

Julie Cavanaugh-Bill (State Bar No. 11533)
 Cavanaugh-Bill Law Offices
 Henderson Bank Building
 401 Railroad Street, Suite 307
 Elko, NV 89801
 (775) 753-4357
 julie@cblawoffices.org

William Falk (Utah Bar No. 16678)
 2980 Russet Sky Trail
 Castle Rock, CO
 (319) 830-6086
 falkwilt@gmail.com

Terry J. Lodge (Ohio Bar No. 29271)
 316 N. Michigan St., Suite 520
 Toledo, OH 43604-5627
 (419) 205-7084
 tjlodge50@yahoo.com

Attorneys for Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,	)	Case No.: 3:21-cv-80-MMD-CLB
	)	(LEAD CASE)
Plaintiffs,)	
)	
v.)	
)	
ESTER M. MCCULLOUGH, et al.,	)	INTERVENING PLAINTIFFS'
	)	MOTION FOR
Defendants,	)	RECONSIDERATION OF THIS
and	)	COURT'S ORDER DENYING
	)	PRELIMINARY INJUNCTION
LITHIUM NEVADA CORPORATION,	)	<u>REDACTED VERSION</u>
)	
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.

The Reno-Sparks Indian Colony (RSIC) and Atsa Koodakuh wyh Nuwu/People of Red Mountain (together “Intervening Plaintiffs”) respectfully move this Court to reconsider its September 3, 2021 order denying the Intervening Plaintiffs’ Motion for Preliminary Injunction, under FRCP 60(b)(2) and Local Rule 59-1(a). Alternatively, Intervening Plaintiffs respectfully move this Court to amend its judgment pursuant to FRCP 52(b).

Reconsideration or amendment is proper for several reasons. First, in its order, this Court overlooked or misunderstood controlling Supreme Court and Ninth Circuit precedent giving the Intervening Plaintiffs, as interested members of the public who have demonstrated a sufficient and concrete interest in the preservation of the historical properties in the Thacker Pass project area, standing to challenge the Bureau of Land Management’s (BLM) failure, before the issuance of the Record of Decision (ROD), to

1 provide the Fort McDermitt Paiute-Shoshone Tribe, the Pyramid Lake Paiute Tribe, the
2 Summit Lake Paiute Tribe, and the Winnemucca Indian Colony “a reasonable
3 opportunity to identify their concerns about historic properties, advise on the
4 identification and evaluation of historic properties, articulate their views on the
5 undertaking’s effects on such properties, and participate in the resolution of adverse
6 effects” in contravention of 36 CFR § 800.2(c)(2)(ii)(A).

7 Second, this court wrote “A court may reverse an agency decision *only* ‘if it is
8 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
9 citing 5 USC § 706(2)(A) (emphasis added). But, 5 USC § 706(2) creates 5 more
10 grounds for holding agency unlawful or setting agency action aside beyond Section A.
11 This Court overlooked 5 USC § 706(2)(D) which requires this Court to “hold unlawful
12 and set aside agency action, findings, and conclusions found to be without observance
13 of procedure required by law.” BLM’s failure to consult with Fort McDermitt, Summit
14 Lake, and the Winnemucca Indian Colony on all the things required by 36 CFR § 800
15 was “without observance of procedure required by law.” If this Court considered the so-
16 called consultation that BLM claims with Fort McDermitt, Summit Lake, and
17 Winnemucca Indian Colony, then case law shows how BLM’s efforts were insufficient.

18 Therefore, the Intervening Plaintiffs are likely to succeed on the merits of this
19 claim, or, at the very least, have established serious questions going to the merits of this
20 claim. In either articulation, this Court’s proper application of the Supreme Court’s and
21 Ninth Circuit’s current standing analysis and 5 USC § 706(2)(D) would result in the
22 Intervening Plaintiffs meeting the requisite likelihood of success on the merits *Winter*
23 factor.

1 The third reason reconsideration or amendment is proper is an abundance of
2 new evidence supporting the Intervening Plaintiffs' contentions that the Thacker Pass
3 project area encompasses part of the September 12, 1865 massacre site where at least
4 31 Paiute men, women, and children were murdered by federal soldiers; that the
5 specific archaeological digs described in the Historic Properties Treatment Plan (HPTP)
6 will disturb the massacre site and human remains; and that many members of the
7 People of Red Mountain are directly related to the Paiutes murdered in Thacker Pass.
8 (Exhibit 1, Dorece Antonio Declaration)

9 This new evidence includes a September 30, 1865 account of the massacre in
10 *The Owyhee Avalanche* newspaper. (Exhibit 2). This account, published just several
11 weeks after the massacre, described the soldiers as approaching the Paiute camp from
12 the east. This makes the most logical escape route to the west and into the project area.
13 The account also stated that the soldiers "fought the scattering devils over several miles
14 of ground for three hours," which means the massacre was almost certainly not
15 confined to the Paiute Camps that Lithium Nevada located in its proffered map.

16 The new evidence also includes two eyewitness accounts of the Thacker Pass
17 Massacre, both of them given to the well-known American labor organizer Big Bill
18 Haywood and recounted in *The Autobiography of Big Bill Haywood*. (Exhibit 3). The first
19 account comes from Jim Sackett, one of the soldiers in the 1st Nevada Cavalry who
20 participated in the massacre. The second comes from one of the massacre survivors, a
21 Paiute man named Ox Sam, whom many of the People of Red Mountain directly
22 descend from. These two accounts also confirm an east to west approach of the Paiute
23 Camp and make it almost certain that people ran west into the project area to escape

1 from the soldiers. So far, the Intervening Plaintiffs have found the Thacker Pass
 2 Massacre described in 6 publicly available sources¹. This undermines the BLM's claims
 3 that its efforts were reasonable or in good faith.

4 This new evidence supports a fresh look at the irreparable harm the Intervening
 5 Plaintiffs will suffer if BLM proceeds with the HPTP and means that the Intervening
 6 Plaintiffs meet the irreparable harm *Winter* factor for preliminary injunctions. Because
 7 the Intervening Plaintiffs also meet the other two *Winter* factors, this court should
 8 reconsider, and grant, the Intervening Plaintiffs' motion for preliminary injunction.

9 10 **I. Legal Standards For Reconsideration or Amendment**

11
12 Federal Rule of Civil Procedure 60(b)(2): "On motion and just terms, the court
 13 may relieve a party or its legal representative from a final judgment, order, or
 14 proceeding for... newly discovered evidence."

15 Local Rule 59-1(a): "A party seeking reconsideration under this rule must state
 16 with particularity the points of law or fact that the court has overlooked or
 17 misunderstood...The court possesses the inherent power to reconsider an interlocutory
 18 order for cause, so long as the court retains jurisdiction. Reconsideration also may be
 19 appropriate if (1) there is newly discovered evidence that was not available when the
 20 original motion or response was filed, (2) the court committed clear error or the initial
 21 decision was manifestly unjust..."

¹ In addition to 1868 Field Notes, *Owyhee Avalanche* article, and *The Autobiography of Big Bill Haywood*, descriptions of the Thacker Pass Massacre in: Angel, Myron (editor). *History of Nevada*, Thompson and West, 1881, pg. 174; Michno, Gregory. *The Deadliest Indian War in the West: The Snake Conflict, 1864-1868*. Caxton Press, 2007, pgs. 131-32; and Smith, Philip D. *The Sagebrush Soldiers: Nevada's Volunteers in the Civil War*. PD Smith, 1962, pgs. 79-80.

1 F.R.C.P. 52(b) provides that, upon motion by a party, the court may amend its
2 findings or make additional findings and may amend the judgment. “A motion made
3 pursuant to Rule 52(b) will only be granted when the moving party can show either
4 manifest errors of law or fact, or newly discovered evidence; it is not an opportunity for
5 parties to relitigate old issues or to advance new theories.” *Penncro Assocs., Inc. v.*
6 *Sprint Spectrum L.P.*, No. 04-2549-JWL, 2006 WL 1999121, at *2 (D. Kan. July 17,
7 2006) (citing *Myers v. Dolgencorp, Inc.*, No. 04-4137-JAR, 2006 WL 839458, at *1 (D.
8 Kan. Mar. 25, 2006)).

9 So long as both are filed within 28 days, a motion under Rule 52(b) may
10 accompany a Rule 59 motion. Fed. R. Civ. P. 52(b).

11 According to F.R.C.P. 59(a)(1)(B), the court may grant a new trial on some or all
12 of the issues “for any reason for which a rehearing has heretofore been granted in a suit
13 in equity in federal court.” Under Rule 59(a)(2), “[a]fter a nonjury trial, the court may, on
14 motion for a new trial, open the judgment if one has been entered, take additional
15 testimony, amend findings of fact and conclusions of law or make new ones, and direct
16 the entry of a new judgment.” “[T]he purpose of a Rule 59(a)(2) motion is to correct
17 manifest errors of law or fact, or, in some limited situations, to present newly discovered
18 evidence.” *Waugh v. Williams Cos., Inc. Long Term Disability*, 323 F. App’x 681, 684-85
19 (10th Cir. 2009) (internal citations and quotations omitted).

20 A Rule 59(e) motion is similarly limited. See *Adams v. Reliance Standard Life*
21 *Ins. Co.*, 225 F.3d 1179, 1186 n.5 (10th Cir. 2000). It provides the court with an
22 opportunity to correct manifest errors of law or fact, to hear newly discovered evidence,

1 or to consider a change in the law. *Servants of the Paraclete v. Does*, 204 F.3d 1005,
2 1012 (10th Cir. 2000).

3 **II. The Intervening Plaintiffs have successfully alleged procedural**
4 **standing.**
5

6 This Court denied consideration of the People of Red Mountain's claims under
7 NHPA because supposedly they lack prudential standing. ECF 92-6. This Court also
8 ruled that the Intervening Plaintiffs lacked standing to challenge BLM's failure to follow
9 the National Historic Preservation Act, Section 106 consultation procedure respecting
10 the Fort McDermitt Paiute-Shoshone Tribe, the Summit Lake Paiute Tribe, and the
11 Winnemucca Indian Colony.

12 It was improper to foreclose review of the BLM's lack of consultation with Fort
13 McDermitt, Summit Lake, and the Winnemucca Indian Colony on prudential standing
14 grounds, given the Supreme Court's and Ninth Circuit's current standing analyses in
15 Administrative Procedure Act (APA) cases.

16 This Court wrote: "RSIC's counsel argued at the Hearing that BLM violated the
17 consultation rights of the tribes it did consult with. But RSIC's counsel cannot make
18 such an argument on behalf of other tribes that he does not represent, who are not
19 participating in this case." Order. pg. 7. This is a misstatement of the Intervening
20 Plaintiffs' argument.

21 The Intervening Plaintiffs argue that BLM's consultation failures contravene the
22 procedural requirements of 36 CFR § 800.2(c)(2)(ii)(A). The Intervening Plaintiffs also
23 argue that BLM's issuance of the ROD "without seeking and considering the views of
24 the public in a manner that reflects the nature and complexity of the undertaking"
25 contravenes 36 CFR § 800.2(d)(1). Both of these failures violate *the Intervening*

1 *Plaintiffs' procedural rights*, as interested members of the public who have
2 demonstrated a sufficient and concrete interest in the preservation of historical
3 properties in the Thacker Pass project area.

4 When NHPA was enacted, Congress declared that “the spirit and direction of the
5 Nation are founded upon and reflected in its historic heritage;” that “historic properties
6 significant to the Nation’s heritage are being lost or substantially altered often
7 inadvertently, with increasing frequency;” and that “the preservation of this irreplaceable
8 heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic,
9 inspirational, economic, and energy benefits will be maintained and enriched for future
10 generations of Americans.” Section 1 of the National Historic Preservation Act, Pub. L.
11 No. 89-665, as amended by Pub. L. No. 96-515.

12 In an effort to preserve this “irreplaceable heritage,” NHPA obligates federal
13 agencies with statutory responsibilities to follow specific procedures to ensure that
14 federal agencies have adequate information before approving projects that will
15 adversely affect historic properties. In fact, NHPA’s implementing regulations at 36 CFR
16 § 800.1(a) state “The procedures in this part define how Federal agencies meet these
17 statutory responsibilities.” These implementing regulations also require that “[t]he
18 agency official shall acknowledge that Indian tribes and Native Hawaiian organizations
19 possess special expertise in assessing the eligibility of historic properties that may
20 possess religious and cultural significance to them.” 36 CFR § 800.4(c)(1).

21 Fort McDermitt, Summit Lake, and the Winnemucca Indian Colony, then,
22 “possess special expertise in assessing the eligibility of historic properties.” And, just
23 like the Intervening Plaintiffs, as members of the public who use and enjoy Thacker

1 Pass, have an actionable interest in ensuring that BLM consulted with other consulting
 2 parties like the Nevada State Historic Preservation Officer, the Intervening Plaintiffs
 3 have an actionable interest in ensuring that BLM consulted with Fort McDermitt, Summit
 4 Lake, and the Winnemucca Indian Colony.

5 **A. Intervening Plaintiffs’ Successfully Established Article III Standing**

6 The APA and National Historic Preservation Act (NHPA) grant the Intervening
 7 Plaintiffs a right to a review of whether the BLM properly observed the NHPA’s
 8 procedures. These procedures required BLM to provide a reasonable opportunity to the
 9 Fort McDermitt, Summit Lake, and Winnemucca Indian Colony tribes to consult on all of
 10 the issues described in 36 CFR § 800.2(c)(2)(ii)(A). Under current Supreme Court
 11 procedural injury and prudential standing jurisprudence, plaintiffs who successfully
 12 establish Article III standing through procedural injury and who fall within the “zone of
 13 interests” protected by the relevant statute, are free to challenge BLM’s failure to
 14 adequately consult with tribes who were proper consulting parties, under NHPA’s
 15 implementing regulations.

16 To establish Article III, constitutional standing, “[t]he plaintiff must have (1)
 17 suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
 18 defendant, and (3) that is likely to be redressed by a favorable judicial decision.”
 19 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016). A
 20 plaintiff may satisfy the injury-in-fact requirement by asserting a “procedural injury.”
 21 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 8 (1992).

22 “To establish procedural standing, the plaintiff must show: (1) that it has been
 23 accorded a procedural right to protect its concrete interests, and (2) that it has a

1 threatened concrete interest that is the ultimate basis of its standing.” *Churchill County*
2 *v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998). “The requisite weight of proof for each
3 element of the test [for standing] is lowered...for ‘procedural standing.” *Id.* “Procedural
4 standing is standing based on a plaintiff’s procedural injury. A plaintiff may claim
5 ‘procedural standing’ when, for example, it seeks ‘to enforce a procedural requirement
6 the disregard of which could impair a concrete interest of the plaintiffs.” *Id.*

7 The Ninth Circuit has noted that “The Supreme Court recognized the lower
8 standards of proof for such procedural standing in a footnote:

9
10 There is much truth to the assertion that ‘procedural rights’ are special: The person who has been
11 afforded a procedural right to protect his concrete interests can assert that right without meeting
12 all the normal standards for redressability and immediacy. Thus, under our case law, one living
13 adjacent to the site for proposed construction of a federally licensed dam has standing to
14 challenge the licensing agency’s failure to prepare an environmental impact statement, even
15 though he cannot establish with any certainty that the statement will cause the license to be
16 withheld or altered, and even though the dam will not be completed for many years.

17
18 *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n. 7).

19
20 Here, the Intervening Plaintiffs seek to enforce NHPA’s procedural requirements,
21 the disregard of which could impair the Intervening Plaintiffs use and enjoyment of
22 Peehee mu’huh (Thacker Pass). The Intervening Plaintiffs are accorded a procedural
23 right to protect their interests under the Administrative Procedure Act, 5 U.S.C., § 702.
24 The Intervening Plaintiffs have also shown that they have a threatened concrete interest
25 that is the ultimate basis of their standing.

26 Specifically, the Intervening Plaintiffs allege concrete aesthetic interests in the
27 enjoyment of Peehee mu’huh as a site for ceremony, for education about tribal history
28 including the two massacres that happened in Peehee mu’huh, for learning about the
29 artifacts and practices of their ancestors, and for hunting and gathering. They also

1 allege that they will continue visiting, studying their ancestors' artifacts, practicing
2 ceremony, and hunting and gathering in Peehee mu'huh in the future.

3 Both the construction of the mine and the prerequisite archaeological digs will
4 harm the Intervening Plaintiffs' ability to use and enjoy Peehee mu'huh. Providing any or
5 all of the Indian tribes who attach religious and cultural significance to Peehee mu'huh
6 including RSIC – and also including Fort McDermitt, Summit Lake, and the Winnemucca
7 Indian Colony – a reasonable opportunity to identify their concerns about historic
8 properties, advise on the identification and evaluation of historic properties, articulate
9 their views on the undertaking's effects on such properties, and participate in the
10 resolution of adverse effects, as required by NHPA, could have caused the Record of
11 Decision to be withheld or altered so that the Intervening Plaintiffs' use and enjoyment
12 of Peehee mu'huh was not affected. Therefore, RSIC and the People of Red Mountain
13 have a concrete interest in the BLM making a reasonable effort to consult with other
14 Tribes.

15 For the other two Article III standing requirements, the Intervening Plaintiffs'
16 injury is "fairly traceable" to BLM's failure to adequately consult and to take into account
17 information about cultural and historical resources in Peehee mu'huh and how those
18 effects may be avoided or mitigated. Finally, keeping in mind that "Plaintiffs alleging
19 procedural injury can often establish redressability with little difficulty, because they
20 need to show only that the relief requested – that the agency follow the correct
21 procedures – may influence the agency's ultimate decision of whether to take or refrain
22 from a certain action," the Intervening Plaintiffs possess oral history and knowledge of
23 traditional practices in Peehee mu'huh that the BLM has already admitted it was not

1 aware of. *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th
 2 Cir. 2008). This may influence the agency's ultimate decision of how to treat historic
 3 properties in Thacker Pass.

4
 5 **B. Intervening Plaintiffs successfully meet the “zone of interests” test and,**
 6 **therefore, establish prudential standing.**

7
 8 “The Supreme Court has long held that a person suing under the APA must
 9 satisfy not only Article III’s standing requirements, but an additional test: The interest he
 10 asserts must be ‘arguably within the zone of interests to be protected or regulated by
 11 the statute’ that he says was violated.” *Match-E-Be-Nash-She-Wish Band v. Patchak*,
 12 567 US 209; 132 S. Ct. 2199, 2210, 183 L.Ed.2d 211 (2012) (quoting *Association of*
 13 *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). When
 14 reviewing claims under the APA “prudential standing is satisfied when the injury
 15 asserted by a plaintiff arguably falls within the zone of interests to be protected or
 16 regulated by the statute in question.” *Federal Election Comm’n v. Akins*, 524 US 11, 20
 17 (1998).

18 “The prudential standing test [plaintiffs] must meet ‘is not meant to be especially
 19 demanding.’” *Match-E-Be-Nash-She-Wish Band v. Patchak*, at 2210 (quoting *Clarke v.*
 20 *Securities Industry Assn.*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).
 21 The Supreme Court applies “the test in keeping with Congress’s ‘evident intent’ when
 22 enacting the APA ‘to make agency action presumptively reviewable.’” *Id.* And, the
 23 Supreme Court has “always conspicuously included the word ‘arguably’ in the test to
 24 indicate that the benefit of any doubt goes to the plaintiff.” *Id.* “The test forecloses suit
 25 only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the

1 purposes implicit in the statute that it cannot reasonably be assumed that Congress
2 intended to permit the suit.” *Id.*

3
4 The Ninth Circuit has ruled that:

5
6 “Congress enacted NHPA based on its findings that ‘historical and cultural foundations of the
7 Nation should be preserved as a living part of our community life and development in order to
8 give a sense of orientation to the American people.’ NHPA was enacted to ‘encourage the public
9 and private preservation of all usable elements of the Nation’s historic built environment.”

10
11 *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1158 (9th Cir.
12 1998)(internal citations to the NHPA omitted).

13
14 The Intervening Plaintiffs, who regularly visit Peehee mu’huh for the area’s
15 historical and cultural foundations and who educate the public about these foundations,
16 fall squarely within the “zone of interests” protected by NHPA. The Intervening Plaintiffs
17 have suffered a legal wrong or injury that falls within the “zone of interests” created by
18 the NHPA. It is not clear why this Court doubts whether the Intervening Plaintiffs have
19 standing to challenge the BLM’s consultation with parties BLM was statutorily required
20 to consult with, but because “any doubt goes to the plaintiff,” the APA makes “agency
21 action presumptively reviewable,” and the Intervening Plaintiffs’ interests are more than
22 “marginally related” to the purposes implicit in the NHPA, they should be allowed to
23 challenge the BLM’s lack of consultation with Fort McDermitt, Summit Lake, and the
24 Winnemucca Indian Colony.

25 In support of its contention that RSIC’s counsel cannot make arguments on
26 behalf of other tribes that he does not represent, this Court cited *San Juan Citizens*
27 *Alliance v. Norton*, 586 F. Supp. 2d 1270, 1293 (D.N.M. 2008) (expressing skepticism
28 that a group of tribal members could assert claims on behalf of a tribe that declined to
29 join the litigation).

1 It is important to note that the Intervening Plaintiffs have offered a case directly
2 contradicting the skepticism expressed in *San Juan Citizens Alliance*. In *Montana*
3 *Wilderness Ass’n v. Fry*, F. Supp 2d 1127, 1150-51 (D. Montana 2004), the District of
4 Montana held that a Plaintiff who was not a member of the tribes that he alleged BLM
5 failed to consult with, under NHPA, could, nevertheless, challenge BLM’s failure to
6 consult those tribes. Specifically, the *Montana Wilderness Ass’n* court stated: “Any
7 member of the public who can demonstrate sufficient interest in the preservation of the
8 historical lands at issue falls within the zone of interests protected by the NHPA.” *Id.* In
9 *San Juan Citizens Alliance*, the court only expressed skepticism, in *dicta*, without
10 actually ruling on the issue. In *Montana Wilderness Ass’n*, by contrast, the court’s
11 statement was central to the ruling and is therefore of much greater precedential value.

12
13 **C. The general, prudential prohibition against a litigant raising another person’s**
14 **legal rights is not implicated here.**
15

16 It appears that this Court might be relying on the general prohibition on a litigant’s
17 raising another person’s legal rights. But, RSIC and the People of Red Mountain have
18 not rested their claims on the legal rights or interests of third parties. RSIC and the
19 People of Red Mountain have asserted their own procedural rights and interests in
20 NHPA’s consultation requirements. In cases like these, plaintiffs only have to show that
21 a decision to which NHPA obligations attach is made without the informed historical and
22 cultural considerations that NHPA requires because the harm that NHPA intends to
23 prevent has been suffered. See *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F. 3d
24 18, 28 (1st Cir. 2007); and *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th

1 Cir.1993) (holding ““NHPA is similar to NEPA except that it requires consideration of
2 historic sites, rather the environment.”).

3 This point is further supported by the text of the NHPA’s implementing
4 regulations which state: “The agency official shall acknowledge that Indian
5 tribes...possess special expertise in assessing the eligibility of historic properties that
6 may possess religious and cultural significance to them.” 36 CFR § 800.4(c)(1). By
7 failing to engage with tribes that possess this expertise, the BLM has committed a
8 procedural injury against the Intervening Plaintiffs and in doing so, the BLM has ensured
9 that the harm NHPA intends to prevent will be suffered.

10 Furthermore, the Ninth Circuit has warned district courts that even when
11 “possible relief may appear to some to be irrelevant, trivial, or prohibitively expensive, a
12 district court should beware of shortcutting the process which has been committed in
13 the first instance to the responsible federal agency.” *Tyler v. Cuomo*, 236 F.3d 1124,
14 1134 (9th Cir. 2000).

15 The Supreme Court has ruled that relying on prudential standing to decline
16 adjudication of claims properly within federal courts’ Article III jurisdiction “is in some
17 tension with our recent reaffirmation of the principle that a federal court’s obligation to
18 hear and decide cases within its jurisdiction is virtually unflagging.” *Lexmark Intern. v.*
19 *Static Control*, 134 S. Ct. 1377, 1386 (2014) (internal citations removed). When asking
20 whether RSIC or the People of Red Mountain fall within the class of plaintiffs whom
21 Congress has authorized to sue under the APA and NHPA, the Supreme Court asks
22 whether the plaintiff has a cause of action under the statute. *Id.* at 1387-88. That
23 question requires this Court “to determine the meaning of the congressionally enacted

1 provision creating a cause of action.” *Id.* at 1388. In doing so, this Court should “apply
2 traditional principles of statutory interpretation.” *Id.* “Just as a court cannot apply its
3 independent policy judgment to recognize a cause of action that Congress has denied,
4 it cannot limit a cause of action that Congress has created merely because ‘prudence’
5 dictates.” *Id.*

6 Congress created a cause of action for the Intervening Plaintiffs. The Intervening
7 Plaintiffs have successfully established Article III standing through the requirements for
8 pleading a procedural injury. The Intervening Plaintiffs fall squarely within the “zone of
9 interests” NHPA protects. So, this Court cannot decline to adjudicate the Intervening
10 Plaintiffs’ claims that BLM violated the Intervening Plaintiffs’ procedural rights as
11 described by NHPA merely because ‘prudence’ dictates.

12 **III. BLM’s Letters to Fort McDermitt, Summit Lake, Pyramid Lake, and the**
13 **Winnemucca Indian Colony Were Not Consultation**
14

15 If this Court considered Intervening Plaintiffs’ claims that BLM failed to
16 adequately consult with the Tribes BLM claims it consulted with, case law shows why
17 this consultation was, in fact, inadequate. The only documented efforts at consultation
18 that BLM has provided are a December 19, 2019 letter to Fort McDermitt, Summit Lake,
19 and the Winnemucca Indian Colony. ECF 65-8. A July 29, 2020 letter to Fort McDermitt,
20 Pyramid Lake, Summit Lake, and the Winnemucca Indian Colony. ECF 65-12. And, a
21 November 30, 2020 letter to Fort McDermitt, Pyramid Lake, Summit Lake, and
22 Winnemucca Indian Colony. ECF 65-13. BLM has provided a letter to Fort McDermitt
23 purportedly “soliciting comments on the Thacker Pass Lithium Project Memorandum of
24 Agreement and HPTP” but the letter is not dated and there is no proof of certification.

1 Meanwhile, BLM stated in the July 12 Rehberg letter to RSIC that “[t]he
2 consultation period for the public and Native American tribes on potential effects and
3 resolution of those effects on historic properties from the Thacker Pass lithium project
4 opened in January 2020 and closed November 5, 2020.” ECF 47-2. If the consultation
5 period closed on November 5, 2020, then the November 30, 2020 letter cannot be
6 considered part of the required NHPA consultation, leaving BLM with only two
7 documented section 106 contacts with the Tribes.

8 Just because BLM uses the proper buzzwords – terms like “initiating formal
9 consultation” and “formal government to government consultation,” this does not mean
10 BLM actually engaged in formal government-to-government consultation. It is true that
11 BLM’s letters requested information, “but a mere request for information is not
12 necessarily sufficient to constitute the ‘reasonable effort’ section 106 requires.” *Pueblo*
13 *of Sandia v. US*, 50 F.3d 856, 860 (10th Cir. 1995). Similarly, “[c]ontact, of course, is not
14 consultation...” *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205
15 F.Supp. 3d 4, 32 (D. DC 2016) (citing *Quechan Tribe of Fort Yuma Indian Reservation*
16 *v. U.S. Dep’t of Interior*, 755 F.Supp.2d 1104, 1112, 1118 (S.D.Cal. 2010)).

17 While this Court distinguished *Pueblo of Sandia* because in that case the
18 question was whether the Forest Service engaged in reasonable efforts to identify
19 historic properties and in this case the question is whether the BLM engaged in a
20 reasonable effort to identify Indian tribes, there is no reason to distinguish the definition
21 of “reasonable effort” in *Pueblo of Sandia* from the way it should be applied in this case.

22 The Forest Service’s effort that the *Pueblo of Sandia* court found was
23 unreasonable was much more extensive than the BLM’s effort was here. In *Pueblo of*

1 Sandia, the Forest Service mailed letters to local Indian tribes, including the Sandia
2 Pueblo, and individual tribal members who were known to be familiar with traditional
3 cultural properties. *Id.* Forest Service officials also addressed meetings of the All Indian
4 Pueblo Council and the San Felipe Pueblo and requested specific information at these
5 meetings. *Id.* In this case, BLM never mailed letters to individual tribal members who
6 were known to be familiar with traditional cultural properties. Nor did they attend
7 meetings with the Tribes.

8 In *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755
9 F.Supp.2d 1104 (S.D. Cal. 2010), the court found that BLM's consultation was
10 inadequate after 14 contacts with the Quechan Tribe's president including 9 written
11 letters from BLM to the Tribe's president. The court also found that BLM's consultation
12 was inadequate after 31 contacts with the Quechan Tribe's historic preservation officer,
13 who received the same letters and follow-up calls as did the Tribe's president, and had
14 additional contact with BLM.

15 Of particular note, the *Quechan* court engaged in an extensive review of each of
16 the documents the BLM offered to show consultation. After engaging in this review, the
17 *Quechan* court stated:

18 "First, the sheer volume of documents is not meaningful. The number of letters, reports, meetings,
19 etc. and the size of various documents doesn't in itself show the NHPA-required consultation
20 occurred. Second, the BLM's communications are replete with recitals of law (including Section
21 106), professions of good intent, and solicitations to consult with the Tribe. But mere *pro forma*
22 recitals do not, by themselves, show BLM actually complied with the law."
23

24 *Id.* at 1118.

25 Compared to the BLM's efforts in the *Quechan* case, BLM made even less of an
26 effort to engage in government-to-government consultation. All BLM did here was make
27 contact twice before the NHPA consultation process had concluded, and once after.

1 The Thacker Pass mine will be the biggest lithium mine in the nation, and the
 2 biggest open pit lithium mine in the world. It will adversely affect over 1000 cultural
 3 resource sites and 57 properties eligible for inclusion on the National Register of
 4 Historic Places. When NHPA requires that “The agency official should plan consultation
 5 appropriate to the scale of the undertaking...” much more was required than the mere
 6 contacts BLM made with a few of the many interested Tribes. § 800.2(a)(4).

7 **IV. The Intervening Plaintiffs Have Already Suffered Irreparable Harm. They**
 8 **will suffer more irreparable harm absent a preliminary injunction.**
 9

10 This Court overlooked the irreparable, procedural harm the Intervening Plaintiffs
 11 established. A procedural injury may serve as a basis for a finding of irreparable harm
 12 when a preliminary injunction is sought. See *N. Mariana Islands v. U.S.*, 686 F.Supp.2d
 13 7, 17 (D.D.C. 2009) (finding, in preliminary injunction analysis, that “[a] party
 14 experiences actionable harm when ‘depriv[ed] of a procedural protection to which he is
 15 entitled’ under the APA”) (quoting *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289
 16 F.3d 89, 94–95 (D.C. Cir. 2002)); *Save Strawberry Canyon v. Dep’t of Energy*, 613
 17 F.Supp.2d 1177, 1189–90 (N.D. Cal. 2009) (finding irreparable harm requirement
 18 satisfied where plaintiff claimed procedural violation of National Environmental Policy
 19 Act). “A failure to comply with APA procedural requirements therefore itself causes
 20 irreparable harm because ‘the damage done by [the Agency’s] violation of the APA
 21 cannot be fully cured by later remedial action.’” *Invenenergy Renewables LLC v. US*, 422
 22 F.Supp. 3d 1255, 1290 (Ct. Int’l Trade 2019) (quoting *N. Mariana Islands v. United*
 23 *States*, 686 F.Supp. 2d, 7, 18 (D.D.C. 2009). A court’s analysis focuses on whether
 24 harm is irreparable, “irrespective of the magnitude of the injury.” *Simula, Inc. v. Autoliv,*
 25 *Inc.*, 175 F.3d 716, 725 (9th Cir. 1999).

1 Here, BLM failed to comply with APA procedural requirements, which, in turn,
2 obligate BLM to comply NHPA procedural requirements, and as evidenced by BLM's
3 persistent refusal to take new evidence of the massacre into account or to edit the
4 HPTP to reflect the evidence of the massacre, the damage done by BLM's violation
5 cannot be fully cured by later remedial action. See ECF 73, Exhibits 3-6. NHPA
6 provides for the protection of the nation's historic heritage by requiring that federal
7 agencies follow specific procedures to ensure that they have adequate information
8 before adversely affecting historic properties. All American citizens suffer injury when
9 federal agencies neglect to gather this information. And, the American citizens who
10 descend from those massacred on historic properties, who routinely visit and use those
11 historic properties, and who plan on doing so in the future are especially injured.

12 The Ninth Circuit has stated: "A close statutory analog to NHPA is [NEPA].
13 What § 106 of NHPA does for sites of historical import, NEPA does for our natural
14 environment." *San Carlos Apache Tribe v. US*, 417 F.3d 1091, 1097 (9th Cir. 2005).
15 The Ninth Circuit spelled out its reasoning for treating NHPA like NEPA: "Both Acts
16 create obligations that are chiefly procedural in nature; both have the goal of generating
17 information about the impact of federal actions on the environment; and both require
18 that the relevant federal agency carefully consider the information produced." *Pres.*
19 *Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir.1982).

20 And, in the NEPA context, "Procedural" injury is tied to a substantive "harm to the
21 environment" — "the harm consists of added risk to the environment that takes place
22 when governmental decisionmakers make up their minds without having before them an
23 analysis (with public comment) of the likely effects of their decision on the environment.

1 NEPA's object is to minimize that risk, the risk of uninformed choice. . . .” *West v. Sec’y*
 2 *of Dep’t of Transp.*, 206 F.3d 920, 930 n. 14 (9th Cir. 2000) (quoting *Sierra Club v.*
 3 *Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)). Applying this rationale to the Intervening
 4 Plaintiffs’ claims under NHPA, here, there is an added risk to sites of historical import
 5 that has taken place when BLM decisionmakers made up their minds without having
 6 before them an analysis from all the proper consulting parties (including Fort McDermitt,
 7 Summit Lake, and Winnemucca Indian Colony) of the likely effects of their decision on
 8 historical sites.

9 **A. New Evidence Confirms the HPTP Will Disturb the Thacker Pass Massacre Site**
 10 **and Probable Human Remains.**

11
 12 Even if this Court denies this irreparable, procedural harm, an abundance of new
 13 evidence demonstrates that it is much more likely that the mechanical trenching
 14 operations, hand dug holes, and surface scraping actions specified in the HPTP will
 15 disturb the Thacker Pass Massacre site and the remains of the Paiutes shot to death in
 16 Thacker Pass in the project area.

17 This court noted that “the 1868 field notes do not show a massacre happened
 18 within the Project area.” Order, pg. 28. However, Lithium Nevada’s Environmental
 19 Engineer mapped the 1868 map’s “Remains of Indian Lodgings in relation to the
 20 Thacker Pass Project” and placed the Indian Lodgings just to the east of the project
 21 area. ECF 87-1, pg. 4. The proximity of the Indian Lodgings to the project area,
 22 combined with the Intervening Plaintiffs’ oral histories describing how Paiute people,
 23 being hunted by the US cavalry, hid in Thacker Pass, and especially the new accounts
 24 of the massacre make it very likely that the September 12, 1865 massacre happened, at
 25 least partially, within the project area.

1 The discovery of a September 30, 1865 account of the massacre in *The Owyhee*
2 *Avalanche* newspaper supports Intervening Plaintiffs' contentions. This account,
3 published just several weeks after the event, stated that Paiute camp fires were noticed
4 on the west side of the Quinn River Valley (where Thacker Pass is located); that the 1st
5 Nevada Cavalry camped the night before on Willow Creek (to the east of the Indian
6 Lodgings and Thacker Pass); that the 1st Nevada Cavalry approached the Indian
7 Lodgings from Willow Creek; that the soldiers "fought the scattering devils over several
8 miles of ground for three hours, in which all were killed that could be found;" that "a
9 search among the sage resulted in the discovery of thirty-one permanently friendly
10 Indians;" and that "[m]ore must have been killed and died from their wounds, as a strict
11 search was not made, and the extent of the battlefield so great."

12 Meanwhile, the author of the 1868 Field Notes, US Deputy Surveyor Abed Alley
13 Palmer, described "the sage land between the mountains and the meadow..." which
14 likely means the land crossed moving east to west from the Quinn River Valley ("the
15 meadow") towards the Double H and Montana mountains forming Thacker Pass ("the
16 mountains"). (ECF 76, pg. 4). And, Palmer noted that "[t]here are many Indian skulls
17 and other remains to be found scattered over this portion of the Township," further
18 corroborates the likelihood that the Intervening Plaintiffs' ancestors fled a long distance
19 into the project area. (ECF 76, pg. 5).

20 The Intervening Plaintiffs have also discovered two eyewitness accounts of the
21 Thacker Pass Massacre, both of them given to the well-known American politician and
22 labor organizer Big Bill Haywood and recounted in *The Autobiography of William D.*
23 *Haywood*. The first account comes from one of the soldiers in the 1st Nevada Cavalry,

1 Jim Sackett. The second comes from a survivor of the massacre, a Paiute man named
2 Ox Sam, whom many of the People of Red Mountain directly descend from.

3 Sackett's eye-witness account confirms the soldiers' approach from the east.
4 Sackett explained that, when the soldiers were camping at the mouth of Willow Creek
5 (east of Thacker Pass), the captain "pointed across the valley in the direction of what is
6 now called Thacker Pass" to explain that he had seen Paiute campfires. (Exhibit 3, pg. 5
7 (pg. 27 in Haywood's book)) After a heartless and heartbreaking narration of "pouring in
8 our bullets" into Paiute wikiups where people were sleeping and murdering Paiute
9 children because "Nits make lice," Sackett also said one Indian rode away and escaped.
10 (Exhibit 3, pgs. 5-6).

11 The second eye-witness account Haywood describes belongs to Ox Sam, the
12 one Indian adult who rode away. (Exhibit 3, pgs. 6-7). Sam indicated to Haywood that
13 the massacre was in Thacker Pass ("That's time Thacker Pass"). Before stating that his
14 father, mother, sisters, and brothers were killed, Sam said that he rode away from
15 Thacker Pass to Disaster Peak, which is west and north of Thacker Pass, and is most
16 easily accessible from where the Indian Lodgings were via Thacker Pass. (Exhibit 3, pg.
17 7).

18 Sackett's and Sam's accounts are also significant for the atrocity that they
19 describe. It is important to remember that before the establishment of the reservation at
20 Fort McDermitt, there was no such thing as "the Fort McDermitt Tribe." The Fort
21 McDermitt Tribe was created by the American government out of the survivors of the
22 Thacker Pass and other massacres. Just like Plymouth Rock or Jamestown are central
23 locations in the history of the formation of the American nation, Thacker Pass is central

1 to the formation of the Fort McDermitt Tribe. And, whether federal agencies want to
2 uncover this history or not, even when they possess the records of these massacres,
3 the genocide the federal government perpetrated against Native peoples like those
4 camped in the Quinn River Valley on September 12, 1865 is an important part of
5 American history – all-the-moreso for the shame in that history.

6 With the new evidence that the massacre carried into the project area, leaving
7 the remains of massacred Paiutes in the project area, it also becomes clear that the
8 specific excavations planned for the project area will likely disturb these human remains
9 and cause irreparable harm. The Historic Properties Treatment Plan provided to RSIC
10 includes a confidential map of cultural resource sites that will be adversely affected by
11 the mine (HPTP, Appendix B, pg. 1). It also includes a table listing the first sites to be
12 trenched, dug, or otherwise excavated (Table 2. Pg. 19).

13 RSIC's GIS Specialist Maureen Vazquez, using Lithium Nevada's proffered map
14 showing the locations of the Paiute camps and GIS information included in the HPTP,
15 created a map showing how close excavation will occur to the Paiute camps. (Exhibit 4)
16 These excavation sites are also likely within the massacre site. [REDACTED] is very
17 close (within easy running distance) to the Paiute Camps, for example. And, according
18 to the HPTP, BLM plans on permitting an archaeological firm to dig a 30-meter trench,
19 to dig 3 control units, to perform 3 surface scrapes, and to dig 14 shovel test units.
20 [REDACTED] is close enough to the Paiute Camps that it is very likely Paiutes were
21 massacred in that site and human remains will be disturbed by the archaeological digs.

22 [REDACTED] is another site, likely within the area where Paiutes fled from the
23 massacre, where a 30-meter trench will be dug, 2 control units will be dug, 2 surface

1 scrapes will be performed, and 5 shovel test units will be dug. At [REDACTED], both
2 very close to the Paiute camps, especially the more southern camp, 20-meter trenches
3 will be dug at each site. This is sufficiently specific irreparable harm.

4
5 By: /s/ Terry J. Lodge
6 Terry J. Lodge, Esq. (Ohio Bar No. 29271)
7 316 N. Michigan St., Suite 520
8 Toledo, OH 43604-5627
9 (419) 205-7084
10 tjlodge50@yahoo.com

11
12 Julie Cavanaugh-Bill (State Bar No. 11533)
13 Cavanaugh-Bill Law Offices
14 Henderson Bank Building
15 401 Railroad Street, Suite 307
16 Elko, NV 89801
17 (775) 753-4357
18 julie@cblawoffices.org

19
20 William Falk, Esq (Utah Bar No. 16678)
21 2980 Russet Sky Trail
22 Castle Rock, CO 80108
23 (319) 830-6086
24 falkwilt@gmail.com
25

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29 **CERTIFICATE OF SERVICE**

30
31 I hereby certify that on Friday, October 1 2021, I filed the foregoing using the United
32 States District Court CM/ECF, which caused all counsel of record to be served
33 electronically.
34

35 /s/Terry J. Lodge
36 Terry J. Lodge, Esq. (Ohio Bar No. 29271)
37

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