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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, et al.,

Federal Defendants

and

Arizona Lithium, Ltd.,

Intervenor Defendant.

Case No. 3:24-cv-08154-DJH

**FEDERAL DEFENDANTS' SUR-
REPLY TO PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER
FOLLOWED BY
PRELIMINARY INJUNCTION**

INTRODUCTION

As Federal Defendants explained in their Response, Plaintiff Hualapai Indian Tribe’s speculative concerns about the Project’s possible effects do not rise to the level of likely, imminent, irreparable harm. Yet rather than attempt to address those defects on Reply, Hualapai has doubled down on conjecture. In addition to echoing earlier vague claims about noise and visual impacts, Hualapai now argues for the first time that exploratory drilling is likely to impact Ha’Kamwe’s flow and temperature. But Hualapai identifies no concrete evidence to support this claim, much less prove it a likelihood. The Court should therefore deny Hualapai’s request for a preliminary injunction.¹

ARGUMENT

Hualapai falls short of its burden at the preliminary injunction stage to establish that “irreparable harm is *likely*, not just possible.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21–22 (2008)). “The element of irreparable injury . . . is not subject to balance” under the “sliding-scale” approach post-*Winter*. *Net Vest Fin. LLC v. Ameriprise Fin. Servs. Inc.*, 2013 WL 12120095, at *1 (D. Ariz. Oct. 1, 2013). A mere possibility of harm is thus insufficient. Rather, “*Winter* is clear that the word ‘likely’ means what it normally means, i.e., more probable than not.” *Zitan Techs., LLC v. Liang Yu*, 2019 WL 95779, at *2 (D. Nev. Jan. 3, 2019). A plaintiff “must proffer evidence sufficient” to meet this standard. *Conventus Orthopaedics Inc. v. Fusion Orthopedics USA LLC*, 2024 WL 3618422, at *10 (D. Ariz. Aug. 1, 2024) (quotation omitted) (Humetewa, J.).

I. Harm to Ha’Kamwe’s Flow and Temperature Is Not Likely.

For the first time, Hualapai now argues that the Project is “likely” to impact Ha’Kamwe’s “flow and temperature.” *Compare* ECF No. 11, Mot. 13–14 *with* ECF No. 35, Reply 13. Even if Hualapai did not waive this purported harm by excluding it from its

¹ This sur-reply is limited to the issue of irreparable harm, but Federal Defendants reassert their prior arguments on the merits and balance of equities elements.

1 motion, *Delgadillo v. Woodford*, 527 F.3d 919, 930 n. 4 (9th Cir.2008), the fact Hualapai
2 chose not to raise it earlier undercuts any reliance on it now. In any event, to warrant an
3 injunction, Hualapai would need to establish that exploratory drilling is likely to
4 encounter water, that such water likely contributes to Ha’Kamwe’, and that drilling
5 properly-plugged boreholes encountering such water would likely affect Ha’Kamwe’s
6 flow or temperature. Hualapai has not carried its burden on any of these points.

7 To the contrary, the evidence contradicts the allegation that Phase 3 drilling will
8 likely encounter water in the upper aquifer. The 41 boreholes drilled near Ha’Kamwe’ in
9 prior Phases encountered no groundwater. ECF No. 15, Resp. 7; ECF No. 15-1, EA 22.
10 While a different outcome in Phase 3 is conceivable, it is not likely, particularly given the
11 recent drought conditions in the Big Sandy Basin. EA 21.

12 Regardless, even if Arizona Lithium (“AZL”) encounters water in the upper
13 aquifer, Hualapai has not shown more than a speculative possibility that this aquifer
14 meaningfully contributes to Ha’Kamwe’. Hualapai asserts, based on the EA and the
15 Court’s statement, that “even the 2000 Manera Study used by BLM to support the Final
16 EA findings indicates that the water feeding the Ha’Kamwe may be sourced from the
17 upper aquifer.” Reply 9 (quoting ECF No. 32, TRO 9). But to the extent the Manera
18 report discusses Ha’Kamwe’ at all, it states that “the spring emanates from . . . the
19 volcanic formation” constituting the “confined” lower aquifer, not the upper. ECF No.
20 15-16, Manera Rep. 1; *see also id.* at 14, 34. The Manera Report makes no determination
21 about the upper aquifer’s possible contribution to Ha’Kamwe’, and the EA conservatively
22 notes that “any contribution” from the upper aquifer is “unclear.” EA 21. Such a
23 theoretical possibility falls far short of a concrete likelihood.

24 Hualapai’s own hydrology report suggests the upper aquifer likely contributes
25 very little, if anything, to Ha’Kamwe’. It states that “flows from Ha’Kamwe’ decreased
26 to zero” in 2011 during a test of the lower aquifer that involved pumping artesian water
27 from a “deep well” south of the spring. ECF No. 15-13, SWHL Rep. 8. This shows that,
28 in 2011, Ha’Kamwe’s flow derived *exclusively* from the lower aquifer—the only source

1 of such artesian water. Even Hualapai has acknowledged that it is the “volcanic aquifer
 2 that supplies Cofer Hot Springs,” not the upper aquifer. Ex. 1, Fee-to-Trust App. Package
 3 323.² This explains why the Tribe is party to a restricted covenant that prevents a
 4 neighboring property owner—Freeport Mineral Company—from drawing or diverting
 5 water from the lower aquifer without any mention of the upper aquifer. *Id.* Hualapai falls
 6 short of establishing that Ha’Kamwe is fed by the upper aquifer and, thus, subject to
 7 likely harm here. *See Bartell Ranch LLC v. McCullough*, 558 F. Supp. 3d 974, 990 (D.
 8 Nev. 2021) (finding no likelihood of harm where “the Court cannot substantiate the
 9 Tribes’ allegations that digging incident to the HPTP will disturb any burial sites”).

10 Even assuming the upper aquifer contributes to the spring, Hualapai fails to
 11 explain why encountering water would impact Ha’Kamwe’s flow or temperature. The
 12 only pressurized aquifer in the Project area is the lower aquifer located over 1,000 feet
 13 deep, EA 21, and drilling holes no more than 360 feet deep is “not anticipated to reach”
 14 this aquifer, *id.* at 22. Hualapai does not contest this. *See* Reply 8–14.

15 Hualapai nonetheless asserts that “[f]urther impacts are likely to occur to
 16 Ha’Kamwe’s flow and temperature,” Reply 13, because AZL must drill through the
 17 upper aquifer to reach the lithium-bearing clay below. *See* ECF No. 15-2, EA App. C Fig.
 18 4. Hualapai again does not explain the hydrological mechanism by which such effects
 19 could occur. Nor does the Tribe’s hydrology report explain how encountering non-
 20 pressurized groundwater during drilling would affect Ha’Kamwe’. Instead, in its section
 21 on “Effects of Exploratory Drilling,” the report claims that prior phases of exploration
 22 “did not specify the use of tremie pipes to seal the abandoned boreholes” and that this
 23 “likely affected the vertical migration of groundwater, impacting spring discharges and
 24 thermal spring water temperatures.” SWHL Rep. at 17–18. The report identifies no
 25

26
 27 ² Hualapai applied to have Cholla Canyon Ranch taken in trust by the United States in
 28 December 2013. The Bureau of Indian Affairs’ assessment of the application involved
 many steps, including the cited Memorandum on Administrative Acceptability of Title
 Commitment Exceptions for Fee to Trust Acquisition.

1 evidence to substantiate this suggestion that prior boreholes were improperly abandoned.
2 Nonetheless, the plan for the Project now at issue requires AZL to plug boreholes “using
3 cement grout (preferable) or bentonite clay via tremie pipe if water is intersected.” EA 9.
4 And AZL’s Exploration Plan states that, though not expected, encountering any “shallow
5 water or hydrocarbon zones . . . would bring a halt to deeper excavation and immediate
6 notification to the BLM Kingman Field Office.” Ex. 2, Exploration Plan 17. In other
7 words, if AZL encounters groundwater, it will stop drilling, properly plug and backfill the
8 hole, and move on with its exploration.

9 Hualapai’s failure to explain the inadequacy of such procedures is fatal to its
10 request for an injunction. *See, e.g., Colo. River Indian Tribes v. Dep’t of Interior*, 2015
11 WL 12661945, at *27 (C.D. Cal. June 11, 2015) (holding that irreparable harm was
12 unlikely in light of solar project’s “design features,” including “tribal monitoring” and
13 requirement to “halt constriction [sic] in the event of a[n] [archaeological] discovery”);
14 *Quechan Tribe of the Ft. Yuma Indian Rsrv. v. U.S. Dep’t of the Interior*, 2012 WL
15 1857853, at *7 (S.D. Cal. May 22, 2012) (“Plaintiff has not submitted any evidence that
16 the procedures provided by the Memorandum of Agreement for newly discovered
17 cultural and burial items are not adequate to guard against irreparable injury to items
18 discovered on public land.”). Rather than explain how Ha’Kamwe’ could be harmed,
19 Hualapai insists that “using tremie pipes to deliver grout to the bottom of a borehole” will
20 not effectively reduce harm to the spring because it is a “legal requirement and basic best
21 practice.” Reply 11 n.5. But this makes little sense—the *fact* that these methods are
22 effective is what matters, not whether they are legally required. And the Arizona
23 Department of Water Resources (“ADWR”) requires this abandonment method because it
24 *is* effective at “fill[ing] all voids, including all annular space(s), and displac[ing] water”
25 from a borehole that penetrates an aquifer. Ex. 3, ADWR Well Abandonment Handbook
26 8. BLM’s requirements thus prevent Phase 3 boreholes “from being a channel allowing
27 the vertical movement of water,” *id.* at 19—the only possible risk that the SWHL Report
28 noted in its discussion of exploratory drilling. SWHL Rep. 17–18.

Lacking any evidence of harm from the planned exploration, Hualapai confuses the issues by citing evidence that “groundwater withdrawals would harm Ha’Kamwe’,” Reply 10 (citing Manera Rep. 1), and repeatedly referencing the negative effects of “pumping” during the August 19 hearing, TRO Hrg. Tr., 10:9–19, 21:15–17, 23:1–5.³ This is a red herring. The Project does not involve *any* withdrawal or pumping of groundwater. Indeed, BLM went so far as to require AZL to truck in all water necessary for drilling and dust suppression from off-site. EA 5, 21.

Finally, Hualapai’s assertion of harm from drilling into the upper aquifer rings hollow in light of the Tribe’s own well on the Cholla Canyon Ranch property. ADWR records indicate that this well is 340 feet deep and intended to produce water for “domestic” and “irrigation” purposes.⁴ This is consistent with Hualapai’s “agricultural” use of the property, including its “valuable palm tree orchard” for which the Tribe “seek[s] commercial markets.” Fee-to-Trust App. Package 10; *see also id.* at 341 (noting that the property was used for “agriculture, cattle grazing, and a palm tree farm” as of 2016). Hualapai does not explain how drilling boreholes to a similar depth *without* pumping water would cause harm. Hualapai thus has not carried its burden to show how exploratory drilling is likely to impact Ha’Kamwe’s flow or temperature.

II. Hualapai’s Asserted Harm to Cultural Activities Remains Speculative.

Nor has Hualapai shown that the Project is likely to impede the Tribe’s use of Ha’Kamwe’ for cultural purposes. Hualapai attached multiple declarations to its Motion asserting that noise, dust, and other effects of the Project would hamper the Tribe’s use of Ha’Kamwe’, ECF No. 11-2–6, but the Court correctly declined to find that these vague statements support an injunction, TRO 6. Nothing in Hualapai’s Reply warrants a

³ At the hearing, Hualapai’s counsel also referenced the SWHL Report’s assertion that drops in water flow at Ha’Kamwe’ “could be due to drilling activities.” TRO Hearing Tr., 10:16–19. In truth, the report conflates the possible effects of pumping and exploratory drilling while providing no evidence or data to support the proposition that exploratory drilling alone has impacted Ha’Kamwe’. SWHL Rep. 19.

⁴ <https://app.azwater.gov/WellRegistry/Detail.aspx?RegID=509509>.

1 contrary outcome. Hualapai once again asserts that “[n]oise, vibrations, traffic, dust, and
2 visual impacts” will interfere with tribal members’ use of Ha’Kamwe’ while citing no
3 specific facts substantiating why such interference is imminent or how Phase 3 drilling
4 activities could be seen or heard from the spring. Reply 13. Even under Hualapai’s own
5 overbroad theory of harm, *see infra*, these vague assertions do not suffice to support an
6 injunction. *See Bartell Ranch LLC v. McCullough*, 570 F. Supp. 3d 945, 953 (D. Nev.
7 2021) (rejecting “insufficiently specific evidence of irreparable harm”).

8 Hualapai’s latest declaration does not remedy these shortcomings. *See* ECF No.
9 35-1, Mapatis Decl. The Court should be skeptical of this belated declaration, which is
10 again short on concrete facts or dates and contradicts opposing counsel’s admission
11 during the hearing “that the tribe wasn’t aware of . . . phase 2 drilling, until after it was
12 complete.” *See* Reply 14 n.7; TRO Hrg. Tr. 23:23–25. Moreover, Hualapai fails to
13 establish that vague concerns about temporary, unspecified sights or sounds rise to the
14 level of irreparable harm. *See Colo. River Indian Tribes v. U.S. Dep’t of the Interior*,
15 2012 WL 12894189, at *6 (C.D. Cal. May 24, 2012) (“It simply cannot be held that *any*
16 injury to religious/cultural items or members’ sensibilities automatically constitutes
17 irreparable harm.”); *Bartell Ranch*, 558 F. Supp. 3d at 990 (finding no irreparable harm
18 based on assertion that “the entire Thacker Pass area [is] sacred, so any digging anywhere
19 in that area causes harm” where “extensive ground disturbance [had] already occurred”).
20 Indeed, Hualapai uses Cholla Canyon Ranch for agriculture, *see* Fee-to-Trust App.
21 Package 10, 341, and is considering expanding this use in the future, *see* ECF No. 15-19,
22 Draft Hualapai Master Plan §§ 1.5.10 & 2.5.10. Such agricultural use suggests that the
23 site’s spiritual purposes can coexist with other activities nearby or even on the property.
24 In short, Hualapai’s speculative concerns about interference with its use of Ha’Kamwe’
25 cannot support preliminary relief.

26 CONCLUSION

27 For these reasons, the Court should deny Hualapai’s request for an injunction.
28

Respectfully submitted this 4th day of September, 2024.

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