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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BARTELL RANCH, LLC, et al.,

Plaintiffs,

v.

ESTER M. MCCULLOUGH, et al.,

Defendants,

and

LITHIUM NEVADA CORP.,

Defendant-Intervenor.

Lead Case:
Case No. 3:21-cv-00080-MMD-CLB

DEFENDANT-INTERVENOR LITHIUM NEVADA CORP.'S OPPOSITION TO INTERVENING PLAINTIFFS MOTION FOR LEAVE TO AMEND THE COMPLAINT

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Defendant-Intervenor Lithium Nevada Corp. ("Lithium Nevada") files this Response in Opposition to the Reno-Sparks Indian Colony's ("RSIC") and Atsa koodakuh wyh Nuwu/People of the Red Mountain's ("the People," collectively the "Intervening Plaintiffs"), Motion to Amend the Complaint, ECF 139. Intervening Plaintiffs seek to assert claims on behalf of other Tribes notwithstanding multiple Court orders that Intervening Plaintiffs lack standing to do so. After filing for intervention on July 20, 2021, five months after this case began, arguing they must be included based on their allegations that BLM unlawfully failed to consult them, Intervening Plaintiffs waited another five months to seek leave to assert *new* claims. Now, they attempt to bring new claims using publicly available information that they say they did not discover until August 2021, conceding they would not have provided this information if BLM had affirmatively consulted them prior to the issuance of the Record of Decision ("ROD") in January 2021. Apparently acknowledging the lack of merit in their original claims and irrelevance of their "newly discovered" publicly available information to those claims, Intervening Plaintiffs now seek to proffer *new* claims but fail to demonstrate how they have standing to do so or that such claims would not be futile.

Leave to amend should be denied because Intervening Plaintiffs' new arguments are repetitive of their initial claims under the National Historic Properties Act ("NHPA"), raise futile claims regarding NHPA consultation, or raise fruitless claims under the Archaeological Resources Protection Act ("ARPA")[1] that are entirely separate from this case reviewing the ROD for the Thacker Pass Project ("Project"). It would be prejudicial to further delay this litigation, hindering the United States' ability to meet climate change objectives and reducing its dependence for critical minerals on foreign sources.[2] If the Court determines Intervening

[1] While Intervening Plaintiffs also raise claims under the Native American Graves Protection Act ("NAGPRA"), that statute does not apply to the facts of this case and would not require a separate record. *See infra* Section II.C.vi (explaining the futility of the arguments under NAGPRA). Intervening Plaintiffs' additional claim under the National Environmental Protection Act ("NEPA"), which are premised on previously rejected evidentiary claims relating to the 1865 calvary attack, are similarly futile and would also not require a new record. *Id.* at Section II.C.vii.

[2] *FACT SHEET: Securing America's Critical Supply Chains*, WHITE HOUSE STATEMENTS AND RELEASES (Feb. 24, 2021) ("Critical minerals are an essential part of defense, high-tech, and

Plaintiffs can bring an ARPA claim (or any other new claim that requires an additional administrative record), that should be considered in a bifurcated second phase to avoid undue delay of a decision on the merits of the pending claims.

I. LEGAL STANDARD

After a responsive pleading has been filed, Federal Rule of Civil Procedure 15(a) allows a party to amend their pleading only by leave of the court or written consent of the adverse party. Although leave "shall be freely given when justice so requires," the Court must consider whether a proposed amendment would cause "undue prejudice" to the other party, is sought in bad faith, or is futile. *Bowles v. Reade*, 198 F.3d 752, 757–58 (9th Cir. 1999) (internal citation omitted). The court also "may consider the factor of undue delay." *Id.* "It is firmly within the Court's discretion to deny Plaintiffs' motion based on their dilatory motive, undue delay, and the resulting prejudice to Defendants." *Seawater Seafoods Co. v. Dulcich*, No. 6:16-cv-01607-MC, 2018 U.S. Dist. LEXIS 48297, at *18 (D. Or. Mar. 23, 2018).

II. ARGUMENT

A. The Proposed Amendments Cause Prejudice

All parties (including the Intervening Plaintiffs) collaborated in setting an expedited summary judgment briefing schedule, ECF 138. Intervening Plaintiffs intervened several months after the case commenced based in part on their stated willingness and the Court's conclusion that it could "mitigate potential prejudice [caused by the late intervention] by requiring the Tribes to adhere to the same case schedule the parties have already agreed to." *W. Watersheds Project v. BLM*, Case No. 3:21-cv-103 (July 28, 2021), ECF 59 at 4. Now, after two sur-replies to address newly proffered information, a motion to reconsider, and a motion for leave to amend, the case has, unfortunately been delayed and this delay should not be exacerbated. *See, e.g.*, *Bartell Ranch LLC v. McCullough*, Case No. 3:21-cv-80, ECF Nos. 79, 117, 144. Now that this case is no longer in its "early stages," *W. Watersheds Project v.* BLM, Case No. 3:21-cv-103 (July 28, 2021), ECF 59 at 5, the Intervening Plaintiffs' are

other products … the United States needs to ensure we are not dependent upon foreign sources or single points of failure in times of national emergency.").

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attempting to add claims mere days before the Court rules on the motions to supplement the Administrative Record ("AR"), and on the eve of commencement of the summary judgment briefing. This appears to be an attempt to restrain the case from merits briefing and to continue raising record issues for several more months. Such delay is contrary to the intent of the NEPA regulations, which urge that "any actions to review, enjoin, stay, vacate, or otherwise alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable … to … minimize any costs to agencies, applicants, or any affected third parties." 40 C.F.R. § 1500.3(d). Intervening Plaintiffs acknowledge that their claims could constitute a separate case but argue that adding these new claims somehow still constitutes "the most judicially economic route." ECF 139 at 4.

The proposed amendment should not delay the merits briefing on the case as that would prejudice other parties, especially Lithium Nevada. Further delay could lead to more preliminary injunction proceedings as work on the Project will need to progress. *See* ECF 39 at 2–5 (stipulation between Bartell plaintiffs, BLM, and Lithium Nevada in May 2021 detailing that Lithium Nevada did "not anticipate conducting any major ground disturbance … for approximately six to seven months" and requesting that "this Court schedule oral argument … prior to Lithium Nevada's initiation of ground disturbance" in early 2022); ECF 117 at 5 ("[T]he Court will address the merits of RSIC's claim in its Complaint (ECF No. 46) later this Winter or in early Spring."). Additional preliminary injunction proceedings will be time-intensive and inefficient for all involved when the case is ready to proceed on the merits. Intervening Plaintiffs' proposed new ARPA claims are separate from the NHPA claims pending before this Court and, therefore, not within the AR produced after several months of work. ECF 92 at 6 ("[T]he Tribes challenge BLM's decision to issue the ROD in contravention of the NHPA in this case, *not any decision related to the ARPA process*." (emphasis added)). Where a party proposes such a "late-tendered amendment that would fundamentally change the case to incorporate new causes of action" that would require further discovery or a new administrative record, the amendment may be denied as prejudicial to the opposing party. *Fresno Unified Sch. Dist. v. K.U.*, 980 F. Supp. 2d 1160, 1178 (E.D. Cal.

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2013); *see also Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) ("The district court's conclusion that Solomon's motion to amend would cause undue delay and prejudice was not an abuse of discretion. Solomon made the motion on the eve of the discovery deadline. Allowing the motion would have required re-opening discovery, thus delaying the proceedings."). The prejudice caused by amendment weighs against granting Intervening Plaintiffs' motion. *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (denying leave to amend in part because "[t]he new claims set forth in the amended complaint would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense").

To address Intervening Plaintiffs' ARPA claims, BLM will need to gather the documents it relied on and all related consultation documentation to create *another* administrative record, and then there may be motion practice on the proposed new administrative record, followed by substantive briefing on the merits of this new claim. This weighs heavily towards a finding that the resulting delay would prejudice the pace of this case and the motion to amend should be denied. *See Ctr. for Food Safety v. Vilsack*, No. C 10-04038 JSW, 2011 U.S. Dist. LEXIS 21275, at *11, 15 (N.D. Cal. Feb. 18, 2011) (denying amendment where "Plaintiffs' challenge to the February 4, 2011, decision implicates a separate administrative record subject to new judicial findings and should be the subject of a separate action" to avoid prejudice).[3]

B. Leave to Amend Should be Denied Based on Dilatory Motives

Intervening Plaintiffs' proposal to add new claims just as summary judgment briefing is about to commence creates an inference of dilatory motive. *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (noting that an effort to add new claims

[3] If the Court were to grant leave to amend, the new claims should be bifurcated and merits briefing allowed to go forward so that the separate claims raised under ARPA can concurrently develop an AR and be adjudicated. *Cf. Pangerl v. Peoria Unified Sch. Dist.*, No. CV-14-00836-PHX-JJT, 2016 U.S. Dist. LEXIS 11432, at *4 (D. Ariz. Jan. 29, 2016) ("considering that the amendment contained new claims of a distinct evidentiary character, the Court concluded it would be most efficient to resolve the appeal on the currently set schedule and turn to Plaintiff's new claims thereafter, if necessary"). As discussed below, none of the claims warrant delaying this Court's decision on the merits of this case. *See infra* § II.C.

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on which discovery had not been undertaken just before summary judgment briefing is to commence might reflect bad-faith such that it "was well within [the court's] discretion to deny … leave to amend…."). While Intervening Plaintiffs claim they have "transparently shared the new information" relating to their discovery of evidence in August 2021 that allegedly justified their prior claims that a massacre occurred near the Project area, ECF 139 at 11, that "evidence" does not require new claims. The Intervening Plaintiffs submitted this very information to the Court to support their arguments that BLM should have consulted RSIC. *See* ECF 92 at 18. Apparently because those arguments have failed, they now seek to plead new claims, three months later, with no explanation for this further delay. Intervening Plaintiffs suggest that because they consistently implied to BLM during ARPA consultations that they may raise ARPA violations in the future, such insinuations somehow excuse their delay in asserting those claims or failure to bring them in a new case. ECF 139 at 11. Given Intervening Plaintiffs' agreement to abide by the briefing schedule already in place upon their intervention, it would not be clear to any party that new claims that developed within a different record, several months after the ROD at issue, would be added to this proceeding. *See W. Watersheds Project v. BLM*, Case No. 3:21-cv-103 (July 28, 2021), ECF 59 at 4.

The last-minute character of virtually all of Intervening Plaintiffs' filings is particularly dilatory in this context. A number of the "new" claims re-state the original allegations, while others allege new interests where Intervening Plaintiffs previously alleged they had none, *see Bartell Ranch LLC v. McCullough*, Case No. 3:21-cv-80 (Sept. 3, 2021) ECF 92 at 10, and ultimately create the impression that Intervening Plaintiffs are using the litigation process to try to find support for their claims, rather than support their existing claims with record evidence properly before the Court.

i. "New" NHPA Claims Simply Restate Current Claims.

Intervening Plaintiffs propose "new" NHPA claims that are simply recitals of the original NHPA claims with a regulation citation added. ECF 139 at 4–6. To file a motion to amend on such grounds causes unnecessary delay where the Intervening Plaintiffs should simply explain in merits briefing the regulations that support their existing claims. *Hooper v.*

McDaniel, No. 3:11-cv-00221-LRH-VPC, 2012 U.S. Dist. LEXIS 131163, at *22 (D. Nev. Sep. 13, 2012) ("To the extent petitioner seeks to supplement his petition with this document, the court denies the motion because the content contained in the document is duplicative of the allegations in the first amended petition."); *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995) (observing that when "amendments are either duplicative of existing claims or patently frivolous …. [a]mending the petition to include them would be futile."). Thus, leave to amend to re-allege the NHPA arguments, which are not "new" claims should be denied:

Original Claims (ECF 139 at 4–5)	***Amended*** **Claims** (*Id.* at 5–6)
"BLM's failure to make a reasonable and good faith effort to identify Indian tribes that should have been consulted with because they attach religious and cultural significance to Peehee mu'huh before issuing a ROD for the Thacker Pass Lithium Mine Project violates the NHPA and is unlawful."	"~~BLM's failure to make~~ ***Without making*** a reasonable and good faith effort to identify Indian tribes that should have been consulted with because they attach religious and cultural significance to Peehee mu'huh, ~~before issuing a ROD for the Thacker Pass Lithium Mine Project violates the NHPA and is unlawful~~ ***contravene 36 CFR § 800.2(c)(2)(ii)(A)***;"
"BLM's failure to provide to Indian tribes who attach religious and cultural significance to the [sic] Peehee mu'huh a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, articulate their views on the undertaking's effects on such properties, and participate in the resolution	"~~BLM's failure to provide~~ ***Without providing*** to Indian tribes who attach religious and cultural significance to Peehee mu'huh a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, articulate their views on the undertaking's effects on such properties, and participate in the resolution of adverse effects, ~~violates the~~

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of adverse effects violates the NHPA and is unlawful."	~~NHPA and is unlawful~~ ***contravene 36 CFR § 800.2(c)(2)(ii)(A)***;"
"BLM's failure to seek and consider the views of the public in a manner that reflects the nature and complexity of the Project and its effects on historic properties before issuing a Record of Decision for the Thacker Pass Lithium Mine Project violates the NHPA, is unlawful."	"~~BLM's failure to seek~~ ***Without seeking*** and consider***ing*** the views of the public in a manner that reflects the nature and complexity of the ~~Project and its effects on historic properties before issuing a Record of Decision for the Thacker Pass Lithium Mine Project violates the NHPA, is unlawful~~ ***undertaking, contravene 36 CFR § 800.2(d)(1)***;"
"BLM's failure to make a draft Memorandum of Agreement available for public comment before issuing a Record of Decision for the Thacker Pass Lithium Mine Project violates the NHPA and is unlawful."	"~~BLM's failure to make~~ ***Without making*** a draft Memorandum of Agreement available for public comment, ~~before issuing a Record of Decision for the Thacker Pass Lithium Mine Project violates the NHPA and is unlawful~~ ***contravene the State Protocol Agreement***;"

A quarter of Intervening Plaintiffs' new claims are repetitive of their original Complaint and raise an inference of dilatory conduct. *Jones v. Holmes*, No. 3:11-cv-00047-LRH-WGC, 2015 U.S. Dist. LEXIS 170211, at *16 (D. Nev. Sep. 3, 2015) ("[T]hen Plaintiff has monopolized more of this court's time with duplicative filings and extremely dilatory requests to conduct discovery and amend his complaint."). Their motion for leave to amend should be denied on this basis. Intervening Plaintiffs can assert their legal authority cited in their merits briefing of their original claims without delaying the case any further.

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Intervening Plaintiffs mined the AR to try to find new support for their "new" claims they seek to allege on behalf of other Tribes not represented here. *See* ECF 141 at ¶¶ 8, 10–13, 50, 60, 67–69, 71, 74, 76–77, 79, 111–15 (alleging claims on behalf of "five Tribes" or specifically naming other Tribes). This is most transparent in their new allegation that BLM failed to acknowledge the "traditional use and religious significance to the Intervening Plaintiffs" of Sentinel Rock. ECF 141 at ¶ 72. The connection with Intervening Plaintiffs is only alleged in one paragraph within the FAC and is not explained in the proposed motion to amend. Within the motion Intervening Plaintiffs claim that Sentinel Rock is generally "religiously significant to regional Tribes." ECF 139 at 20. But this claim is rebutted on the face of the record: during consultation with the Fort McDermitt Tribal Chairwoman on the Project, the Chairwoman brought up Sentinel Rock in discussion but did not ask that it be designated as a historic property. ECF 65-17 at 4. This demonstrates that BLM consulted with relevant Tribes, those Tribes had the opportunity to designate Sentinel Rock as culturally significant, and they independently chose not to. The fact that BLM subsequently did not pursue inclusion of Sentinel Rock in the National Register reflects that BLM "[g]ather[ed] information" and acted "[b]ased on [that] information." 36 C.F.R. § 800.4(a)(4), (b).

Unlike Intervening Plaintiffs' prior claims regarding the religious significance of the Thacker Pass Area, no declarant explains how the ancestors of either the People or RSIC interacted with Sentinel Rock to create its significance to the parties in this case. *See, e.g.*, ECF 45 at Ex. 1, 2. Instead, it appears they only now assert Sentinel Rock is significant because *BLM* raised it as a possibly significant area during the consultation process, and the Intervening Plaintiffs now identify this reference in the NHPA record as a potential lifeline to draw the Court away from their original, likely meritless consultation claim. *See* ECF 92 at 18. This suggests that Intervening Plaintiffs are looking for new harms on the eve of summary judgment briefing in a dilatory manner rather than bringing harms they believe genuinely arise from BLM's decision. *Seawater Seafoods Co.*, 2018 U.S. Dist. LEXIS 48297, at *13 ("A court may even infer a bad faith or dilatory motive when a plaintiff relies exclusively on proposed amendments to oppose a motion for summary judgment."); *Idaho State Snowmobile*

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Ass'n v. U.S. Forest Serv., 2021 U.S. Dist. LEXIS 25886, at *27–28 (Feb. 10, 2021) ("In order to exhaust administrative remedies, claims raised during the administrative process must be 'so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court.'" (quoting *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 846–47 (9th Cir. 2013)).[4]

ii. Intervening Plaintiffs' Could Have Raised These Issues Before.

The Intervening Plaintiffs are participating in this case based on their claims that BLM unlawfully failed to consult them. Yet, rather than demonstrate they provided BLM any notice they were interested in the project area through more than a decade of land use planning and other project authorizations in the *same* area, they rely on 1868 GLO Field Notes that have been publicly available for *years* to argue "newly discovered" evidence of their interest. In their effort to justify their delay in seeking to add their latest claims, they assert that they did not have evidence of the harm they allege arises out of the Project until August 16, 2021, when they discovered "the 1868 GLO Field Survey Notes" from which they identify the 1865 calvary attack. ECF 139 at 11. But one month prior to that, in July 2021, the Court granted intervention because "the Tribes argue that they have significantly protectable interests under the NHPA that are related to the claims in this case because …. the HPTP contemplates digging up sacred sites containing the remains of the Tribes' members' ancestors." *W. Watersheds Project v. BLM*, Case No. 3:21-cv-00103 (July 28, 2021), ECF 59 at 7.

There are several problems with this new argument. First, it is inconsistent with their assertion, upon which they succeeded in getting intervention, that the caves where their ancestors hid during a massacre were the sacred areas within the Project requiring consultation

[4] Although Intervening Plaintiffs additionally allege they were delayed by the BLM's response to their FOIA request received October 20, ECF 139 at 3, they fail to upload the relevant results of the FOIA request, do not allege what information was gleaned from the FOIA request, or that the portion of the FOIA request that they attempted to upload constituted the entirety of the production. In any event, all such information must be related to the consultation claims of other Tribes and is inappropriate for consideration in this case because RSIC may only allege consultation claims *on its own behalf* (and would not need FOIA to obtain evidence of BLM's consultation efforts with itself). *See infra* § II.C.ii. As such, the date of BLM's FOIA response does not constitute a plausible reason for delay in amending the Complaint.

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with them. *See Bartell Ranch LLC v. McCullough*, Case No. 3:21-cv-80 (July 20, 2021), ECF 43 at ¶¶ 1, 16; *id.* at Ex. 3 ¶ 9, 11; *id.* at Ex. 5 at 3. Apparently conceding the unrefuted evidence that no such caves exist in the Project area, ECF 66 at 7, Ex. 2 ¶ 9, Intervening Plaintiffs now rely on the 1868 GLO Field Notes as the only evidence to support the claim that they have long held the Project area as sacred, but then assert they did not discover that "evidence" until *after* commencing litigation.[5] Thus, prior to the August 2021 discovery of 1868 Field Notes and Map, which depict the two Tribal lodgings and the events described as a calvary attack, and the October 2021 receipt of the NHPA record, where the Intervening Plaintiffs discovered that BLM had considered Sentinel Rock, the Intervening Plaintiffs do not allege they knew of any sacred site in the Project area. ECF 139 at 20, 22.

Another major problem with this argument is that Intervening Plaintiffs concede that they did not have the 1868 GLO Field Notes until August 2021, long after the ROD issued in January 2021. Thus, even if BLM had consulted them prior to issuing the ROD, they would not have had the 1868 GLO Field Notes to provide to BLM. To the extent Intervening Plaintiffs seek to use this "evidence" to assert that BLM should have been on "notice" of their interests in the Project area, they point to no information specific to RSIC that would have notified BLM to disregard RSIC's own identified area of cultural interest that RSIC previously provided to BLM that excluded the Project area. Nor do Intervening Plaintiffs provide any explanation as to why they did not discover this publicly available information sooner or, why, if the area described within the 1868 GLO Field Notes is sacred to them, that they did not include it within their area of cultural interest they previously identified to BLM. Finally, as this Court already ruled, the two Indian camps and incident described in the 1868 GLO Field Notes are outside the project area.

Intervening Plaintiffs' pattern of finding "evidence" they argue supports their claims after the fact supports an inference of dilatory motive. *Naranjo v. Bank of Am. Nat'l Ass'n*,

[5] *See Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 799 (9th Cir. 2001) (finding no abuse of discretion in denial of a motion to amend based on the "history of dilatory tactics and the doubtful value of the proposed amendments"); *superseded by statute on other grounds as stated in Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014).

No. 14-CV-02748-LHK, 2015 U.S. Dist. LEXIS 25899, at *15 (N.D. Cal. Feb. 27, 2015) (observing that in evaluating a motion to amend the complaint "[a] court may … find bad faith when the moving party has a 'history of dilatory tactics'" (citation omitted)).

C. The Proposed Additional Claims are Futile

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Kirby v. County of Los Angeles*, No. 2:14-cv-9161-PSG (GJS), 2017 U.S. Dist. LEXIS 69256, at *19 (C.D. Cal. Mar. 1, 2017) (citation omitted). A proposed claim is futile when it fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Intervening Plaintiffs continue to broadly allege NHPA claims on behalf of the People, an "[im]proper party" to this suit, ECF 117 at 5, and make most of their new NHPA claims on behalf of other Tribes in contravention with this Court's orders. *See* ECF 92 at 7; ECF 117 at 8. The majority of the remaining new claims stem from Intervening Plaintiffs' contention that BLM neglected to locate evidence of an 1865 calvary attack in its extensive survey and analysis of the Indirect Area of Potential Effects ("APE"), which is belied by the AR evidence and BLM's reasonable and detailed search of the physical area within and consultation regarding the Indirect APE. Intervening Plaintiffs fail to state a claim under the NHPA, ARPA, NAGPRA, or NEPA.

i. The People are Still Not a Proper Party.

Intervening Plaintiffs do not differentiate within their new claims: all are brought on behalf of both the People and RSIC. *See* ECF 139 at 10 (explaining "Intervening Plaintiffs' amendments"); ECF 141 at ¶ 128. This disregards the Court's order that "[t]he People are not a proper party … in the NHPA process." ECF 92 at 6. That order constitutes the law of this case, and the People cannot now implicitly request that this Court "reconsider[] an issue that has already been decided," *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993), and make no effort to demonstrate the People's new claims fall into any of the narrow exceptions to the law of the case doctrine. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). The People "are a subset of the Fort McDermitt Tribe," ECF 117 at 3, and make no effort in the motion to amend to explain how, despite lacking standing under NHPA, the People should

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have standing to make new claims under ARPA, NAGPRA, or NEPA given the Court's prior orders. This Court previously observed that the People's initial failure to argue that they had standing as a party independent of the Fort McDermitt Tribe was inappropriate, ECF 92 at 4, and under the law of the case the People cannot now assert *new* claims on behalf of the Fort McDermitt Tribe.[6] Intervening Plaintiffs' persistent refusal to acknowledge this defect and raise more claims purportedly on the People's behalf is another reason to deny leave to amend. *Sport Collectors Guild Inc. v. United States*, No. CV-19-04573-PHX-MTL, 2020 U.S. Dist. LEXIS 243534, at *6 (D. Ariz. Dec. 29, 2020) ("It is also proper for a court to dismiss a cause of action with prejudice when a plaintiff lacks standing and further pleading amendments would be futile.").

ii. RSIC's "New" Claims Rely on Interests of Other Tribes.

As previewed by the People's attempt to represent the Fort McDermitt Tribe as an unelected and unauthorized subset of that Tribe, the proposed amended Complaint demonstrates RSIC similarly ignores this Court's prior rulings and violates the law of the case by seeking to add claims raising the rights of other Tribes. *See* ECF 141 at ¶¶ 8, 10–13, 50, 60, 67–69, 71, 74, 76–77, 79, 111–15. RSIC acknowledges that it is contravening the Court's prior orders but proceeds anyway with "other reasons" to challenge those consultations. ECF 139 at 20–21. RSIC again alleges deficiencies in BLM's consultation efforts for the Project with the Fort McDermitt Tribe based on a 2009 conversation about a different project. *Id.* RSIC argues that BLM should have consulted all "regional Tribes about Sentinel Rock," with no explanation for why Sentinel Rock would hold religious significance or acknowledgment that the Fort McDermitt Tribe had discussed Sentinel Rock with BLM. *Id.*; *see also* ECF 65-17 at 4. RSIC argues that under the State Protocol Agreement BLM "misrepresent[ed] to the Nevada [State Historic Protection Office ("SHPO")] … that consultation with the Tribes

[6] The People also "cannot" represent the Fort McDermitt Tribe because that Tribe has a designated Chairman as the representative. ECF 117 at 7–8. "It would debase a tribe's sovereignty for a tribal member, even someone within the zone of interest under NHPA, to override a tribe's government-to-government consultation authority in what would amount a veto of the tribe's official position." *Slockish v. U.S. FHA*, No. 3:08-cv-01169-YY, 2020 U.S. Dist. LEXIS 250527, at *64 (D. Or. Apr. 1, 2020).

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began in 2017 and is ongoing." ECF 139 at 21. This argument cannot be regarding RSIC because BLM consulted with RSIC multiple times prior to 2017 and RSIC affirmatively represented to BLM that the Project area and the newly identified four properties that are the subject of the new proposed claims were not of cultural interest to it. In reliance on RSIC's representations to BLM, the agency consequently did not consult with RSIC on this Project beginning in 2017. ECF 92 at 10 ("representatives of [RSIC and Burns Tribe] disclaimed an interest in the area including the Project area in discussions regarding the Winnemucca RMP"). Thus, all of these claims are purportedly raised on behalf of other, federally-recognized Tribes, and the court should deny leave to amend the Complaint to add more claims that RSIC lacks standing to assert.[7]

iii. RSIC Failed to Exhaust Administrative Remedies to Dispute the Adequacy of BLM's Literature Review.

RSIC cannot raise claims regarding BLM's literature review when it had the opportunity to do so during the decision-making process and did not exhaust its administrative remedies. "[A]ctions brought under the Administrative Procedures Act normally require exhaustion of all administrative remedies." *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. CV 14-1667 PSG (CWx), 2015 U.S. Dist. LEXIS 199747, at *54 (C.D. Cal. June 30, 2015). Here, BLM consulted with RSIC to determine the boundaries of its areas of interest during the 2015 Winnemucca Resource Management Plan consultations and RSIC did not "identif[y] the Project area as containing a massacre site" or "indicate[] they had any particular cultural interest in the Project area." ECF 92 at 10–11. Moreover, as discussed above, and as addressed in early Court rulings, RSIC disclaimed any interest in the project

[7] RSIC's effort to draw parallels between BLM's previous historic properties consultation efforts and the cases *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010) and *Pueblo of Sandia v. United States*, 50 F.3d 856, 862–63 (10th Cir. 1995) solely raises the consultation claims of other Tribes. *See* ECF 139 at 19–22. RSIC is implicitly arguing that the Court should let it raise claims on behalf of other Tribes because it now believes it can make *stronger* claims on behalf of other Tribes. *See* ECF 139 at 19 (arguing that its new consultation arguments regarding BLM's previous historic properties consultation efforts alleged in RSIC's amended Complaint "are [now] very similar to the facts in *Pueblo of Sandia*"). The Court should not countenance these futile claims that RSIC does not have standing to make. *See* ECF 92 at 18; ECF 117 at 6; *see infra* § II.C.iii.

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area. Despite this, RSIC still could have notified BLM it sought consultation for the Project area or otherwise raised concerns with BLM's research and review during the process. *See* Notice of Intent, 85 Fed. Reg. 3413-02, 3414 (Jan. 21, 2020). RSIC did neither, and as such failed to exhaust administrative remedies regarding its claims that BLM conducted inadequate record investigation under NHPA and the State Protocol Agreement. *Ctr. for Biological Diversity*, 2015 U.S. Dist. LEXIS 199747, at *55 (concluding where "the record indicates that the Corps did publicize the Project and permit approval process such that interested parties would have been aware of their opportunity (and obligation) to raise relevant issues during the administrative process" that "the Court cannot conclude it is appropriate to excuse the Santa Ynez Band's failure to exhaust its administrative remedies on equitable grounds due to insufficient notice" to raise the issue that BLM should have consulted the Santa Ynez Band); *Winnemem Wintu Tribe v. U.S. DOI*, 725 F. Supp. 2d 1119, 1139 (E.D. Cal. 2010) (determining that Tribal plaintiffs failed to state a claim for NEPA violations for multiple reasons, including because "plaintiffs do not plead any facts establishing that they have exhausted any available administrative remedies" regarding their claims that cutting down old-growth manzanita trees violated NEPA).

iv. BLM's Surveys and Literature Review Were Reasonable.

RSIC's "new" NHPA claim is subsumed within its existing claim and RSIC lacks standing to raise it because it was not consulted and, therefore, has no basis to argue inadequate surveying or literature review. To the extent RSIC is arguing that BLM's surveys and literature review should have somehow put BLM on notice of RSIC's interest in the Project area notwithstanding RSIC's disclaimer of any interest, RSIC can make those arguments in the merits briefing of its pending claim. To the extent RSIC seeks to assert BLM's efforts to identify historic properties, including its literature and physical surveys, were unreasonable under the NHPA, given that RSIC was not consulted, failed to provide BLM any notice of its interest in the project area, and failed to exhaust its administrative

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remedies, RSIC fails to state a claim under NHPA. Moreover, BLM's surveys and literature review were reasonable and, therefore, lawful under the NHPA.

NHPA requires "federal agencies to 'make a reasonable and good faith effort' to identify historic properties that might be affected by an action, and to 'take [those potential effects] into account." *Wildearth Guardians v. Provencio*, 923 F.3d 655, 676 (9th Cir. 2019) (citation omitted). RSIC contends that BLM's failure to find the 1868 Field Notes in its survey of literature related to historic properties in the Project area under 36 CFR § 800.4(a)(2) led to BLM's failure to identify two sets of "Indian Lodgings," only one of which falls in the Indirect APE, and the calvary attack site, which is not within the Project area, ECF 117 at 9, but RSIC argues *could have potentially occurred* inside the Project's Indirect APE. ECF 139 at 22–23. RSIC is attempting to distinguish this claim from this Court's multiple prior orders concluding that the 1865 attack did not occur within the direct Project area by focusing solely on the Indirect APE. *See* ECF 92 at 21, ECF 117 at 9.

But RSIC's claims ignore the lack of evidence even that the sites actually did occur in the Indirect APE as well as BLM's extensive research and surveying of the Project area and that the Project's Indirect APE extends far beyond any area of proposed disturbance (as even the Project boundary includes a buffer beyond proposed disturbance areas). The fact that RSIC was able to find the 1868 Field Notes and map in August 2021, does not erase the years of research and survey work that BLM conducted to prepare for and supplement its consultations with regional Tribes encompassing the project area and Indirect APE. *See* ECF 92 at 21 ("[T]he HPTP states that archival background research and extensive pedestrian surveys yielded the historic properties in the plan, none of which are listed as burial or massacre sites, raising the reasonable implication that there are no burial or massacre sites within the Project area."); ECF 65-14, App'x C at 7 (observing that no "ground-disturbing activities" will occur in the Indirect APE but BLM nonetheless inventoried "12,963 acres" of the project, which included "pedestrian inventories" over "portions of the indirect effects area"), *id.* at 34 (noting the only Project effects on identified resources within the Indirect APE would be "visual" not "surface"); TPNHPA-0001 at AR-000007–9 (describing intensive

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Class III Inventories in the Indirect APE). BLM considered the possibility that evidence of associated Indian Tribe activity by virtue of its analysis of two pieces of literature referencing the 1865 calvary attack. ECF 115 at 5–6 (acknowledging that BLM included in the record two sources that "contain[] mention of the 1865 massacre"). And BLM was both aware of Sentinel Rock and discussed it during Tribal consultations, but the Fort McDermitt Tribe did not request that Sentinel Rock be considered as a culturally or religiously significant historic property. TPNHPA-0092 (observing BLM was aware that Sentinel Rock may have "religious significance"); ECF 65-17 at 4 (Fort McDermitt Tribal Chairwoman mentions Sentinel Rock but did not ask that it be designated as a historic property in the National Register). Because the standard for NHPA review of available historical evidence and consultation is that it must be "reasonable," 36 C.F.R. § 800.4(b)(1), BLM does not have to chase down every possible inference of Tribal activity in areas outside the Project boundary which boundary includes a significant buffer beyond the areas of actual disturbance. *See Okinawa Dugong (Dugong Dugon) v. Mattis*, 330 F. Supp. 3d 1167, 1194–95 (N.D. Cal. 2018) (determining that although plaintiffs "stated a more thorough method was required to provide 'conclusive' and 'definitive' information about dugong density …. the available [reports and literature] confirmed a very low density of dugong in the [project] area…. Defendants adequately explained why existing data was sufficient for their purposes"); *see also Wishtoyo Found. v. U.S. Fish & Wildlife Serv.*, 505 F. Supp. 3d 1025, 1031–32 (C.D. Cal. 2020) ("The USFWS properly noted that the 'tribal groups that are culturally affiliated with the [area] are the best source of information about [Traditional Cultural Properties] ("TCPs") that may occur in the area.' None of these tribal groups indicated that TCPs occurred in the area, which indicates that the USFWS's determination that no historic properties were affected was reasonable." (internal citations omitted)).

Ignoring this, RSIC argues that had BLM identified the lodgings and the site of the calvary attack, BLM would have reached out to them pursuant to the State Protocol Agreement and they could have raised their cultural concerns relating to the Project area. ECF 139 at 22–23. This acknowledges that there is no "new" claim and, instead, the RSIC is

arguing that this evidence should be considered relative to its pending claim before the Court that BLM should have consulted RSIC. In addition, this argument belies the factual record developed in previous hearings. RSIC never before identified the Project area or those properties to BLM as Tribal interests in prior resource management planning or during the course of numerous prior BLM authorizations for substantial surface disturbance previously approved in the project area. ECF 66 at 3–5 (describing thousands of acres of exploration, digging, and trenching authorized under multiple prior projects in the same area). BLM asked RSIC during prior Winnemucca Resource Management Plan consultations to identify resources of cultural importance to RSIC and they did not "identif[y] the Project area as containing a massacre site" or "indicate[] they had any particular cultural interest in the Project area." ECF 92 at 10–11. In 2015, RSIC provided BLM a map of areas in which RSIC had cultural interests and excluded both the Project area and the 1865 calvary attack area that they now assert to be of importance—but not until several months after the ROD issued. *Id.* at 11; ECF 87-1, Ex. 1-E (map showing great distance between RSIC's area of cultural interests and the project).

The most direct source of information about culturally sensitive areas and resources is the Tribes themselves, and RSIC never, before June of this year, identified the Project area or the surrounding APE as encompassing any historic properties. The record demonstrates that RSIC never provided BLM any notice it considered the four properties important. RSIC fails to explain how BLM would make the connection between the Project area or these four properties and RSIC without such notice. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999) (per curiam) (determining where "the Tribe had many opportunities to reveal more information to the Forest Service" but did not explain their concerns, the Court was "unable to conclude the Forest Service failed to make a reasonable and good faith effort to identify historic properties"); *cf. Battle Mt. Band of the Te-Moak Tribe of W. Shoshone Indians v. U.S. BLM*, 302 F. Supp. 3d 1226, 1237 (D. Nev. 2018) ("[O]nly an Indian Tribe has the authority to identify its own TCPs .... the mere identification of a TCP

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by a tribe does not automatically make it eligible for inclusion on the National Register." (internal citation omitted)).

But "even if the Court … disregarded the fact that [the lodgings] are outside of the area of cultural interest RSIC identified in its letter to BLM—they would not reasonably put BLM on notice that it should have consulted RSIC about the Project because they lie outside the Project area." ECF 92 at 15. "[T]he [1868 BLM Field] notes only describe the scattered remains of 'Indians' generally, with no further description specifically identifying them as the ancestors of RSIC members, and the location described in the notes falls outside RSIC's stated area of cultural interest in any event." *Id.* at 14. BLM thus fulfilled its regulatory duty to "gather information from any Indian Tribe" identified pursuant to 36 C.F.R. § 800.3(f) to assist in identifying properties which may be of religious and cultural significance to them and may be eligible for the National Register as required under 36 C.F.R. 800.4(a)(4). *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. DOI*, 608 F.3d 592, 607–08, 610 (9th Cir. 2010) (concluding the agency adequately consulted a Tribe on a 2004 project where the agency only waited a month for the Tribe to respond because "the Tribe responded to the BLM's [previous] inquiries [in 2001] by submitting a map outlining the boundaries of what it called 'traditional cultural property'" and although BLM did not wait long for the Tribes to subsequently identify any further historic properties, "the Tribe has made no showing that it would have provided new information had it been consulted again earlier in the Amendment's approval process").

The Indirect APE is "outside the current Plan of Operations and will not be subject to ground-disturbing activities." ECF 65-14 at 7. BLM's research was reasonable and its rigorous and wide-ranging physical surveys of thousands of acres revealed no evidence to support RSIC's claim, and this Court should thus not grant leave to amend to add this futile claim. *See Ctr. for Biological Diversity v. U.S. BLM*, No. 2:14-cv-00226-APG-VCF, 2017 U.S. Dist. LEXIS 137089, at *54–55 (D. Nev. Aug. 23, 2017) (concluding a cultural resources inventory, an ethnographic assessment that "relied on interviews with tribe members and site

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visits in 2008 and 2009," and prior studies and scholarly references constituted "a good-faith attempt to identify relevant cultural sites").[8]

v. RSIC Fails to State an ARPA Consultation Claim.

RSIC fails to state facts sufficient to allege a claim under ARPA. "Under the ARPA, federally recognized Indian tribes must be notified about an ARPA permit that might harm sites of religious or cultural importance." *Franco v. U.S. Forest Serv.*, No. 2:09-cv-01072-KJM-KJN, 2016 U.S. Dist. LEXIS 44266, at *46 (E.D. Cal. Mar. 31, 2016) (citing 43 C.F.R. § 7.7(a)(1)). Here, RSIC admits that on September 10th BLM asked RSIC to provide comments on the ARPA permit or arrange for consultation by Friday, September 24th. ECF 139 at 12. Despite RSIC's newly asserted interest in the Project and urgent need to bring new information to BLM's attention, RSIC declined to call BLM to arrange for ARPA consultation until Thursday, September 23rd, the day before the consultation deadline. *Id.* at 13. RSIC does not provide any documentary evidence produced concurrent with that call, but claims that BLM verbally led RSIC to believe that the ARPA permit consultation deadline would be pushed back almost two weeks solely by virtue of RSIC's consultation request on the eve of the deadline. *Id.* RSIC's conclusion strains credulity, considering the high importance of the Project to our nation's national security and all parties understanding of the importance to efficiently address the concerns in this case in a timely manner. And although RSIC protests that they did not receive this consultation request at least 30 days before the ARPA permit

[8] RSIC additionally attempts to add claims regarding the State Protocol Agreement. ECF 139 at 20–23; *see also* ECF 141 at ¶ 124. RSIC provided no notice to BLM they had any interest in the Project area or that RSIC had changed its position that it had submitted to BLM that the Project area was outside RSIC's cultural area of interest. RSIC thus cannot show that BLM unreasonably failed to consult with RSIC or raise RSIC's interests to the Nevada SHPO. Even if BLM had located the two pieces of literature or the 1868 Field Notes, it was only required under the State Protocol Agreement to consult with the implicated federally-recognized Tribes which did not include RSIC, because RSIC had led BLM to believe that it had no interest in the Project area or these four properties. *See State Protocol Agreement Implementing the NHPA*, § V(F) (Dec. 22, 2014), https://shpo.nv.gov/uploads/documents/BLM_Nevada_State_Protocol_Agreement_2014.pdf (observing "[c]onsultation on the resolution of adverse effects will include the appropriate Indian tribes," citing the National Programmatic Agreement at Section 2.5.b.2); *National Programmatic Agreement Under the NHPA,* Section 2.b.2 (Feb. 9, 2012) (directing "BLM to consult with the *relevant* … Indian Tribes" (emphasis added)).

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issued, *see* 43 C.F.R. § 7.7(a), BLM's Response makes clear that RSIC received its first request for consultation in July 2021—well over 30 days before the permit issued, providing ample time to schedule consultation. *See* ECF 153 at 14–15.

Moreover, because project ground disturbance will not occur in the Indirect APE, RSIC cannot allege that the issuance of the ARPA permit will result in discovery of cultural resources. *See* ECF 92 at 14 (agreeing that the 1865 Field Notes describe possible remains that "fall just within the area of indirect impacts, much less any specific location that will be excavated under the HPTP"); ECF 65-14 at 7 (noting that the Indirect APE is "outside the current Plan of Operations and will not be subject to ground-disturbing activities"); TPEIS-0696 (FEIS App'x A, Fig. 4.11-1 demonstrates no exploration or mining will occurring in the Indirect APE). BLM established the Indirect APE solely to "consider adverse visual effects based on a series of buffers, heights, and sizes of TPP infrastructure and facilities," rather than any building or digging. *Id.* at 1 (emphasis added). Thus, there is no possible resulting prejudice. *See Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1142 ("Plaintiffs do not identify specific archaeological resources protected by the ARPA, nor do they identify any action by the USFS … that could constitute an ARPA violation. Consequently, plaintiffs have not pled sufficient facts to state a plausible claim for an ARPA violation by the USFS.").

Furthermore, when a plaintiff "allege[s] that defendants' activities are violating" ARPA but "there has been no excavation of [eligible] resources," the plaintiff "does not present evidence of any [ARPA] violation." *Attakai v. United States,* 746 F. Supp. 1395, 1410 (D. Ariz. 1990). "[T]he Act is clearly intended to apply specifically to purposeful excavation and removal of archaeological resources, not excavations which may, or in fact inadvertently do, uncover such resources." *Id.* As discussed extensively, after surveying thousands of acres and significant ground disturbance, there is no evidence of the two Indian lodgings or the 1865 calvary attack site arising from the 1868 Field Notes within the Project area. ECF 92 at 21. If indeed, the Indirect APE beyond the outermost edges of the Project boundary that itself includes a significant buffer beyond disturbance, is ever disturbed, "the HPTP includes a plan if human remains are unexpectedly discovered." *Id.* Because RSIC cannot allege that such

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resources have been uncovered, it cannot allege an ARPA violation. *Cf. Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1137 & n.8 (concluding where plaintiffs alleged "USFS destroyed three ancient 'grandfather' grapevines," plaintiffs sufficiently allege that the USFS *destroyed items* encompassed under ARPA" such that the court would not dismiss for failure to state a claim (emphasis added)).

vi. RSIC Fails to State a NAGPRA Claim.[9]

RSIC cannot state a claim under NAGPRA because no human remains have been discovered. "NAGPRA does not apply unless Native American cultural items are actually excavated or discovered. The mere potential for their excavation or discovery is insufficient." *Slockish v. U.S. FHA*, No. 3:08-cv-1169-ST, 2012 U.S. Dist. LEXIS 118718, at *34 (D. Or. June 19, 2012); *see also Slockish*, 2020 U.S. Dist. LEXIS 250527, at *110, *113 (concluding "Defendants did not violate NAGPRA" by failing to consult with Indian Tribes where "no additional material of any kind was discovered after November 16, 1990, including in 2008 during construction," despite the fact that other "sacred objects were discovered before November 16, 1990" in that same area); *Rosales v. United States*, No. 07-cv-0624, 2007 U.S. Dist. LEXIS 87368, at *27 (S.D. Cal. Nov. 28, 2007) ("Plaintiffs' claimed violations of other portions of [NAGPRA's] regulations similarly fail because no federal agency is alleged to have possession or control of human remains or objects."); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 891, 894 (D. Ariz. 2003) (concluding that because "[n]othing … suggests that there was an actual discovery of human remains or other object protected under NAGPRA at the Old San Carlos," despite evidence that the area once contained

[9] The People imply in the proposed Amended Complaint they have standing to claim that BLM violated NAGPRA by failing to consult with the lineal descendants of human remains, namely, members of the People, that are "almost certain" to exist within the Indirect APE. ECF 141 at ¶ 120–21. But the People are not a federally-recognized Tribe and, therefore, absent timely written request to BLM for consultation, there was no basis for BLM to identify them for consultation. ECF 92 at 6. In addition, by failing to argue that the People separately have standing to bring claims in this case, the People are once again improperly usurping the Fort McDermitt Tribe's sovereignty by proposing claims on behalf of the People, which are Fort McDermitt Tribal members. ECF 66 at 11–16; ECF 117 at 8 (maintaining that "[t]he Court does not wish" to "be perceived as disregarding the government-to-government relationship between the federal government and the Fort McDermitt Tribe").

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cemeteries plaintiffs failed to "trigger NAGPRA obligations and procedures"). Unlike situations where remains were previously found in a project area or where documentary evidence demonstrated cemeteries once existed within the project area, here RSIC can at most claim "that the Thacker Pass project may result in the … inadvertent discovery of human remains," but cannot point to actual evidence of remains discovered anywhere in the project area, or even within the Indirect APE. ECF 139 at 23. Thus, RSIC fails to state a claim under NAGPRA. *Slockish*, 2012 U.S. Dist. LEXIS 118718, at *35 ("only when and if [the discovery of remains] occurs and is reported to the BIA will NAGPRA duties and obligations be triggered" (citation omitted)).

vii. RSIC Fails to State a NEPA Claim.

An agency does not create a supplemental EIS "every time new information comes to light." *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 373 (1989). The 1868 Field Notes were not "significant" new information for BLM to rely on to initiate a supplemental EIS because they did not present new information at all. The described attack was acknowledged in the record, the reasonable physical survey and literature review of the Indirect APE did not reveal evidence of any human remains within the Project area, and no disturbance is planned within the Indirect APE that could disturb any potential remains. *See supra* Section II.C.iv. RSIC thus fails to state a violation of NEPA. *Cottonwood Env't Law Ctr. v. Marten*, No. 2:20-cv-00031-BU-BMM, 2020 U.S. Dist. LEXIS 237683, at *11 (D. Mont. Dec. 17, 2020) (explaining that a forest plan revision did not constitute "new information" warranting a supplemental EIS because the "modest reduction in sediment yields" it anticipated was accounted for in a previous SEIS, and thus the plaintiff failed to state a claim under NEPA); *see also Cottonwood Envtl. Law Ctr. v. Bernhardt,* 796 F. App'x 368, 371 (9th Cir. 2019) (unpublished) (affirming denial for failure to state a claim where the claim "lacks allegations about whether the Park Service has actually updated the population objective or how a revised population objective might affect bison management").

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III. CONCLUSION

For all the above reasons, Intervening Plaintiffs' motion to amend their Complaint should be denied.[10]

DATED this 23th day of December 2021.

By: /s/ *Laura K. Granier*

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[10] This Response largely ignores Intervening Plaintiffs' counsel's abrupt three-page diatribe about the unfairness of receiving a fine for permitless entry and construction on government land. It is unclear what, if anything, Mr. Falk's personal permitting difficulties have to do with the claims he desires to make on behalf of his clients. The motion to amend does not describe what permission Mr. Falk sought from the various noted Tribal interests before he constructed latrines within the Project area, nor does it explain what BLM's "superior resources," or its separate regulatory ability to issue trespass citations, has to do with the resources it used to conduct acres of physical cultural surveys and literature reviews, as relevant to the claims in this case.

Certificate of Service

I hereby certify that on December 23, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

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