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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, et al.,

*Federal Defendants.*

and

ARIZONA LITHIUM LIMITED,

*Defendant-Intervenor*

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

**FEDERAL DEFENDANTS'  
POST-HEARING SUMMATION  
BRIEF**

1 A preliminary injunction is an “extraordinary remedy” only warranted if the  
 2 plaintiff proves that imminent irreparable harm is likely, success on the merits is likely,  
 3 and the equities tip in the plaintiff’s favor. *Stensrud Inc. v. Unknown Parties*, CV-24-  
 4 00334-PHX-DJH, 2024 WL 894674, at \*2 (D. Ariz. Mar. 1, 2024) (quoting *Winter v.*  
 5 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Hualapai has not carried those  
 6 burdens. The hearing confirmed that Hualapai’s asserted harm is a speculative possibility,  
 7 not a likelihood. And Hualapai is unlikely to prevail on the merits of its claims that the  
 8 Bureau of Land Management (BLM) violated the National Environmental Policy Act  
 9 (NEPA) and National Historic Preservation Act (NHPA). The Court should therefore  
 10 deny Hualapai’s request for a preliminary injunction.

11 **I. Hualapai Failed to Carry Its Burden to Prove Likely Irreparable Harm.**

12 Hualapai failed to establish that imminent, “irreparable harm is *likely*, not just  
 13 possible.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)  
 14 (citing *Winter*, 555 U.S. at 22). To the contrary, the evidence establishes that it is unlikely  
 15 that Phase 3 will irreparably injure Hualapai.

16 The science does not support Hualapai’s speculation about impacts to  
 17 Ha’Kamwe’s flow or temperature. Hydrologist Peter Burck testified at the hearing that  
 18 any non-pressurized water encountered during drilling will simply remain in the borehole  
 19 until it is plugged, causing no effects to Ha’Kamwe’. Sept. 17, 2024 Tr. of Inj. Hr’g  
 20 (“Tr.”) at 142:4–24; 144:17–21. And even if pressurized artesian water is encountered, all  
 21 three experts agreed that immediately plugging such holes with cement grout via tremie  
 22 pipe—as BLM requires—would prevent vertical movement of water. *Id.* at 80:23–81:8;  
 23 145:10–147:11; 204:21–25, 205:1–20. In other words, BLM’s plugging requirements  
 24 create a very low chance that water in the upper aquifer—if such water exists—could  
 25 somehow escape that aquifer if encountered during drilling.

26 Nor has Hualapai demonstrated that encountering artesian water in the upper  
 27 aquifer is likely in the first place. Both Mr. Burck and Dr. Moravec, another hydrologist,  
 28 disagreed with Hualapai’s theory that Ha’Kamwe’ is fed by a shallow karst aquifer

1 riddled with pressurized pockets of water. *Id.* at 154:10–20; 211:4–7. Hualapai’s expert  
 2 provides poor support for his theory, *id.* at 86:17–87:12, 151:15–154:20, 211:4–214:14;  
 3 cites no other studies finding the Big Sandy Basin is characterized by karst, *id.* at 88:7–  
 4 12; and fails to explain why neither prior phases of exploration nor the many wells drilled  
 5 elsewhere in the basin encountered shallow pressurized water, *id.* at 89:10–20; 150:23–  
 6 151:14. Ha’Kamwe’s water likely emanates from a deep, confined aquifer rather than a  
 7 shallow artesian source, making it unlikely that the planned 360-foot deep, 3.5-inch wide  
 8 boreholes will encounter artesian water. *Id.* at 154:21–25; 210:11–18.

9       The same is true with respect to noise or visual impacts. *See* ECF No. 15 at 4–5,  
 10 14–18 and ECF No. 40 at 1–6.<sup>1</sup> Though Federal Defendants recognize noise and visual  
 11 impacts can affect cultural practices, the Project-specific circumstances here do not  
 12 warrant preliminary injunctive relief. First, Hualapai members are not constantly present  
 13 at Ha’Kamwe’ and drilling will not be occurring around the clock. Tr. at 32:13–14; 35:1–  
 14 16; 48:3–6; 118:5–9; 119:25–121:17; 125:25–126:5; PX11\_8. Second, most Phase 3  
 15 activity is miles away or hidden by hills, Tr. at 167:23–174:4–10; 185:18–186:1, and  
 16 Phase 3 drilling locations are generally farther from Ha’Kamwe’ than prior phases.  
 17 PX12\_3–5. BLM also addressed visual concerns by consolidating and relocating staging  
 18 areas away from Ha’Kamwe’. PX11\_6, 11–12. Third, temporary noise already occurs at  
 19 Ha’Kamwe’. Tr. at 123: 6–17. Noise from equipment and vehicles is potentially  
 20 disruptive if it occurs during cultural activities. Tr. at 124:2–15; *id.* at 37:8–19; 48:7–  
 21 49:10; 53:15–21. But any chance coring noise aligns with those activities is diminished by  
 22 distance, topography, and the drill’s 1-to-12-hour operational time per site. *Id.* at 167:23–  
 23 168:8; PX11\_8.

24       Finally, BLM provided a mechanism to address visual and noise concerns through  
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26  
 27 <sup>1</sup> Nor do dust impacts warrant preliminary injunctive relief. Tr. at 28:18–25; 117:1–3.  
 28 BLM’s requires the use of off-site water to suppress dust. PX11\_5, 24–25; Tr. at 128:4–9.  
 The same is true for plants, as BLM required Arizona Lithium to minimize plant impacts  
 and reclaim disturbed areas. PX11\_6–7, 19–20, 23, 28.

1 coordination to “ensure that cultural practices are either not disrupted or will be subject to  
 2 only limited, temporary disruption.” PX11\_18, 26. The Navajo Transitional Energy  
 3 Company (NTEC) committed to implementing this requirement to avoid disrupting  
 4 Hualapai. DX12\_5. No Hualapai witness testified to attempting to coordinate with  
 5 NTEC, much less that coordination failed. Tr. at 33:16–19; 36:15–37:2; 125:25–126:8.  
 6 The hearing instead proved that Ha’Kamwe’s use is typically scheduled more than 48  
 7 hours ahead, Tr. at 27:11–21; 33:1–15; 36:6–14; 40:5–10; 121:18–122:1; and that NTEC  
 8 could shift its schedule to address Hualapai concerns within 48 hours. Tr. at 178:7–19.

9 The hearing thus established that: 1) the Project is unlikely to affect Ha’Kamwe’s  
 10 flow or temperature; 2) the Project will create a narrow set of conceivable visual and  
 11 noise impacts; and 3) BLM provided a means to avoid cultural injuries. Hualapai thus fell  
 12 short of establishing a likelihood that the Project will irreparably injure it.

## 13 **II. BLM Properly Invoked the Arizona Protocol and Complied with the NHPA.**

14 Hualapai also has not established that it is likely to prevail on its claim that BLM  
 15 violated the NHPA. As the Court requested, BLM further explains its compliance with  
 16 the NHPA under the Arizona Protocol Agreement (Protocol). *See* ECF No. 15 at 12–14.

17 The first step of the Section 106 process was for BLM to determine if Phase 3 “has  
 18 the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a). If not, then  
 19 BLM “has no further obligations under section 106.” *Id.* at § 800.3(a)(1). In making this  
 20 determination, BLM “shall follow” any applicable “program alternative.” *Id.* at  
 21 § 800.3(a)(2). “When a governing programmatic agreement is in place, compliance with  
 22 the procedures in that agreement satisfies the agency’s NHPA Section 106  
 23 responsibilities.” *Dine Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831,  
 24 846 (10th Cir. 2019) (applying New Mexico protocol agreement).<sup>2</sup>

25 The Protocol is one such agreement and applies here. It was approved pursuant to  
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27  
 28 <sup>2</sup> The NEPA and NHPA processes are distinct and need not encompass the same scope or  
 follow the same timeline. ECF No. 15 at 14 (citing 36 C.F.R. 800.3(b)).

1 an Advisory Council on Historic Preservation (ACHP) agreement that tasks BLM and  
 2 State Historic Preservation Officers (SHPO) to develop agreements to “encourag[e]  
 3 streamlined consultations.” Protocol § 1, DX6\_4. The Protocol modifies the standard  
 4 Section 106 process by providing that BLM “may act without consulting the SHPO on  
 5 BLM administered lands on those undertakings that culminate in No Historic Properties  
 6 Affected or No Adverse Effect findings.” *Id.* § 4, DX6\_5. But the Project falls under  
 7 section 5.L. of the Protocol, and thus requires formal SHPO consultation unless the  
 8 SHPO agrees to “continue proceeding under this protocol.” *Id.* at § 5, DX6\_5-6. If the  
 9 SHPO agrees that BLM may proceed under the Protocol, it “eliminate[s] the need for”  
 10 further SHPO consultation. *Id.* § 4, DX6\_5.

11 This case centers on whether BLM arbitrarily defined the Project’s Area of  
 12 Potential Effects (APE). ECF No. 11 at 8. Hualapai’s disagreement with BLM’s  
 13 definition of the APE does not render BLM’s decision arbitrary. To the contrary,  
 14 “[e]stablishing an area of potential effects requires a high level of agency expertise, and  
 15 as such, the agency’s determination is due a substantial amount of discretion.” *Valley*  
 16 *Cnty. Pres. Comm’n v. Mineta*, 373 F.3d 1078, 1091 (10th Cir. 2004). Here, BLM  
 17 defined the Project’s APE to include only the BLM lands that might actually be  
 18 disturbed. DX6\_1–2. Because the “exploration plan is temporary in nature and does not  
 19 propose any permanent infrastructure, the BLM determined that this undertaking would  
 20 not cause visual, audible, atmospheric, or cumulative impacts to a historic property.” *Id.*;  
 21 36 C.F.R. § 800.16(d) (“The APE ‘is influenced by the scale and nature of an  
 22 undertaking.’”). BLM explained this decision to Arizona’s SHPO (as well as ACHP,  
 23 Hualapai, and Fort Mojave) on May 6 and 28, 2021. DX4\_1; DX5\_1–2. BLM  
 24 documented both its explanation and the SHPO’s concurrence that the Project could  
 25 proceed under the Protocol on May 7 and June 17, 2021. *Id.* ACHP and Hualapai were  
 26 copied on BLM’s explanation of its application of the Protocol. *Id.* In sum, BLM  
 27 complied with the ACHP-approved Arizona Protocol agreement and, thus, Section 106.

28 As the ACHP’s regulations recognize, the window for challenging such a “no

1 historic properties affected” determination must close in order to finalize any agency  
2 decision. *See* 36 C.F.R. § 800.4(d)(1)(i) (requiring objections within 30 days). Indeed,  
3 while it advised BLM to reconsider its NHPA analysis, ACHP recognized that because  
4 “the Section 106 review has concluded, there is no formal dispute resolution or objection  
5 process available to the Tribe or other consulting parties at this time” and it is thus “not  
6 incumbent upon the BLM to reconsider.” PX10\_2.

### 7 **III. BLM Gave a Hard Look to Water Impacts.**

8 Nor has Hualapai demonstrated likelihood of success on its “hard look” NEPA  
9 claim. The EA reasonably determined that Phase 3 drilling will have “no impact on  
10 groundwater.” PX11\_25. This conclusion was based on three key considerations.

11 First, AZL will not pump any water from the aquifer to support the Project’s  
12 exploratory activities. *Id.* Instead, all necessary water will be trucked in from the nearby  
13 town of Wikieup. *Id.* at 24.

14 Second, Phase 3 drilling “is not anticipated to reach” the deep artesian aquifer that  
15 provides Ha’Kamwe’s geothermal water. *Id.* at 25. The data BLM reviewed supports this  
16 conclusion, as neither the boreholes drilled near Ha’Kamwe’ in prior phases nor the  
17 dozen holes and wells drilled a couple miles away for the Manera study encountered  
18 artesian water at less than 1,000 feet. *Id.*; PX17\_25–27. And when the drilling for the  
19 Manera study did encounter artesian water, it was only after penetrating a “ten feet thick”  
20 confining layer of “volcanic” rock that slowed the drill. PX17\_17.

21 Finally, to the extent the upper aquifer could contribute at all to Ha’Kamwe’, the  
22 EA determined that “protection of water resources would be provided by promptly  
23 plugging and abandoning all core holes” consistent with Arizona Administrative Code  
24 R12-15-816. PX11\_24. Specifically, BLM requires that boreholes encountering artesian  
25 water be plugged with cement grout via tremie pipe, *id.* at 12—a procedure found  
26 appropriate for all types of aquifer scenarios contemplated in the Arizona Department of  
27 Water Resources’ (ADWR) Well Abandonment Handbook, DX16\_12–15.

28 Hualapai is incorrect that, because the EA notes that some water from the upper

1 aquifer *may* contribute to Ha’Kamwe’, BLM had to further analyze the effects of drilling  
 2 through the upper aquifer. ECF No. 35 at 9. NEPA mandates no such analysis where, as  
 3 here, BLM imposed mitigation measures that prevent such “potential effects” from  
 4 occurring in the first place. *Id.*; see *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d  
 5 1005, 1015 (9th Cir. 2006); Hualapai’s minimization of these BLM requirements as a  
 6 mere direction to follow Arizona law, ECF No. 35 at 11, ignores that Arizona  
 7 Administrative Code R12-15-816 does not mention tremie pipe and references cement  
 8 grout as one of several recommended materials. In any event, BLM selected the exact  
 9 plugging method that Hualapai’s expert recommended in his report. PX6\_29. Hualapai  
 10 has not explained the inadequacy of this procedure or identified a superior option that  
 11 was before BLM. See *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*,  
 12 279 F. Supp. 3d 898, 937 (D. Ariz. 2017) (faulting plaintiffs for failing to explain  
 13 inadequacy of EA’s discussion of “well-recognized” mitigation methods to prevent  
 14 “cross-contamination of groundwater layers”).

15 Nor does Hualapai identify any study on the upper aquifer’s contribution to  
 16 Ha’Kamwe’ that BLM ignored. BLM adopted the Wright Report’s suggestion to prepare  
 17 for the possibility of encountering artesian water, PX6\_2; DX9; DX10, but was not  
 18 required by NEPA to alter its analysis in response to the report’s unsupported karst  
 19 aquifer theory. See *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1048 (9th Cir. 2013)  
 20 (declining to “substitute [the court’s] judgment” for that of BLM where BLM considered  
 21 studies but “did not draw the same conclusions” as the plaintiff); see also *Patagonia Area*  
 22 *Res. All. v. U.S. Forest Serv.*, 2023 WL 5723395, at \*6 (D. Ariz. Sept. 5, 2023) (rejecting  
 23 plaintiff’s request for groundwater study as “impractical” for exploratory drilling  
 24 project). Rather, BLM was well within its discretion to rely on the Manera Report and the  
 25 prior phases of drilling—the most recent sources of lithographic data in the immediate  
 26 area—to determine that intersecting shallow, artesian water is not expected. PX11\_24–  
 27 25. The EA’s conclusions are thus “founded on reasonable inferences from scientific  
 28 data” and satisfy NEPA. *Concerned Citizens*, 279 F. Supp. 3d at 936 (quotation omitted).



#### IV. BLM's Consideration of Alternatives Complied with NEPA.

BLM's determination that only two alternatives warranted detailed consideration was also appropriate given the Project's purpose and scope. BLM published the Draft EA on April 12, 2021, and accepted comments through July 10, 2021. PX11\_6. Hualapai suggested that there may be "other approaches" to meeting the Project's purpose and need, and thus BLM should "revisit its alternatives analysis" to better "meet Hualapai's concerns." DX7\_11. This vague language was insufficient to identify a specific middle-ground alternative requiring analysis in the Final EA. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004).

Nonetheless, while BLM did not add an additional alternative to the EA, it did address Hualapai's concerns by analyzing the effects of approving the proposed project with more mitigation features. The alternative BLM analyzed added requirements that AZL truck in water from off-site, PX11\_6, relocate the Project's staging areas, *id.*, reduce access roads. *id.*, provide an opportunity for tribal monitoring, *id.* at 9–10, immediately cease work if human remains or cultural resources are found, *id.* at 10, travel at speeds of no more than 25 miles per hour on site, *id.* at 11, minimize idling equipment, *id.* at 12, and plug holes using cement grout and tremie pipe if water is found, *id.*

After a negotiation regarding the scope of its involvement, Hualapai became a cooperating agency in 2024. DX8\_3. Under a Memorandum of Understanding (MOU) with BLM, Hualapai was to provide input on potential changes to specific sections of the Final EA. *Id.* at 1–2. But Hualapai's comments exceeded the MOU's scope by asserting that the EA failed to consider middle-ground alternatives, such as "approving only one or two" drill sites or relocating drill sites farther from Ha'Kamwe'. PX8\_6. In addition to ignoring the changes to the draft EA and the Project's purpose of allowing AZL to "explore its valid existing mining claims," PX11\_5, Hualapai's suggestion to analyze the Project's impacts for a brand-new alternative after nearly four years of review was never contemplated by the MOU. BLM thus did not act arbitrarily in concluding that no reasonable alternatives with fewer impacts had been proposed. *Id.* at 13.



1 Respectfully submitted this 24th day of September, 2024.

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