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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,)	Case No.: 3:21-cv-80-MMD-CLB
)	(LEAD CASE)
Plaintiffs,)	
)	
v.)	
)	INTERVENING PLAINTIFFS'
ESTER M. MCCULLOUGH, et al.,)	REPLY IN SUPPORT OF
)	THEIR MOTION
Defendants,)	TO SUPPLEMENT
and)	
)	
LITHIUM NEVADA CORPORATION,)	
)	
Intervenor-Defendant.)	

WESTERN WATERSHEDS PROJECT, et al.,)	Case No.: 3:21-cv-103-MMD-CLB
)	(CONSOLIDATED CASE)
Plaintiffs,)	
)	
RENO SPARKS INDIAN COLONY, et al.,)	

Intervenor-Plaintiffs,

and

BURNS PAIUTE TRIBE,

Intervenor-Plaintiff.

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants,

and

LITHIUM NEVADA CORPORATION,

Intervenor-Defendant.

Now come The People of Red Mountain (The People) and the Reno-Sparks Indian Colony (RSIC), Intervening Plaintiffs herein, by and through counsel, and reply in support of their Motion for Supplementation of the Record and for the Taking of Judicial Notice (ECF 115).

I.BACKGROUND

Lithium Nevada argues that the Court's previous ruling denying standing to the People of Red Mountain and the "mere existence of the proffered documents does not explain why those documents should supplement the AR. . . ." (LNC's Response to Intervening Plaintiffs' Motion to Supplement, pp. 5-7. (ECF 128)). However, Intervening Plaintiffs have contemporaneously filed a "Motion for Leave To Amend Complaint," to this Reply and have proffered a "First Amended Complaint" which urges several additional claims which demonstrate that the BLM's significantly inadequate historic

1 review influenced the agency's poor identification of potentially affected Native
2 American tribes and in, turn, produced inadequate or nonexistent agency efforts at
3 consultation. The First Amended Complaint also sets out new claims that significant
4 historic properties have gone completely unidentified by BLM, and that the resulting
5 obligatory BLM coordination with the Nevada State Historic Preservation Officer
6 ("SHPO") to obtain the SHPO's concurrence in BLM's National Historic Preservation Act
7 ("NHPA") §106 compliance efforts is legally a failure. The BLM's unduly narrow and
8 uninformed review of cultural and historical resources also have caused the flawed and
9 legally suspect issuance of an archeological resources excavation permit under the
10 Archaeological Resources Protection Act ("ARPA") and as to the 1865 cavalry
11 massacre of natives near Thacker Pass, possible violations of the Native Americans
12 Grave Protection and Repatriation Act ("NAGPRA").

13 The Intervening Plaintiffs' amended claims include that BLM has received
14 notification that there are very likely human remains, funerary objects, sacred objects,
15 and objects of cultural patrimony in the Thacker Pass Project Area of Potential Effects
16 that will be excavated under the current Historic Properties Treatment Plan. NAGPRA
17 requires BLM to consult with lineal descendants of possible human remains before
18 excavation regardless of tribal affiliation. Many of the People of Red Mountain descend
19 from the survivors of the September 12, 1865 Thacker Pass massacre and therefore
20 have standing.

21 In the proffered First Amended Complaint, Intervening Plaintiffs allege that
22 BLM failed to identify at least four historic properties eligible for inclusion in the National
23 Register of Historic Places within the Area of Potential Effects before issuing the Record

1 of Decision. These properties are the September 12, 1865 Thacker Pass Massacre site;
2 two areas of Indian Lodgings identified by US Deputy Surveyor Abed Alley Palmer's
3 General Land Office 1868 Field Notes Journal; and Sentinel Rock, part of the geological
4 features marking Thacker Pass. All of these historic properties are eligible for inclusion
5 on the National Register of Historic Places because they "are associated with events
6 that have made a significant contribution to the broad patterns of our history" and "they
7 have yielded, or may be likely to yield, information important in prehistory or history." 36
8 CFR § 60.4. But none of them are found in the BLM's inventory of historic and cultural
9 features likely to be affected by the proposed massive lithium mine.

10 Under NHPA implementing regulations, the BLM has supplanted NHPA
11 regulations through the use of State Protocol Agreements. The BLM's Nevada State
12 Office, pursuant to a National Programmatic Agreement (NPA, 1997, as amended 2012)
13 among BLM, the Advisory Council on Historic Preservation ("ACHP"), and the National
14 Conference of State Historic Preservation Officers, replaced the procedures set forth in
15 36 CFR § 800.3 through § 800.7 with the 2014 BLM-State Historic Preservation Officer
16 (SHPO) State Protocol Agreement. It "defines how BLM and SHPO will interact under
17 the NPA for implementing the NHPA, including Section 106 (§ 800.3 through 800.7),
18 Section 110 and Section 112." State Protocol Agreement, Purpose, p. 1. The State
19 Protocol Agreement, therefore, prescribes the procedures BLM was required to follow
20 before issuing the Thacker Pass ROD.

21 The Protocol Agreement requires BLM to
22 determine the information needed to identify and evaluate historic properties
23 within the Area(s) of Potential Effect (APE). BLM will base such determinations
24 on a file search of the BLM/SHPO cultural resource records, aerial photographs,
25 Government Land Office (GLO) records, BLM land records, resource

management plans, project-specific NEPA documents of the proposed project area, available cultural resource planning models, and on information sought and obtained from SHPO and consulting parties. . . . Resources of religious and cultural significance to Native American tribes must be included in determining inventory needs. . . .

Id. § I.B.

The State Protocol Agreement also obligated BLM to prepare a Cultural Resources Inventory Needs Assessment (CRINA) for presentation to the Nevada State Historic Preservation Officer. The intent of the CRINA “is to establish the Direct and Indirect Effect APEs, provide a summary of known resources present within the APEs, evaluate inventory needs, describe the methods (other than standard inventory) that will be used to analyze effects (*e.g.*, visual and auditory simulation modelling), and list the tribes, consulting parties and members of the public who will be consulted for individual undertakings.” *Id.* at § I.B.1.

According to the Thacker Pass CRINA, “The following inventory actions are needed for the project...review aerial imagery, and historic reference material including topographic maps and GLO maps to identify any potential unrecorded historic properties within the Indirect APE that may be indirectly affected by the project.” TPNHPA 0001, p. 10/26 of .pdf.

II. REPLIES AS TO SPECIFIC SUPPLEMENTATION REQUESTS

A. *The 1865 Cavalry Massacre of Paiutes*

The BLM’s obligatory review of its own Government Land Office records fell far short of what the State Protocol requires, because it completely overlooked a massacre and Native American lodgings. The Court was made aware of the 1865 cavalry massacre of indigenous people near Thacker Pass only after the Intervening Plaintiffs

1 produced a U.S. Deputy Surveyor's 1868 Field Notes journal statements concerning
2 "the remains of an extensive Indian Camp. It was at these camps that Captain RC
3 Payne with Co. E, 1st Nevada Cavalry, attacked, and whipped a body of Indians on
4 Sept. 12 1865. There are many Indian skulls and other remains to be found scattered
5 over this portion of the Township. I found some also opposite here on the east side of
6 the River."

7 Since July 2021, the Intervening Plaintiffs have discovered and provided to BLM
8 six more publicly available sources describing the September 12, 1865 Thacker Pass
9 Massacre. The massacre began within the latter-day Indirect Area of Potential Effect
10 that BLM identified for the Thacker Pass mine. The Intervening Plaintiffs' additional
11 sources, along with Lithium Nevada's production of a map from the 1868 GLO records,
12 show that the massacre extended into both the Exploration Direct Area of Potential
13 Effect and the Mining Direct Area of Potential Effect. As BLM admits, two of the seven
14 sources Intervening Plaintiffs provided are historic treatises mentioned in the AR --
15 meaning, while information about the massacre was available to the agency, the agency
16 didn't notice it. The BLM has belatedly added those two sources to the AR, but
17 inexplicably won't add its own survey records to the AR, perhaps because they are
18 daunting proof of BLM's arbitrary and incomplete inventory. The agency's utter failure to
19 note the 1865 massacre caused BLM not to consider the eligibility of the massacre site
20 for the National Register, to not identify adverse effects to the massacre site that the
21 mine would cause, to not realize that Paiute natives killed by the cavalry are direct
22 descendants of members of the Fort McDermitt Tribe. BLM's silence on the 1865
23 massacre caused the agency to do nothing to mitigate the probable adverse effects

1 (eradication) of some or all of the massacre site. BLM's failure to identify the 1865
2 massacre means that Native American concerns about disturbances to the site and
3 planning to mitigate adverse effects to the site are missing from BLM communications
4 with the Nevada SHPO, the Tribes, the Final Environmental Impact Statement, Record
5 of Decision and the Historic Properties Treatment Plan. Even now, BLM has not alerted
6 the Nevada SHPO about the massacre site, nor formally advised the Tribes, nor
7 supplemented the Final EIS, amended the ROD, or revised the HPTP. `

8 BLM's lack of comprehension of the historical fact that 31 to 70 Paiutes were
9 murdered in the vicinity of Thacker Pass and that federal soldiers made no effort to
10 gather and bury their bodies suggests that there are human remains and sacred objects
11 in the Thacker Pass project area. Which implicates ARPA and NAGPRA.

12 BLM's 1868 Government Land Office records also contain a map that
13 identifies two areas with "Remains of Indian Lodgings." Thanks to Lithium Nevada's
14 presentation of the 1868 Map, it is evident that the northernmost lodging area is within
15 the Thacker Pass Project Area of Potential Effects, and the southern area is just outside
16 the Project Area. RSIC's GIS Specialist Maureen Vazquez, using Lithium Nevada's
17 proffered map showing the locations of the Paiute camps and GIS information about the
18 Area of Potential Effects portrayed in a map titled "Lithium NV Thacker Pass - Areas of
19 Potential Effect" included in the Thacker Pass Cultural Resources Inventory Needs
20 Assessment (CRINA) (TPNHPA-0001, pg 12), mapped the "Indian Lodgings." (EXHIBIT
21 1, Map of Paiute Camps in the Thacker Pass Area of Potential Effects)

22 The BLM did not identify, inventory, or evaluate the northern lodgings area
23 despite its location within the APE, although required to do so by NHPA. The southern

1 lodgings area certainly should have been included within the Indirect Effects APE. BLM
2 should have identified, inventoried, and evaluated the northern lodgings for inclusion on
3 the National Register; it is close enough to the proposed mine that it would potentially
4 suffer seismic events, erosion, and traffic effects and would also potentially suffer
5 indirect visual, audible, or atmospheric effects that diminish the integrity of the location,
6 setting, feeling and/or association that contribute to the property's historical
7 significance.

8 The GLO maps reveal that the massacre played out across public and private
9 land. But obligations imposed by the State Protocol Agreement apply regardless of land
10 ownership. The State Protocol Agreement requires analysis of both the massacre site
11 as well as the Indian Lodgings by BLM, in conjunction with the SHPO and the Tribes.
12 Those consultations have yet to happen.

13 By completely missing the fact of the 1865 massacre, the victims of which are
14 ancestrally connected to members of the Fort McDermitt (and possibly other) Tribes,
15 BLM's subsequent consultation efforts are seriously deficient, but not only under the
16 NHPA. The federal Archeological Resources Protection Act (ARPA) and the federal
17 Native American Graves Protection and Repatriation Act (NAGPRA) also govern the
18 process of determining what cultural and historical resources are present and what
19 mitigation may be indicated, since Fort McDermitt, RSIC and three other Tribes
20 contacted BLM about the lithium mine project in spring 2021. The proposed
21 archeological exploration of Thacker Pass and environs to this point has been based on
22 the assumption that the studies would mainly evaluate the cultural existence of Numic
23 peoples, who are not believed to be related to the Native Americans inhabiting northern

1 Nevada. The 19th century events ignored by BLM, however, directly implicate modern-
2 day natives.

3 BLM maintains that the Intervening Plaintiffs have not shown that the existing
4 record is inadequate for effective judicial review nor that a recognized exception to the
5 record-review doctrine applies. (BLM's Opposition to Intervening Plaintiffs' Motion to
6 Supplement the Administrative Record, p. 3, citing *Southwest Center for Biological*
7 *Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). But the singular
8 failure of BLM to review intra-agency records that might contain references to the Indian
9 Wars of the 1800's, and citing recognized historical treatises in the AR that contain
10 information about the 1865 massacre while ignoring those sources' historical facts of
11 the massacre, have directly cause record inadequacy for and prevent judicial review.
12 Even Lithium Nevada seems to agree, pointing to *Slockish v. U.S. FHA*, No. CV-08-
13 1169-ST, 2011 U.S. Dist. LEXIS 152892, at *41 (D.Or. Sep. 21, 2011) for the
14 proposition that "Either defendants performed the required inventory, which would then
15 be found in the Administrative Record, or they did not." Lithium Nevada Response, p. 7.

16 *Southwest Center* holds that the Ninth Circuit allows extra-record materials (1) if
17 necessary to determine "whether the agency has considered all relevant factors and
18 has explained its decision," (2) "when the agency has relied on documents not in the
19 record," or (3) "when supplementing the record is necessary to explain technical terms
20 or complex subject matter." *Id.* at 1450. But the Court also noted that "Extra-record
21 documents may also be admitted 'when plaintiffs make a showing of agency bad faith,'"
22 citing *National Audubon Society v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 n. 9 (9th Cir.
23 1993). The extra-record materials sought by Intervening Plaintiffs are aimed to

determine whether the BLM has considered all relevant factors and explained its decision. There further is some evidence of agency bad faith here. Sending two letters to Tribes during a global pandemic and calling it “consultation,” in tandem with a misrepresentation about 2009 consultation with the Fort McDermitt Tribe, combined with a failure to consult agency records or review known historical treatises in the decision-making record suggest more than inadvertence on BLM’s part. Contrary to what BLM contends, the Intervening Plaintiffs have met both *Southwest Center* criteria, namely that the existing record is inadequate for effective judicial review and that one, or even two, recognized exceptions to the record-review doctrine apply here.

B. April 15, 2020 Preliminary Draft Environmental Impact Statement (PDEIS)

BLM has agreed to provide this item as part of the AR at TPNHPA 0188, and consequently Intervening Plaintiffs consider this controversy to be settled.

C. Bengston Ethnographic Assessment, TPNHPA 0003

BLM has agreed to provide this item under seal, so the Intervening Plaintiffs consider this controversy settled.

D. Email String Alternatives Development Meeting Summary, TPNHPA-088

This email string refers to an attached meeting summary from a “Thacker Pass EIS Alternatives Development Meeting” and BLM has supplemented the AR with TPNHPA-0155 through 0163. Subject to the BLM’s production of additional supplemental items, Intervening Plaintiffs conditionally deem the record to be settled on this score.

E. Thacker Pass Project Environmental Impact Statement Alternatives Development Meeting Summaries, TPNHPA-086

1 BLM has supplemented the AR with TPNHPA-0155 through 0163. Subject to the
2 BLM producing further supplemental items, Intervening Plaintiffs conditionally deem the
3 record to be settled on this score.

4 **F. Thacker Pass EIS Biweekly Cooperating Agency Coordination**
5 **Meeting, TPNHPA-0101**
6

7 This email string refers to a “Biweekly Cooperating Agency Coordination
8 Meeting.” BLM has provided an additional document, TPNHPA-0183, on November 23,
9 2021, that appears to be responsive supplementation. Subject to any further
10 supplemental items being identified by BLM on this topic, Intervening Plaintiffs
11 conditionally consider the AR to be supplemented and settled as to this request.

12 **G. Email string re Thacker Pass EIS environmental justice meeting,**
13 **TPNHPA-084**

14 This email string refers to a “Thacker Pass EIS environmental justice” discussion
15 meeting agenda which is not attached to the email. The meeting agenda has not been
16 produced and this item remains open.

17 **H. Pandemic harm survey, TPNHPA-76**

18 In this email string dated March 2020, a BLM manager requested information on
19 whether the pandemic will harm government-to-government communications and
20 references, and stated he was going to put responsive data on an excel spreadsheet.
21 BLM has stated that it would search for and provide the spreadsheet if located. No
22 responsive documents have been added to the record and this item remains open.

23 **I. Nonsequential Bates numbers**

24 The following gaps in Bates numbers are present in the NHPA AR, with no
25 explanation:

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CERTIFICATE OF SERVICE

I hereby certify that on Monday, November 29, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/Terry Lodge
Ohio Bar No. 29271

EXHIBIT INDEX

EXHIBIT	DESCRIPTION	# OF PAGES
1	Map of Paiute Camps In Area of Potential Effects	2