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**UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA**

WESTERN WATERSHEDS PROJECT,	)	Case No. 3:21-cv-103-MMD-CLB
<i>et al.</i> ,	)	
Plaintiffs,	)	<b>RENO-SPARKS INDIAN</b>
	)	<b>COLONY AND ATSA</b>
and	)	<b>KOODAKUH WYH NUWU/</b>
	)	<b>PEOPLE OF RED MOUNTAIN</b>
RENO-SPARKS INDIAN COLONY and ATSA	)	<b>MOTION TO INTERVENE</b>
KOODAKUH WYH NUWU/ PEOPLE OF RED	)	
MOUNTAIN	)	
	)	
Plaintiff-Intervenor,	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF THE	)	
INTERIOR, <i>et al.</i> ,	)	
	)	
Defendants	)	
	)	

1 and )  
 2 )  
 3 LITHIUM NEVADA CORP. )  
 4 )  
 5 Defendant-Intervenor )  
 6 \_\_\_\_\_ )  
 7

8 The Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of  
 9 Red Mountain, by and through local counsel Julie Cavanaugh-Bill and out-of-  
 10 state counsel William Falk and Terry Lodge (who are submitting *pro hac vice*  
 11 applications and will comply with LR IA 11-2 within 14 days), hereby move for  
 12 leave to intervene as plaintiffs in the captioned action as a matter of right,  
 13 pursuant to Fed.R.Civ.P. 24(a)(2). Alternatively, the Reno-Sparks Indian Colony  
 14 and Atsa koodakuh wyh Nuwu/People of Red Mountain move to be permitted to  
 15 intervene as plaintiffs pursuant to Fed.R.Civ.P. 24(b).

16 In support of their motion, the Reno-Sparks Indian Colony and Atsa  
 17 koodakuh wyh Nuwu/People of Red Mountain respectfully refer the Court to their  
 18 memorandum of points and authorities in support of their motion, and  
 19 the proposed complaint attached hereto.

20 Dated this 20th day of July, 2021.

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## **Memorandum of Points and Authorities**

The Applicants-Intervenors Reno-Sparks Indian Colony, a recognized tribe and Atsa koodakuh wyh Nuwu/People of Red Mountain, an unincorporated association (together “Intervenors”) submit this memorandum supporting their motion to intervene as plaintiffs in this case.

The Reno-Sparks Indian Colony (“RSIC”) is a federally recognized tribal government formed in 1936 under the federal Indian Reorganization Act. Located in Reno, Nevada, the RSIC consists of 1,157 members from three Great Basin Tribes – the Paiute, the Shoshone and the Washoe. RSIC attaches cultural and religious significance to historic properties that will be affected by the Thacker Pass Lithium Mine Project (“the Project”).

Atsa koodakuh wyh Nuwu/People of Red Mountain (“the People”) is an unincorporated association of indigenous peoples who share the common cause of enforcing their rights under federal law as members of the Fort McDermitt Paiute and Shoshone Tribe.

## **Introduction and Background**

The Intervenors seek to intervene in this action to challenge the Bureau of Land Management’s (“BLM”) Record of Decision (“ROD”) approving the Thacker Pass Lithium Mine Project Plan of Operations. As noted above, the Reno-Sparks Indian Colony attaches cultural and religious significance to historic properties that will be affected by the Project. Declaration of Michon R. Eben, ¶ 6. Atsa

1 koodakuh wyh Nuwu/People of Red Mountain (“the People”), located somewhat  
2 nearer to the Project, consists of members of the Fort McDermitt tribe who hold,  
3 preserve and pass on oral histories about Thacker Pass (“Peehee mu’huh”),  
4 regularly perform ceremonies in Peehee mu’huh, hunt and gather in Peehee  
5 mu’huh, plan on performing ceremony, hunting, and gathering in Peehee mu’huh  
6 in the future, and are concerned with the Project’s effects on historic properties  
7 located within its footprint. Declaration of Daranda Hinkey, ¶¶ 3-4. The original  
8 name for Thacker Pass in the local Numic dialect spoken by members of Atsa  
9 koodakuh wyh Nuwu/People of Red Mountain is “Peehee mu’huh,” which will be  
10 used instead of “Thacker Pass.”

11 Intervenor maintain that BLM’s ROD violated the National Historic  
12 Preservation Act (“NHPA”) 16 U.S.C. §§ 470 *et seq.*, and the Administrative  
13 Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* because BLM issued the ROD  
14 before complying with the NHPA’s Section 106 requirements requiring  
15 meaningful government-to-government consultation with Indian tribes and before  
16 complying with NHPA’s Section 106 requirements pertaining to seeking and  
17 considering the views of the public in a manner that reflects the nature and  
18 complexity of the undertaking. Notwithstanding these violations, Defendant-  
19 Intervenor Lithium Nevada Corp. (“Lithium Nevada”) still intends to begin  
20 destructive, mechanical trenching operations in Peehee mu’huh as soon as July  
21 29, 2021.



1 action.” *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir.  
2 2011).

3  
4 In evaluating whether Fed.R.Civ.P. 24(a)(2) requirements are met, the  
5 Court follows “practical and equitable considerations” and construes the rule  
6 “broadly in favor of proposed intervenors.” *Id.* The court does so because “a  
7 liberal policy in favor of intervention serves both efficient resolution of issues and  
8 broadened access to the courts.” *Id.*

9 Fed. R. Civ. P. 24(b) provides that “[o]n timely motion, the court may  
10 permit anyone to intervene who has a claim or defense that has a claim or  
11 defense that shares with the main action a common question of law or fact.”

## 12 Argument

### 13 14 **I. Intervenors’ motion is timely because it is made early in the** 15 **proceedings, does not prejudice the other parties, and the** 16 **Intervenors have only recently learned of the threat to their** 17 **interests.** 18

19 Courts weigh three factors in determining whether a motion to intervene is  
20 timely: “(1) the stage of the proceeding at which an applicant seeks to intervene;  
21 (2) the prejudice to other parties; and (3) the reason for and length of the delay.”  
22 *Peruta v. County of San Diego*, 771 F.3d 570 (9th Cir. 2014). “Although delay  
23 can strongly weigh against intervention, the mere lapse of time, without more, is  
24 not necessarily a bar to intervention.” *US v. Alisal Water Corp.*, 370 F.3d 915,  
25 921 (9th Cir. 2004)

1 Intervenor seek intervention at an early stage of the proceedings. There  
2 have been no hearings or rulings on substantive matters. The BLM has not yet  
3 filed and served the administrative record with the Court. Intervenor are moving  
4 to intervene over two months before the Plaintiffs' motion for summary judgment  
5 and brief in support of their motion for judgment is due on September 24, 2021,  
6 under the Joint Case Management Plan, and nearly five months before the  
7 deadline for the Defendants' replies in support of summary judgment on  
8 December 12, 2021.

9 Intervenor are moving to intervene before the preliminary injunction  
10 hearing scheduled for July 21, 2021. In *Idaho Farm Bureau Federation v. Babbitt*,  
11 58 F.3d 1392, (9th Cir. 1995), the 9th Circuit ruled that intervention by right was  
12 properly granted where intervention was sought before there were hearings or  
13 rulings on substantive matters and, although one party had moved for preliminary  
14 injunction, intervention was sought before the preliminary injunction hearing. In  
15 *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998),  
16 the D.C. Circuit found that a district court erred when it denied an applicant's  
17 motion to intervene even after "the district court had entered only a preliminary  
18 injunction, not a permanent injunction."

19 "In evaluating prejudice, courts are concerned when 'relief from long-  
20 standing inequities is delayed.'" *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659  
21 (9th Cir.1978).

1           The parties will not be prejudiced by granting the Intervenor's Motion to  
2 Intervene. Granting the motion would not delay relief from long-standing  
3 inequities because the inequities are not long-standing. It has been less than five  
4 months since the complaint in this case was filed. As stated above, there have  
5 been no hearings or rulings on substantive matters. The BLM and LNC do not  
6 have to file their separate replies in support of their motions for summary  
7 judgment until December 13, 2021. The soonest that relief could be granted to  
8 any party, then, is more than 5 months away.

9           The short delay between the Plaintiffs' filing and the Intervenor's request to  
10 intervene is first attributable to the late stage at which the Intervenor became  
11 aware of the Thacker Pass Lithium Mine Project. Atsa koodakuh vyh  
12 Nuwu/People of Red Mountain did not learn about the Project until February,  
13 2021. Hinkey Declaration, ¶ 5. Despite the religious and cultural significance the  
14 Reno-Sparks Indian Colony ("RSIC") attaches to Peehee mu'huh, RSIC did not  
15 learn about the Project or plans to physically disturb the site pursuant to a  
16 Historic Properties Treatment Plan until April, 2021. Eben Declaration, ¶ 9.  
17 Regardless, "[a]lthough delay can strongly weigh against intervention, the mere  
18 lapse of time, without more, is not necessarily a bar to intervention." *US v. Alisal*  
19 *Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)

20           The Project was fast-tracked at a time when the worst pandemic in at least  
21 a hundred years was raging around the world. The Project's public commenting  
22 period was held online while most of Atsa koodakuh vyh Nuwu live on the Fort



1 McDermitt Paiute-Shoshone Reservation without reliable internet access.

2 Meanwhile, RSIC never received notice of the Project.

3 It has been difficult to ascertain what NHPA section 106 consultation the  
4 BLM actually has engaged in. Inexplicably, the Notice of Availability of the Final  
5 Environmental Impact Statement for the Proposed Thacker Pass Project,  
6 published December 4, 2020, stated that “[t]he BLM and Nevada SHPO recently  
7 executed a Memorandum of Agreement to resolve adverse effects to the 57  
8 historic properties.”

9 But, then, the Record of Decision contradicted the Notice of Availability  
10 and stated:

11 “In accordance with the requirements of Section 106 of the National Historic  
12 Preservation Act, the BLM coordinated and consulted with the State Historic  
13 Preservation Office (SHPO). The BLM received a letter dated Wednesday,  
14 October 7, 2020, providing the SHPO’s concurrence on the cultural resource report  
15 and finding of adverse effect. **A Memorandum of Agreement and treatment plan**  
16 **are being prepared**, and the BLM will continue to consult with the SHPO on the  
17 Project and treatment plan in accordance with programmatic protocols.” (emphasis  
18 added).

19  
20 Moreover, on June 10, 2021, counsel for Intervenor filed a Freedom of  
21 Information Act Request for documentation of consultations the BLM has  
22 engaged in with Indian Tribes. However, despite being well outside the statutory  
23 timetable for the BLM to provide that documentation, BLM has not provided it.  
24 Another reason for the delay in filing is that the Intervenor sought to gain the  
25 BLM’s agreement to delay physical disturbance of Peehee mu’uh until the  
26 Intervenor was adequately consulted under the NHPA without resort to legal

1 action. See: RSIC June 3 Correspondence to BLM Winnemucca; Atsa koodakuh  
2 wyh Nuwu June 24 Correspondence to BLM Winnemucca.

3 It wasn't until May 27, 2021, when the Plaintiffs moved for a preliminary  
4 injunction, that the Intervenors were made aware of the imminence of Lithium  
5 Nevada's plans to begin physical disturbance of historic properties in Peehee  
6 mu'huh. Based on the Plaintiffs' filings, it seems these plans surprised them, too.

7 On June 3, 2021, RSIC delivered a letter to Ester McCullough, District  
8 Manager of the BLM, Winnemucca District Office, and Ken Loda, BLM,  
9 Winnemucca Project Manager. Bryan Hockett, BLM Nevada State Archaeologist,  
10 and Shannon Deep, BLM Winnemucca Archaeologist, were copied with the  
11 letter. This letter described the BLM's failure to adequately consult regional tribes  
12 and requested that the BLM halt any plans for mechanical trenching operations  
13 and any other construction activities as part of the Project until meaningful  
14 government-to-government consultation with all of the tribes that are connected  
15 to Thacker Pass has concluded.

16 On June 24, 2021, Atsa koodakuh wyh Nuwu/People of Red Mountain,  
17 through counsel, delivered a letter to McCullough, Loda, Hockett, and Deep,  
18 requesting that the BLM prevent any desecration of Peehee mu'huh until Atsa  
19 koodakuh wyh Nuwu/People of Red Mountain have had an adequate time to  
20 consult with BLM about mitigating adverse effects to traditional cultural, and  
21 historic, properties in Peehee mu'huh.

On July 12, 2021, RSIC received a short response from Kathleen Rehberg, Field Manager, BLM Humboldt River Field Office, denying RSIC's request for NHPA, Section 106 consultation on historic properties affected by the Thacker Pass Project. The letter stated that the consultation period for the public and Native American tribes opened in January 2020 and closed November 5, 2020. With this illegal rejection of RSIC's request for government-to-government consultation under the NHPA, section 106, it became clear to RSIC that it must seek a court order to engage in NHPA, Section 106 consultation. See: Kathleen Rehberg Letter to RSIC.

**II. The Intervenor's interest in consultation under the Section 106 process is significantly protectable.**

"An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). "The 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980))

Here, the Intervenor's have a significant interest in ensuring that land they have often hunted, gathered, planted, and prayed on; the site of a massacre of their ancestors; a place where their ancestors hid from soldiers coming to

1 violently force them on to reservations; artifacts created by their ancestors; an  
2 obsidian quarry used by their ancestors; burial sites, and other cultural  
3 resources, are not destroyed or desecrated by activities connected to a massive  
4 lithium mine before the Intervenor, the general public, and Indian tribes have  
5 been meaningfully consulted. This interest is clearly protected by the National  
6 Historic Preservation Act and Administrative Procedure Act.

7 There is a relationship between the Intervenor's legally protected interest  
8 and the Plaintiff's claims. The Plaintiff seeks to enjoin construction of the Thacker  
9 Pass Lithium Mine because the BLM failed to comply with the National  
10 Environmental Policy Act. The Intervenor seeks to enjoin construction of the Mine  
11 because the BLM failed to comply with the Section 106 consultation  
12 requirements of the National Historic Preservation Act.

13 The Plaintiff and the Intervenor attempt two similar routes to the same  
14 destination. In fact, the 9th Circuit has stated:

15 "A close statutory analog to NHPA is the National Environmental Policy Act  
16 ("NEPA"), 42 U.S.C. §§ 4321-4370. What § 106 of NHPA does for sites of historical  
17 import, NEPA does for our natural environment. Our circuit has already noted the  
18 parallel: Both Acts create obligations that are chiefly procedural in nature; both  
19 have the goal of generating information about the impact of federal actions on the  
20 environment; and both require that the relevant federal agency carefully consider  
21 the information produced. That is, both are designed to insure that the agency  
22 "stop, look, and listen" before moving ahead." *San Carlos Apache Tribe v. US*, 417  
23 F.3d 1091, 1097 (9th Cir. 2005) (internal citation omitted).

24  
25 It is practical and compatible with efficiency and due process to allow  
26 Intervenor to intervene. Intervenor has standing to file their proffered  
27 complaint on behalf of their members, under the NHPA and APA. If Intervenor

1 instead are forced to file separately, their claims more than likely would be  
2 combined with the Plaintiffs' claims anyway. If the court denies the Intervenor's  
3 Motion to Intervene and the Plaintiffs' Motion for Preliminary Injunction under the  
4 NEPA, then Intervenor would file a separate complaint, file for a temporary  
5 restraining order, and seek a preliminary injunction under the NHPA. It would be  
6 more efficient for the court and for all the parties to resolve the issues in one  
7 preliminary injunction hearing.

8 **III. Ruling in favor of the BLM and Lithium Nevada would impede the**  
9 **Intervenor's ability to protect their interest in NHPA consultation.**  
10

11 The Intervenor is so situated that the disposition of the action may impair or  
12 impede their ability to protect their interests. The Ninth Circuit follows the  
13 guidance of Rule 24 advisory committee notes "that state that '[i]f an absentee  
14 would be substantially affected in a practical sense by the determination made in  
15 an action, he should, as a general rule, be entitled to intervene.'" *Southwest*  
16 *Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).  
17 Under the NHPA, the Intervenor has a significantly protectable interest in  
18 meaningful and adequate consultation with the BLM before it permits the  
19 desecration of Peehee mu'huh and before Lithium Nevada destroys Peehee  
20 mu'huh. If the BLM and Lithium Nevada prevail, a massive open pit mine will be  
21 constructed on a massacre site, historic properties, and hunting and gathering  
22 grounds important to the region's Tribes.

1 To make matters more urgent, it appears that the Defendants and Lithium  
2 Nevada plan to desecrate Peehee mu'huh quickly if the Plaintiffs' Motion for  
3 Preliminary Injunction is denied. On May 13, 2021, Lithium Nevada informed  
4 Plaintiffs that it intended to begin ground disturbance as soon as June 23, 2021.  
5 On May 27, 2021, the Plaintiffs moved for a Preliminary Injunction. On June 8,  
6 2021, in exchange for a two-week extension to file response briefs to the  
7 Plaintiffs' Motion for Preliminary Injunction, the BLM and Lithium Nevada  
8 stipulated that no Project area ground disturbance activities would occur before  
9 July 29, 2021.

10 The Plaintiffs have moved for a Preliminary Injunction to enjoin mechanical  
11 trenching operations on historic properties in Thacker Pass ostensibly authorized  
12 by a Historic Properties Treatment Plan under the NHPA. The Preliminary  
13 Injunction hearing is currently scheduled for July 21, 2021. If this Preliminary  
14 Injunction hearing is disposed of without the Intervenor and their claims under  
15 the NHPA, it is likely the BLM and Lithium Nevada will desecrate Peehee mu'huh  
16 in violation of the NHPA. This will impair the Intervenor's interest in meaningful  
17 consultation with the BLM about the destruction and desecration of land to which  
18 the Intervenor attach religious and cultural significance to before that land is  
19 destroyed and desecrated.

20 **IV. The Intervenor is not adequately represented because no**  
21 **present party will make all of the Intervenor's arguments, no**  
22 **present party is capable of making such arguments, and the**  
23 **Intervenor offer necessary elements to the proceeding.**  
24

1 “The burden on proposed intervenors in showing inadequate representation is  
2 minimal, and would be satisfied if they could demonstrate that representation of  
3 their interests ‘may be’ inadequate.” *Trbovich v. United Mine Workers*, 404 U.S.  
4 528, 538 n. 10 (1972). The Ninth Circuit “considers three factors in determining  
5 the adequacy of representation: (1) whether the interest of a present party is  
6 such that it will undoubtedly make all of a proposed intervenor's arguments; (2)  
7 whether the present party is capable and willing to make such arguments; and  
8 (3) whether a proposed intervenor would offer any necessary elements to the  
9 proceeding that other parties would neglect.” *California v. Tahoe Reg'l Planning*  
10 *Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

11 The Intervenor's interest in being consulted about activities that would  
12 desecrate land to which they attach cultural and religious significance under the  
13 NHPA is not adequately represented by the current parties in the action. As  
14 Lithium Nevada has pointed out in its Response to the Plaintiffs' Motion for  
15 Preliminary Injunction, the Plaintiffs have not challenged the Historic Properties  
16 Treatment Plan approved by the BLM and State Historic Preservation Office  
17 under the NHPA. None of the Plaintiffs represent the interests of Tribes or Native  
18 Americans who visit and use Peehee mu'huh. Nor do the Plaintiffs bring any  
19 claims under the NHPA.

20 It cannot be said, then, that the Plaintiffs will “undoubtedly” make all of the  
21 Intervenor's arguments. So far, in their Complaint, their Motion to Intervene, and  
22 their Reply in Support of Motion for Preliminary Injunction, the Plaintiffs have not

1 made *any* arguments under the NHPA. Moreover, without any Tribal or Native  
2 American plaintiffs, the Plaintiffs are not capable of making these arguments.  
3 Finally, the BLM's and Lithium Nevada's plan to begin physical disturbance of  
4 Peehee mu'huh under the Historic Property Treatment Plan are governed by the  
5 NHPA. Arguments under the NHPA are necessary elements to the proceeding  
6 that the current parties neglect. Therefore, representation of the Intervenor's  
7 interests is inadequate and they should be permitted to intervene as a matter or  
8 right.

9 **V. The Intervenor's meet the standards for permissive intervention, too.**

10 If the Court does not allow the Intervenor's to intervene as of right, the  
11 Court should grant the Intervenor's permissive intervention. The Intervenor's have  
12 a claim that shares with the main action a common question of law or fact.  
13 Namely, whether the BLM has fulfilled its obligations in permitting the Thacker  
14 Pass Lithium Mine Project.

15 Fed. R. Civ. P. 24(b)(3) requires that, in exercising discretion to allow  
16 permissive intervention, "the court must consider whether the intervention will  
17 unduly delay or prejudice the adjudication of the original parties' rights." As  
18 described above, no substantive hearings or rulings have been made. The action  
19 is still nearly five months before the Court would rule on summary judgment,  
20 which gives the parties ample time to respond to the Intervenor's claims. So,  
21 granting the Intervenor's permissive intervention will not unduly delay or prejudice  
22 the original parties and permissive intervention is proper.



1       **WHEREFORE**, the Reno-Sparks Indian Colony and Atsa koodakuh wuh  
2 Nuwu/People of Red Mountain pray the Court grant them leave to intervene in  
3 this matter, pursuant to Fed.R.Civ.P. 24(a)(2) or, alternatively, pursuant to  
4 Fed.R.Civ.P. 24(b).

5  
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27

**CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

By: /s/Julie Cavanaugh-Bill  
Julie Cavanaugh-Bill (State Bar No. 11533)

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