respect to impacts on its cultural resources violates 36 C.F.R. § 800.4(c)(1), as pointed out to BLM by the ACHP. Indigenous Knowledge is a "special expertise" recognized in 36 C.F.R. § 800.4(c)(1) and is the best available science. Pl.'s Mot., Delehanty Decl., Att. 9 at 2.

C.F.R. § 800.1(a). As set out in the Tribe's motion, the EA found a host of effects on Ha'Kamwe'. Pl.'s Mot. at 7. As the ACHP pointed out, those listed impacts meet the definition of effects under the NHPA. 36 C.F.R. § 800.16(i). Pl.'s Mot., Delehanty Decl. Att. at 2 (Doc. 11-7).

BLM's attempt to divorce the NHPA and NEPA processes is unavailing. *See* TRO at 9 (noting the "perceived discrepancies" between the NHPA and NEPA analyses and finding "BLM's refusal to reevaluate concerning."). Indeed, the case BLM relies on held that evaluation of effects under one statute does not satisfy the duty to evaluate those same effects under the other—*not* that effects evaluated in one process can be ignored in the other. *Preservation Coal.*, 667 F.2d at 858–59; *see also Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982) (explaining that *Preservation Coalition* held that "compliance with one environmental statute does not assure compliance with another"). The contrived segregation that BLM seeks is not supported by NEPA, the NHPA, or BLM's own State Protocol Agreement with the Arizona State Historic Preservation Office. 40 C.F.R. § 1502.25; 36 C.F.R. § 800.3(b).

Indeed, the State Protocol Agreement that Federal Defendants relied upon during the TRO hearing even has a section on integrating the NEPA and the NHPA processes. It provides that "BLM is tasked with coordinating procedures to the fullest extent possible for compliance with NEPA and Section 106 of the NHPA, and in meeting the BLM's tribal consultation responsibilities." Fed. Defs.' Resp., Ex. 9 at 11 (Doc 15-9). Moreover, "NEPA documents should be used to facilitate Section 106 consultations, and the results of the Section 106 process will inform the development and selection of alternatives in the NEPA documents." *Id*. BLM simply may not ignore the evidence it acknowledges in the NEPA process while undertaking the NHPA process. That result is nonsensical and undermines the NHPA's mandates.

Here, BLM's decision to narrowly define the area of potential effects is not a reasoned decision. It is clear that this Project could affect Ha'Kamwe' and, as a result, it should have been included within the APE.

As this Court noted, the BLM's narrow view of "effects"—which excluded Ha'Kamwe'—was rejected by the ACHP, the expert federal agency charged with reviewing and protecting historic and cultural properties: "[l]ike the ACHP, the Court disagrees with BLM that the impacts identified in the Final EA, as well as others not identified, 'do not meet the definition of 'effects' under Section 106.'" TRO at 9.

Contrary to BLM and AZL's assertion, there is no exception in the NHPA for temporary effects. Pl.'s Mot., Delehanty Decl., Att. 9.[2] Federal Defendants citation to the regulatory definition of APE is not to the contrary, Resp. at 12-13, as is clear from the entirety of the definition:

> Area of potential effects means 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. The area of potential effects 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).

Thus, the boundary of the APE can be influenced by the scale and nature of the project, but it may not exclude historic properties directly or indirectly affected by the undertaking; effects may not simply be ignored. Here, Ha'Kamwe' is both directly and indirectly affected by the Project and should have been included in the APE. The Project surrounds Cholla Canyon Ranch and Ha'Kamwe' on three sides as indicated on the below map from the EA. Figure 1. It was patently irrational for BLM to carve Ha'Kamwe' out of the APE given the Project's close proximity and the presence of

[2] When queried about temporary effects at the TRO hearing, counsel for Federal Defendants provided an example of a temporary effect of a one-day use of a crane. TRO Hearing Tr., 45:24–46:8. In stark contrast, this project involves 131 drill holes and 21 acres of surface disturbance, plus noise, vibrations, and cultural impacts that will last for eighteen months. In addition, the Project could permanently impact the source of Ha'Kamwe'.

numerous sight- and sound-lines in all directions.

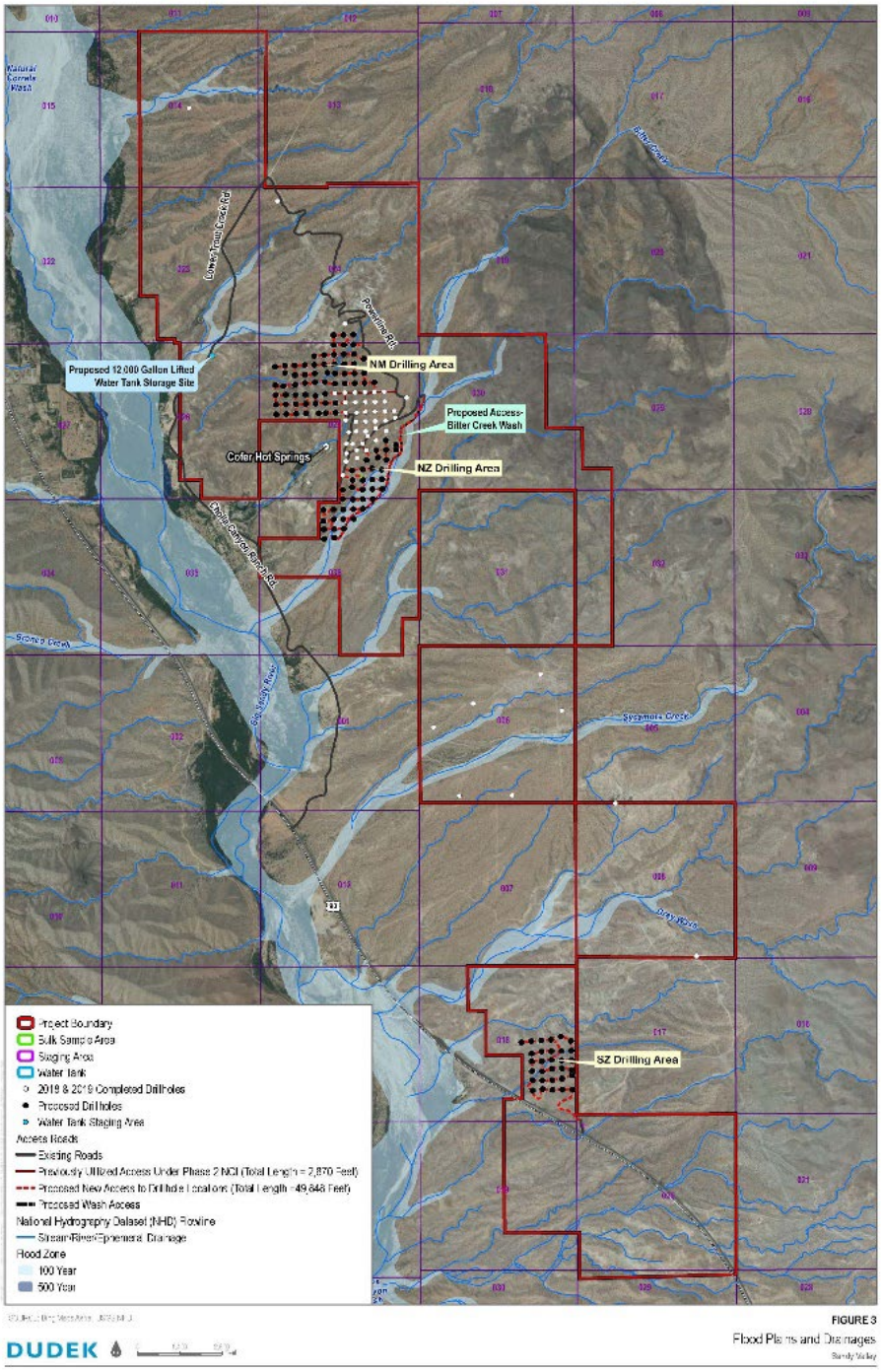

Figure 1. Showing the Project surrounding Cholla Ranch and Ha'Kamwe' on three sides. See Fed. Defs.' Resp. Ex. 2 at 7 (Doc. 15-2).

In sum, BLM's failure to include Ha'Kamwe' in the APE vitiated its bottom-line duty to "take into account the effect of the [Project] on any historic property." 54 U.S.C.

§ 306108; *see also Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1438 (C.D. Cal. 1985) (holding agency violated the NHPA by improperly constraining the geographic scope of Section 106 analysis). If BLM properly included Ha'Kamwe' within the APE the Tribe would have then had an opportunity to participate in the resolution of adverse effects process resulting in a written agreement, in this case likely a memorandum of agreement, which records the resolution measures agreed upon to resolve adverse effects. 36 C.F.R. § 800.6. BLM's erroneous, constrained area of potential effects is not a reasoned decision[3] based on the facts and should not be accorded discretion. BLM's failure to include Ha'Kamwe' undermined the required consultation process and violated the NHPA. As the Court noted, and Federal Defendants conceded, this failure weighs in favor of granting injunctive relief. TRO Hearing Tr., 47:5 – 47:16.

2. BLM Violated NEPA by Failing to Consider Reasonable Alternatives.

NEPA regulations require that both environmental impact statements (which are generally lengthier documents) and EAs incorporate a range of reasonable alternatives, with the only difference being the depth of discussion and analysis required. *W. Watersheds Project v. Bureau of Land Mgmt.,* 721 F.3d 1264, 1274 (10th Cir. 2013). An EA must contain a "brief discussion of the need for the proposal, of alternatives … [and] of the environmental impacts." *Id.* citing 36 C.F.R. §§ 1508.9(a)-(b). An alternative is reasonable if it: 1) advances the project's purpose and need, and 2) is "significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." *Te-Moak Tribe of W. Shoshone of Nev. v. Dep't of Interior*, 608 F.3d 592, 602 (9th Cir. 2010) (citations omitted) ("give full and meaningful consideration to all reasonable alternatives"); 40 C.F.R. § 1502.14.

[3] Federal Defendants' APE determination, while due some discretion, is nonetheless subject to a "careful review" standard and BLM must demonstrate that it has made a "reasoned decision." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (holding that the court should "carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision.")

Here, BLM failed to consider reasonable alternatives identified by the Tribe that would "better meet the Hualapai's concerns and provide a more appropriate balance of Hawkstone's and the public's interests in resource protection." Pl.'s Mot., Delehanty Decl. Att. 4, at 11. These include, for example, approving fewer drilling sites and locating them farther away from Ha'Kamwe', based on further study of the potential impacts on the underlying aquifer. *See* Pl.'s Mot. at 10.

BLM erroneously asserts that its alternatives analysis was constrained by the purpose of the project: to provide AZL with an opportunity to explore for lithium. But AZL's desire to explore does not circumscribe or supersede BLM's obligation to "take any action necessary to prevent unnecessary or undue degradation of the lands." Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1732(b); *see also* 43 C.F.R. § 3809.411(d)(3)(iii). This duty to "prevent undue degradation" is "the heart of FLPMA [that] amends and supersedes the Mining Law." *Mineral Policy Ctr. v. Norton*, 292 F.Supp.2d 30, 33, 42 (D.D.C. 2003); *See also Ctr. for Biological Diversity v. Dep't of Interior*, 623 F.3d 633, 644 (9th Cir. 2010). Thus, BLM's NEPA duty to consider reasonable alternatives is defined, not by the scope of AZL's proposal, but by its FLPMA obligations.

Moreover, the Tribe's alternatives were not vague, met the objectives of the Project, and were necessary for informed decisionmaking. The Tribe requested consideration of alternatives that "better meet the Hualapai's concerns and provide a more appropriate balance of Hawkstone's and the public's interests in resource protection." Pl.'s Mot., Delehanty Decl. Att. 4, at 11. The Tribe specifically suggested "reducing the number of total wells drilled; reducing the total surface area impacted by drilling, roads, and related activities; and/or reducing noise, light, and vibration associated with drilling and truck traffic." *Id*., Att. 7, at 6. These are not vague proposals and implementation of these proposals into an alternative "would appropriately meet the … objectives" of the project. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt*., 701 F.Supp.3d 862, 884 (D. Alaska, 2023). Additionally, an alternative that took

a more middle-of-the-road approach "was necessary to foster informed decisionmaking and public participation." *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013). The Project demands a trade-off between the diminishment of cultural and traditional uses of the Tribe and development. This trade-off cannot be intelligently made without examining whether the objectives of the Project can be met while also softening or eliminating impacts on the Tribe's resources. *State of Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

Finally, Federal Defendants argue that the Tribe has waived this argument by failing to propose any specific alternatives in "its 2021 comments during the NEPA process," Fed. Defs.' Resp. at 11, n. 7 (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004)). However, in that case, "[n]one of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged [the agency] to consider alternatives." *Dep't of Transp.* 541 U.S. at 764. That's simply not the case here. The Tribe suggested additional alternatives in its 2021 comments and again in March 2024. Federal Defendants argue that the Tribe's suggestions in the March 2024 comments should not be considered as they were part of the cooperating agency process, but the record was still open in March 2024, and BLM was required to consider the Tribe's alternatives. At any rate, BLM's position that the Tribe's comments were entitled to *less* respect once it became a cooperating agency (after the Tribe's lengthy effort to achieve that status) is patently unreasonable.

Thus, BLM not only has a duty under NEPA to consider the reasonable mitigation measures proposed by the Tribe as a middle-of-the-road alternative to AZL's preferred plan, but it is also required by BLM's duties under FLPMA.

3. BLM Failed to Take a Hard Look at Impacts on Ha'Kamwe's Hydrology

The Tribe's motion established that BLM failed to comply with NEPA's hard look requirement because BLM erroneously concluded that drilling will not affect Ha'Kamwe's hydrology. Pl.'s Mot. at 11–13. Defendants attempt to defend BLM's reliance on the 24-year-old Manera 2000 study for the proposition that Ha'Kamwe' is fed

exclusively by a deep, impermeable aquifer that drilling will not reach. But they concede, as BLM did in its EA, that the uppermost portion of the aquifer—where drilling will indisputably occur—may contribute to Ha'Kamwe's flows as well. *See* TRO at 9 ("[E]ven the 2000 Manera Study used by BLM to support the Final EA findings indicates that the water feeding the Ha'Kamwe' may be sourced from the upper aquifer."). Thus, there is no dispute regarding the core issue: the Project may affect the spring's hydrology. BLM was therefore obligated to assess these potential effects under NEPA, and its failure to do so was arbitrary and capricious.

As discussed in the Tribe's motion, NEPA requires that agencies take a "hard look" at a project's environmental consequences, including "all foreseeable direct and indirect impacts." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002). This analysis must be "fully informed," "well-considered," and based on "[a]ccurate scientific analysis." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988); 40 C.F.R. §§ 1500.1(b), 1502.25(a). Such an analysis is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before [it]." *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Here, BLM failed to evaluate the environmental consequences of allowing drilling into and through the aquifer underlying Ha'Kamwe'. Its basis for that failure is irrational and unsupported. After claiming that the source of Ha'Kamwe's water is a "deep confined aquifer" that drill holes will not reach, BLM stated that it *did not know* whether the upper aquifer, where drilling will occur, also "contribut[es]" to Ha'Kamwe's flows—a concession echoed in Federal Defendants' response. EA at 21; Fed. Defs.' Resp. at 7. Given this finding, BLM was not free to proceed as though the spring's flows were immune from harm. To the contrary, "[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). Yet BLM

did proceed on that false assumption, breezing past its own finding of possible effects and declining to assess how drilling in the upper portion of the aquifer will affect Ha'Kamwe's flows. *See* EA at 21–22 (concluding the Project will have "no impact to groundwater"). That approach was arbitrary and capricious and violated NEPA. *See, e.g.*, *Idaho Conservation League v. U.S. Forest Serv.*, No. 1:11-cv-00341-EJL, 2012 WL 3758161, at *14–16 (D. Idaho Aug. 29, 2012).

The Federal Defendants' (and AZL's) efforts to defend BLM's misguided analysis fall flat. First, the Federal Defendants point to two court opinions that upheld agencies' reliance on information from one project or geographic area to make findings about a different project's groundwater impacts. Fed. Defs.' Resp. at 6–8 (citing *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F.Supp.3d 898 (D. Ariz. 2017) and *Patagonia Area Research All. v. U.S. Forest Serv.*, 2023 WL 5723395 (D. Ariz. Sept. 5, 2023)). Their argument misses the point. The Manera Report does not support BLM's conclusion for a host of reasons, including that it was commissioned for a different project and found that that project's groundwater withdrawals would harm Ha'Kamwe'. *See* Pl.'s Mot. at 12–13; Fed. Defs.' Resp., Ex. 16 at 1 ("Manera Report"). But even the most favorable interpretation of the Manera Report does not support the finding that the spring is impervious to the Project's drill holes. Far from rebutting this key point, Federal Defendants concede "the upper aquifer may contribute" to Ha'Kamwe's flows. Fed. Defs.' Resp. at 7 (citing EA at 21; Manera R. at 14). Simply put, no one disputes that the upper portion of the aquifer is relevant to determining whether the spring will be harmed, yet BLM refused to look at the issue.

Defendants also point to BLM's proposed mitigation measures. Fed. Defs.' Resp. at 8–9; AZL's Resp. at 11–12. But these measures—requiring plugging and abandonment of holes and allowing Hualapai tribal monitors on site—do not satisfy NEPA's hard look requirement. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011) (holding mitigation measures do not satisfy NEPA's hard look requirement because they "presuppose[] approval" rather than evaluating effects "*before*

a project is approved"); *Idaho Conservation League*, 2012 WL 3758161, at *14 (rejecting argument that mitigation measures obviated need for further assessment of groundwater effects); *Gifford Pinchot Task Force v. Perez*, No. 03:13-CV-00810-HZ, 2014 WL 3019165, at *33 (D. Or. July 3, 2014) (same). BLM's argument that it can skip the required analysis and fix the problem later, after the harm occurs, is an end-run-around NEPA's hard look requirement.

Federal Defendants also concede that the EA's plugging and abandonment requirements simply incorporate existing state rules regarding well abandonment. Fed. Defs.' Resp. at 8; *compare* EA at 5–6, 9 *with* Ariz. Admin. Code § 12-15-816(I).[4] The EA's only requirement that arguably goes further than state law—requiring that drilling cease "immediately" if artesian flows are encountered, EA at 6, 9—is a commonsense step that any prudent operator would take, evidenced by the EA characterizing it only as a "best management practice," *id.* at 6. These measures do not satisfy NEPA's hard look requirement. *See Idaho Conservation League*, 2012 WL 3758161, at *14; *Gifford Pinchot Task Force*, 2014 WL 3019165, at *33.

Furthermore, these measures disclose no information regarding impacts to Ha'Kamwe' if water is encountered. *See Northern Plains*, 668 F.3d at 1084–85; *N. Idaho Cmty. Action Network v. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (explaining that NEPA "seeks to make certain that" agencies and the public gain "detailed information concerning significant environmental impacts"). Nor did BLM evaluate how effectively the measures would reduce harms that might occur, instead assuming without analysis that all effects would be wholly avoided. [5] EA at 21–22; *see*

[4] The SWHL Report referenced this requirement because boreholes drilled during prior exploration phases did not comply with it. TRO Hearing Tr., 29:8–29:15. It was not the Tribe's "recommendation[]" for addressing hydrologic harm. *Contra* AZL's Resp. at 11; Fed. Defs.'s Resp. at 9.

[5] As explained at the TRO hearing, using tremie pipes to deliver grout to the bottom of a borehole when water is encountered is a generally applicable legal requirement and basic best practice. TRO Hearing Tr., 29:8–29:15; *see* Ariz. Admin. Code § 12-15-816(I). The

Tillett v. Bureau of Land Mgmt., No. 16-cv-00148, 2017 WL 6625111, at *11 (D. Mont. Dec. 5, 2017) (finding EA deficient because it failed to assess efficacy of mitigation measures and effects of action sans those measures). As a result, BLM decisionmakers and the public were left guessing as to what will occur when the Project drills through the upper portions of the aquifer—exactly the kind of guesswork NEPA prohibits.

Finally, Defendants argue that Ha'Kamwe' is safe because drilling during the two prior phases of exploratory drilling did not have obvious impacts on the spring's flows. Fed. Defs.' Resp. at 7–8; AZL's Resp. at 10–12. This argument ignores that the Phase 3 Project will involve 131 drill pads rather than 12 (phase 1) or 37 (phase 2). *See* TRO Hearing Tr., 38:12 – 38:20 (acknowledging in response to the Court's questions that Phase 3 will have "twice as much" drilling as the prior two phases). It also amounts to claiming that BLM is free to gamble with the Tribe's sacred spring and ignore NEPA's requirements simply because earlier activity luckily—not by design—did not yield obvious harm to the spring, a proposition for which Defendants provide no legal support.

In sum, Federal Defendants acknowledged that the Project will drill through a portion of the aquifer that "may contribute" to Ha'Kamwe's flows, Fed. Defs.' Resp. at 7, and was thus required under NEPA to take a "hard look" at the resulting effects, *Idaho Sporting Cong.*, 305 F.3d at 973. Instead of doing so, BLM turned a blind eye.

B. <u>The Tribe is Likely to Suffer Irreparable Harm</u>

The Tribe's motion established that the Project will likely cause irreparable harm to Ha'Kamwe' and tribal members' use of the spring. Pl.'s Mot. at 13–15. Defendants erroneously allege that these harms are speculative.[6] As the Tribe discussed at the TRO

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requirement was referenced in the SWHL Report because boreholes drilled during prior exploration phases did not comply with it. This practice does not constitute the Tribe's "recommendation[]" for addressing hydrologic harm, AZL's Resp. at 11; Fed. Defs.' Resp. at 9, and requiring compliance with the legal minimum does not satisfy NEPA's hard look requirement.

[6] Without understanding its context, Federal Defendants and AZL cite to the Tribe's Draft Master Plan to argue that the Tribe's claim is undercut by a few suggestions from

hearing, and as the Court found in its TRO order, that contention is false. The Tribe's evidence raises "credible concerns that the Phase 3 drilling is likely to imminently threaten the aquifer feeding the Ha'Kamwe' waters." TRO at 5–6. And the harms to Tribal members' ability to gather, Hualapai plant collection sites, and cultural and traditional ceremonies are real. Pl.'s Mot., Jackson-Kelly Decl. ¶ 15; Craynon Decl. ¶¶ 10-11; Powskey Decl. ¶¶ 7-10; Jackson Decl. ¶¶ 12-14.

Federal Defendants suggest that the Tribe could simply reach out to NTEC, the Company's contractor, and effectively send it a calendar of its cultural and traditional practices. Federal Defendants misunderstand the nature of the Tribe's cultural and traditional practices in that such practices, like prayers and ceremonies, are not formally calendared or organized. Tribal members are free to use Cholla Canyon Ranch and Ha'Kamwe' without prior notice to the Tribe based on their own needs. Tribal members may host retreats, overnight trips, or simply participate in spiritual visits to Ha'Kamwe' without obtaining the permission of the Tribe. Pl.'s Mot., Jackson Decl. ¶¶ 15-16, 18.

Noise, vibrations, traffic, dust, and visual impacts will all impact Tribal members' use of Ha'Kamwe' and Cholla Ranch. Drilling and heavy equipment in the viewshed of Ha'Kamwe' and Cholla Ranch will impact Tribal members' ability to engage in cultural and traditional activities. Pl.'s Mot., Jackson-Kelly Decl. ¶ 13; Craynon Decl. ¶ 11; Powskey Decl. ¶¶ 7-8; Jackson Decl. ¶¶ 12, 14, 16-18.

Further impacts are likely to occur to Ha'Kamwe's flow and temperature. As the Court found, "[t]here is evidence in the record that water feeding the Ha'Kamwe' may be sourced, at least in part, by an upper aquifer that AZ Lithium will be drilling into," which "raise[s] credible concerns that the Phase 3 drilling is likely to imminently threaten the

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the community that Cholla Canyon Ranch could be used for "developing a water source" or "agri-business such as hemp farming." However, this plan is merely a draft of suggestions developed from community input and has not been reviewed or approved by the Tribal Council.

aquifer feeding the Ha'Kamwe' waters, causing irreparable harm." TRO at 6. The Tribe's declarations support this finding of irreparable harm:

> There are no substitutes or alternatives to Ha'Kamwe' and the cultural and historical significance it has to the Hualapai people and neighboring Tribes. The Salt Song Trail identifies Ha'Kamwe' as a landmark for our people, medicine people, and our cultural practices. Ha'Kamwe' means "warm water." Any impacts to this spring, including change of flow, reduced temperature, or otherwise, would result in an unnatural physical and spiritual state of the spring, which would be detrimental to the ceremonies we hold at Ha'Kamwe'.

Pl.'s Mot., Jackson Decl. ¶ 13.

Federal Defendants make much of the fact that the Tribe does not discuss the first two phases of drilling. Fed. Defs.' Resp. at 15-16. However, this lawsuit and motion are about drilling from the Project, not prior drilling. If the Court finds that prior drilling is relevant, the Tribe submits a declaration explaining how those earlier phases harmed tribal members by disrupting ceremonies and other practices.[7] *See* Mapatis Decl.

In sum, the Tribe has met its burden of "establish[ing] that irreparable harm is likely, not just possible." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

C. The Balance of Equities and Public Interest Weigh in Favor of Protecting the Environment.

The "balance of hardships" and "public interest" considerations also weigh in the Tribe's favor. Pl.'s Mot. at 15-16. Defendants argue that the temporary economic impacts to the company from a preliminary injunction override the public interest in ensuring that cultural and environmental resources are protected from illegally approved projects. They also argue that this exploration project must proceed, since it hopes to find lithium, a

[7] At the TRO hearing, counsel for the Tribe inadvertently misspoke when the Court asked about Phase 2 drilling. The Tribe became aware of the drilling after it commenced. Counsel was attempting to make the point that because the BLM failed to initiate either an NEPA or an NHPA process before the drilling, there were unaware of it ahead of time, not at any point during the drilling. TRO Hearing Tr., 23:23-25. *See* Mapatis Decl.

mineral used in electric batteries. Both arguments ignore the controlling case law and distort the nature of this project. *See* TRO at 10 (finding that any delay in lithium production "does not outweigh the potential permanent damage the imminent drilling may cause to Ha'Kamwe', which is central to the Hualapai Tribe life-way").

First, they fail to respond to the Tribe's cited cases, which recognize the public interest in preserving cultural resources and the environment and requiring careful consideration of environmental impacts before projects proceed. *See All. for the Wild Rockies,* 632 F.3d at 1138; *Quechan Tribe of Fort Yuma Indian Rsrv. v. Dep't of Interior*, 755 F.Supp.2d 1104, 1122 (S.D. Cal. 2010); *Colorado River Indian Tribes*, 605 F.Supp. at 1440 (finding irreparable harm where a proposed development would "threaten the integrity of the cultural and archeological resources."); *Comanche Nation v. U.S.*, No. CIV-08-849-D, 2008 WL 4426621, at *19 (W.D. Okla. Sept. 23, 2008) (same). The Supreme Court and others have held that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable," so a likelihood of such injury generally "favor[s] the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987); *see also The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("[W]e have held that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim.")

The fact that AZL may suffer some short-term temporary delay during the pendency of the preliminary injunction does not override the need to ensure that BLM follows the law and that resources are protected in the meantime. Where, as here, the hardships are "principally in economic terms" that "may for the most part be temporary . . . the balance of hardship favors the [plaintiff]." *S. Fork Band Council of W. Shoshone of Nev. v. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (issuing injunction against mining project); *see also Southeast Alaska Cons. Council v. U.S. Army Corps*, 472 F.3d 1097, 1101 (9th Cir. 2006) (finding "[t]he public interest strongly favor[ed] preventing

environmental harm" despite a countervailing public "economic interest in the mine" because delay would not, "reduce significantly any future economic benefit that may result from the mine's operation").

Federal Defendants also invoke the importance of "critical minerals" such as lithium, which are used in electric batteries and other renewable energy components.[8] Fed. Defs'. Resp. at 18-19. But contrary to these generalized statements, Federal Defendants ignore the federal government's own recent statements, including from the Secretary of the Interior and other high-ranking government officials, that the development of these minerals **must not** come at the expense of protecting important Native American cultural resources, or the environment. As Interior Secretary Haaland recently stated,

> [t]he Biden-Harris administration is committed to ensuring that future mining efforts protect Tribal lands… Too often in Native history, Tribal displacements, forced relocations and other tragedies were driven by the expansion of mining. We must acknowledge and remedy these injustices as our nation considers expanding domestic mining in order to produce the minerals that are necessary for current technologies and clean energy projects.

Press Release, Department of the Interior, Agriculture Advance Mining Reforms Aimed at Protecting and Empowering Tribal Communities (Dec. 1, 2022), https://www.doi.gov/pressreleases/departments-interior-agriculture-advance-mining-reforms-aimed-protecting-and

Federal Defendants' focus on the potential mining of lithium also ignores that the Project is only an exploratory venture that seeks to determine whether there are any

[8] Defendants selectively cite Earthjustice's website postings supporting electric vehicles for the clean energy transition. The Earthjustice website also provides that the clean energy transition "need[s] to avoid replicating the harms of our current mining system, which continues to sacrifice communities around the world, poisoning people of color and Indigenous peoples in particular." Jessica Knoblauch, *Creating a Sustainable Clean Energy Transition*, EARTHJUSTICE (March 23, 2023), https://earthjustice.org/article/creating-a-sustainable-and-just-clean-energy-transition.

recoverable minerals at the site. As Federal Defendants admit, no mining is proposed. Fed. Defs.' Resp. at 4, n. 5 (acknowledging that only if the company discovered valuable lithium deposit would it conceivably "ultimately propose a lithium mine."). This speculation cannot outweigh immediate, irreparable harm to the Tribe.

Lastly, AZL asserts that the Tribe improperly delayed filing its TRO/PI motion. It claims that the company never discussed forestalling drilling while the Tribe reached out regarding the possibility of resolving some of the outstanding issues. The Tribe understands that immediate injunctive relief is an extraordinary remedy and thus took every step available to avoid filing this motion. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). AZL's position ignores the Tribe's efforts, and now disavows the company's statement to the Tribe that it would not do any drilling from August 10 to 19 while discussions continued. *See* AZL letter to Tribe on August 9, 2024; Pl.'s Mot., Berglan Decl. Att. 14-15.[9] Thus, any slight delay in filing the TRO/PI Motion was due to the Tribe's diligence and efforts to preserve its rights out of court through outreach to BLM and AZL. The Tribe should not be penalized for its efforts to resolve the issue short of this motion.

In any event, the filing was not delayed. In cases where the court weighed the delay in filing for injunctive relief, the delay was significant. *Miller for & on Behalf of N.L.R.B. v. California Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993), *on reh'g*, 19 F.3d 449 (9th Cir. 1994). *See also W. Watersheds Project v. Bernhardt*, 391 F.Supp.3d 1002 (D. Or. 2019) (six-month delay by organizations in moving for TRO did not by itself demonstrate any lack of irreparable harm); *Reno-Sparks Indian Colony v. Haaland*,

[9] Based on the letter, the Tribe believed that there was an agreement to temporarily stay activities. See AZL's Resp., Ex. A, Martirosov Decl. ¶ 15. This is despite counsel for AZL's statement to the contrary at the TRO hearing. ("Let me be clear, I know there was some discussions, but there was never an agreement reached" TRO Hearing Tr. 48:22-23 ("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…" AZL's Resp., Ex. A, Martirosov Decl. ¶ 15.).

663 F. Supp. 3d 1188 (D. Nev. 2023) (denying temporary restraining order when Tribe waited over two years after Record of Decision). There was no delay in filing for immediate injunctive relief, and further irreparable harm will result while the Tribe awaits a final decision by this Court if injunctive relief is not granted. Immediate injunctive relief is the only remedy available to halt this harm, and the filing is timely.

D. The Court Should Not Require a Bond.

Finally, the Court should reject AZL's request for a significant injunction bond.[10] The temporary (and non-irreparable) nature of the company's minor hardship, and the Tribe's strong showing of likely success on the merits, "tips in favor of a minimal bond or no bond at all." *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985) (citing *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975)). Moreover, "[i]t is well established that in public interest environmental cases the plaintiff need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest." *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012); *see also Davis v. Mineta,* 302 F.3d 1104, 1126 (10th Cir. 2002) (prescribing "minimal bond" where plaintiff "seek[s] to vindicate the public interest served by NEPA"); *Friends of the Earth*, 518 F.2d at 323 (holding "substantial bond[]" would "seriously undermine the mechanisms in NEPA for private enforcement").

CONCLUSION

For the foregoing reasons, the Tribe requests that this Court enter a preliminary injunction until it has decided the Tribe's claims, barring Defendants and all persons covered under Fed. R. Civ. P. 65(d)(2) from taking any action implementing or relying on the Decision Record, Finding of No Significant Impact, Final Environmental Assessment, or BLM's decision to authorize lithium exploration activity in the Project area.

[10] As directed in the Court's order, the Tribe will substantiate its position on this issue at the Preliminary Injunction hearing. TRO at 11.

Respectfully submitted this 26th day of August 2024.

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