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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BARTELL RANCH LLC, *et al.*, Plaintiffs, *vs.* ESTER M. McCULLOUGH, *et al.*, Defendants,	***Lead Case:*** Case No.: 3:21-cv-00080-MMD-CLB
WESTERN WATERSHEDS PROJECT, *et al.*, Plaintiffs, *vs.* UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	***Consolidated with:*** Case No.: 3:21-cv-00103-MMD-CLB **BURNS PAIUTE TRIBE'S JOINDER IN SUPPORT IN RENO-SPARKS INDIAN COLONY, *et al.*'s MOTION FOR PRELIMINARY INJUNCTION**

Intervenor-Plaintiff Burns Paiute Tribe ("Tribe") submits this Joinder in support of the Motion for Preliminary Injunction filed by Plaintiff-Intervenors Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain (collectively, "RSIC") (ECF No. 45). This joinder is based upon the accompanying additional argument below, the pleadings and papers contemporaneously filed in support of the Tribe's Motion for Intervention, and the pleadings and papers filed in support of RSIC's Motion for Preliminary Injunction.

I. ARGUMENT IN SUPPORT OF PRELIMINARY INJUNCTION

As set forth in the Motion for Preliminary Injunction, RSIC satisfies all four factors required for entry of such preliminary relief: (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [their] favor," and (4) "the injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Destruction and desecration of archaeological, religious, cultural, and historical resources proposed by Defendants Bureau of Land Management ("BLM") and Defendant-Intervenor Lithium Nevada Corp. ("LNC") will result in immediate and irreparable harm to the RSIC and the Burns Paiute Tribe.

In support of the RSIC motion, the Tribe addresses two factors for entry of preliminary relief below and incorporates by reference the arguments set forth in the RSIC Motion for Preliminary Injunction.

A. RSIC IS LIKELY TO SUCCEED IN THE MERITS IN THIS MATTER.

The RSIC motion demonstrates likelihood to succeed on the merits in this matter. The BLM is obligated to consult with RSIC, the Burns Paiute Tribe, and other Tribes by the National Historic Preservation Act ("NHPA") including 36 C.F.R. §§ 800.1, 800.2, the National Environmental Policy Act ("NEPA"), 40 C.F.R. § 1501.2(d)(2); and its own policies and

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guidelines. These policies include Interior Secretarial Order No. 3317 (December 1, 2011),[1] which "requires Departmental officials to demonstrate a meaningful commitment to consultation by identifying and involving Tribal representative in a meaningful way early in the planning process." Secretarial Order at 1. Likewise, the Interior Departmental Manual requires that "[b]ureaus and offices must consult tribes and … whenever a DOI plan or action with tribal implications arises." Departmental Manual § 5.4(A). [2]

BLM policies echo the strong requirements of DOI to consult in a meaningful way prior to the finalization of an agency decision. For example, BLM Handbook 1780-1 (Improving and Sustaining BLM-Tribal Relations) provides, in part, "Consultation must seek to ascertain tribal concerns about areas proposed for mineral leasing or development. These include areas of traditional use, access to sacred sites, and other locations of cultural sensitivity." BLM Handbook 1780-1 § XIII-3. [3]

The record is clear that the BLM did not meet its obligations to consult with RSIC and the Burns Paiute Tribe. This failure cannot be summarily dismissed simply as a procedural oversight. Consultation is not a meaningless process, but a critical commitment to Tribal sovereignty and agency decision making. *See, e.g.,* 36 C.F.R. § 800.16(f) ("Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.").

As set forth in the RSIC motion, irrefutable evidence indicates that the BLM failed to consult with all impacted Tribes, including the Burns Paiute, and failed to consider the impacts

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[1] Available at https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf. Hereinafter referred to as "Secretarial Order."

[2] Available at https://www.doi.gov/sites/doi.gov/files/uploads/dm_chapter_5_procedures_for_consultation_with_indian_tribes.pdf.

[3] Available at https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf.

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of the Project to those Tribes. *See, e.g.,* Exhibit 1, ¶¶ 16-20, Corrected Declaration of Diane Teeman, the Tribe's cultural and heritage director.[4] BLM may counter that it consulted with other Tribes that it deemed appropriate; however, this is not sufficient. Indeed, grouping tribes together is unhelpful. Tribes are not interchangeable and consultation with one tribe does not relieve the BLM of its obligation to consult with any other Tribe that may be a consulting party under NHPA, NEPA, and BLM's other obligations. *See Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) ("[Government] cannot favor one tribe over another."); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) ("The government owes the same trust duty to all tribes.").

Whether or not the BLM did a lot of consulting in general does not show that its consultation was adequate. The District Court of South Dakota addressed this when considering a Bureau of Indian Affairs action in *Lower Brule Sioux v. Deer*, 911 F.Supp. 395 (D.S.D. 1995). There, the court held:

> Meaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker. The decision maker is to comply with BIA and administration policies.

Id. at 401. As the district court reasoned, "fair notice of agency intentions requires telling the truth and keeping promises." *Id.* at 399. Agency policies in that case, like here, stated that the agency's policy was to consult with Tribes on a government-to-government basis whenever plans or actions would affect tribal resources, assets, or tribal health and safety. *Id.* at 399.

In *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 718 (8th Cir. 1979), the Eighth Circuit found that "where the Bureau has established a policy requiring prior consultation with a

[4] Ms. Teeman's original declaration was filed as Exhibit 2 to the Tribe's Motion to Intervene (ECF No. 53-1). This declaration corrects typographical errors and provides clarification to statements in the original declaration.

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tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded." The Court found that the failure to comply with its own policy was not only a violation of "general principles of administrative law," but it was also a violation of the government's trust duty. *Id.*

Here, the record is undisputed that consultation did not occur with the RSIC and the Burns Paiute Tribe. The evidence and the law support that BLM failed to adequately consult and that RSIC is likely to succeed on the merits of the claim.

B. RSIC AND THE BURNS PAIUTE TRIBE WILL SUFFER IRREPARABLE HARM IN GROUND DISTURBING ACTIVITIES PROCEED.

The RSIC motion also demonstrates that irreparable harm will occur to RSIC and other Tribes if ground disturbing activities proceed. This includes a distinct risk of irreparable harm to the Burns Paiute Tribe. The Thacker Pass area is of significant religious, historic, and cultural significance to the Tribe and an area that continues to be utilized. Corrected Teeman Decl. ¶¶ 10-15.

Courts have concluded that the nature of Tribal rights warrant unique protection in the preliminary injunction context because harm to them is presumed to be irreparable. *See United States v. Michigan,* 508 F. Supp. 480, 492 (W.D. Mich. 1980), aff'd, 712 F.2d 242 (6th Cir. 1983); *Nez Perce Tribe v. U.S. Forest Serv*., No. 3:13-CV-348-BLW, 2013 WL 5212317, at *7 (D. Idaho Sept. 12, 2013) ("The plaintiffs are not seeking damages; they are seeking to preserve their Treaty rights along with cultural and intrinsic values that have no price tag.").

Likewise, courts have held that an agency's failure to conduct required environmental and cultural evaluations infringes upon a party's "procedural" rights, and that infringement is, in itself, "irreparable harm." *See, e.g., Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 23

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(2008); *Sierra Club v. Marsh*, 872 F.2d 497, 499-504 (1st Cir. 1989); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124-25 (9th Cir. 2005).

As this Court stated in its Order approving RSIC's intervention, the impending digging up and removal of these resources will result in immediate and irreparable harm to RSIC's interests: "The Tribes persuasively argue that the digging incident to this plan will cause them irreparable harm. (ECF Nos. 43, 43-1, 44-1.)." Order granting RSIC intervention, at 7-8 (Western Watershed, Case No. 3:21-cv-00103, ECF No. 59). Ground disturbing activities will irreparably harm cultural, historic, and archaeological resources important to the Tribes and tribal people in this proceeding. Moreover, these actions, if allowed to proceed, will occur prior to government-to-government consultation – a process that recognizes the sovereign nature of Tribal governments and the important role of those governments in decision making that impacts Tribal resources. This amounts to the type of harm that warrants a preliminary injunction.

II. CONCLUSION

RSIC has satisfied the requirements for this Court to issue a preliminary injunction to stop the impending ground disturbing activities that will irreparably impact Tribal religious, cultural, and historical resources. Accordingly, this Court should grant RSIC's motion and preliminary enjoin any ground disturbing activities authorizes by the Federal Defendants pending a final decision on the merits in this proceeding.

Dated this 10th day of August 2021.

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By:/s/*Louis M. Bubala III*
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Kaempfer Crowell, that I am over the age of 18 and not a party to the above-referenced case, and that on August 10, 2021 I filed and served the foregoing **BURNS PAIUTE TRIBE'S JOINDER IN SUPPORT IN RENO-SPARKS INDIAN COLONY, *et al.'s* MOTION FOR PRELIMINARY INJUNCTION** as indicated:

X **BY NOTICE OF ELECTRONIC FILING**: through Electronic Case Filing System of the United States District Court, District of Nevada, to the individuals and/or entities at their email addresses.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 10, 2021.

/s/ Merrilyn Marsh
An Employee of KAEMPFER CROWELL

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