

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

ARWYN CARROLL (MA Bar 675926)
LEILANI DOKTOR (HI Bar 11201)
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0465
Fax: (202) 305-0506
arwyn.carroll@usdoj.gov
leilani.doktor@usdoj.gov

Attorneys for Federal Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BARTELL RANCH LLC, *et al.*,
Plaintiffs,

v.

ESTER M. MCCULLOUGH, *et al.*,
Defendants.

WESTERN WATERSHEDS
PROJECT, *et al.*,
Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*,
Defendants.

Case No. 3:21-cv-80-MMD-CLB
Related Case No. 3:21-cv-103-MMD-
CLB
(Consolidated)

**FEDERAL DEFENDANTS'
RESPONSE IN OPPOSITION TO
INTERVENING PLAINTIFFS'
MOTION FOR
RECONSIDERATION OF THIS
COURT'S ORDER DENYING
PRELIMINARY INJUNCTION**

1 The Reno-Sparks Indian Colony (“RSIC”) and Atsa Koodakuh
2 Nuwu/People of the Red Mountain (“the People”) have not provided the Court with
3 any basis for reconsidering its decision denying their motion for a preliminary
4 injunction. They have not demonstrated any error of law, let alone “clear error,” that
5 would support a finding that they are likely to succeed on the merits of their claims
6 or will be irreparably harmed by the limited ground disturbance contemplated by the
7 Historic Properties Treatment Plan (HPTP). They also have not carried their burden
8 of demonstrating why their “new” evidence could not have been submitted in the
9 course of the original proceedings. But even if they had, the evidence is merely
10 cumulative of that already considered by the Court and does not offer a basis for
11 reconsideration. Plaintiff-Intervenors’ motion for reconsideration should therefore be
12 denied.

13 **BACKGROUND**

14 Plaintiffs and Plaintiff-Intervenors in this action challenge the United States
15 Bureau of Land Management’s decision approving two plans of operations for a
16 lithium mine in Humboldt County, Nevada (“the Project”). As part of that decision-
17 making process, and consistent with the National Historic Preservation Act (NHPA)
18 and its implementing regulations, BLM reached out to multiple tribes with an
19 expressed interest in the Thacker Pass area and sought public comment on the
20 Project’s potential impacts on historical properties and potential mitigation of those
21 impacts. Also as part of the NHPA process, a contractor prepared the HPTP to further
22 evaluate and mitigate those potential impacts. As thoroughly explained in prior
23 briefing, the HPTP contemplates a disturbance of less than 0.25 acres—and
24 mechanical excavation of less than 0.04 acres—in several sites located entirely within
25 the boundaries of the Project area.¹

26
27 ¹ See Fed. Defs’ Opp’n to Pls.’ Mot. for Prelim. Inj. at 7–10, *W. Watersheds Project v. Bureau of*
28 *Land Management*, Case No. 3:21-cv-103-MMD-CLB (D. Nev. consolidated July 30, 2021)

1 RSIC and the People moved to intervene in this action on July 20, 2021—the
 2 day before the Court heard the other Plaintiffs’ motion for a preliminary injunction—
 3 to assert a single claim alleging that BLM failed to comply with the NHPA before
 4 issuing its decision.² Shortly after the Court permitted intervention, RSIC and the
 5 People (joined by the Burns Paiute Tribe) moved for a preliminary injunction against
 6 ground-disturbing activities contemplated by the HPTP.³ In asserting a likelihood of
 7 success on the merits, Plaintiff-Intervenors argued, among other things, that: (1) BLM
 8 had not made the requisite “reasonable and good faith effort to identify Indian tribes”
 9 for consultation, *see* 36 C.F.R. §§800.2 (c)(2)(ii)(A), 800.3(f)(2); (2) BLM did not
 10 afford the public an opportunity to participate, *see id.* §§ 800.2(d)(1), 800.3(f)(2); and
 11 (3) BLM’s consultation with other tribes failed to satisfy the NHPA’s consultation
 12 requirements.⁴ Plaintiff-Intervenors also argued that they would be irreparably
 13 harmed even by the limited scope of excavation conducted under the HPTP because
 14 of the cultural and historical significance they attached to Thacker Pass as the site of
 15 a massacre.⁵

16 The Court declined to issue preliminary injunctive relief.⁶ It first concluded that
 17 “the People lack prudential standing to assert a claim under the NHPA” because they
 18

19 ECF No. 30; Declaration of Mark E. Hall ¶ 4, *W. Watersheds Project v. Bureau of Land*
 20 *Management*, Case No. 3:21-cv-103-MMD-CLB (D. Nev. consolidated July 30, 2021) ECF
 21 No. 30-1; Fed. Defs’ Opp’n. to Pl.-Intervenors’ Prelim. Inj. Mot. at 20, ECF No. 65; Second
 22 Declaration of Mark E. Hall ¶ 7, ECF No. 65-26; Fed. Defs’ Surreply at 3–4, ECF No. 84.

23 ² The Burns Paiute Tribe, which joins RSIC’s and the People’s motion but presents no
 24 additional arguments in its support, *see* ECF No. 99, also intervened to assert claims alleging
 25 violations of the NHPA, among others.

26 ³ Pl.-Intervenors’ Mot. for Prelim. Inj., ECF No. 45.

27 ⁴ *Id.* at 9–18; RSIC and the People’s Reply in Supp. of Mot. for Prelim. Inj. (“Pl.-Intervenors’
 28 Reply”) at 5–6, ECF No. 73.

⁵ Pl.-Intervenors’ Mot. for Prelim. Inj. at 18–19; Pl.-Intervenors’ Reply at 11–12.

⁶ Order of September 3, 2021, ECF No. 92.

1 are not a federally recognized Indian tribe and did not affirmatively request
2 consultation,⁷ and that RSIC could not assert claims under the NHPA “on behalf of
3 other tribes that [its counsel] does not represent, who are not participating in this
4 case.”⁸ It then concluded that RSIC was not likely to succeed on the merits of its
5 claims based on un rebutted evidence supporting BLM’s “reasonable decision not to
6 consult the [RSIC and the Burns Paiute Tribe] because representatives of both Tribes
7 disclaimed an interest in the area including the Project area” during earlier
8 communications “and neither tribe subsequently put BLM on notice that they
9 considered the Project area sacred or culturally significant until after BLM issued the
10 ROD.”⁹ Finally, though acknowledging RSIC’s interests in the Thacker Pass area, it
11 determined that the limited excavation under the HPTP is not likely to cause
12 irreparable harm. Specifically, it found that Plaintiff-Intervenors’ evidence concerning
13 a massacre site did not establish that burial sites were likely to be disturbed by the
14 excavation under the HPTP in light of previous exploration and extensive disturbance
15 of the area—during which no sites have been located—and that, even if they are, the
16 HPTP affords protections.¹⁰

17 Plaintiff-Intervenors now move for reconsideration of only two of the Court’s
18 conclusions. First, they argue that the Court erred by rejecting the argument that they
19 lack standing to assert claims challenging BLM’s consultation efforts under the
20 NHPA with *other* tribes not party to this litigation. Second, they argue that the Court
21 erred in concluding that they have not demonstrated irreparable harm from the
22 limited HPTP-related excavations, contending that (1) mere procedural injury
23
24

25 ⁷ *Id.* at 5–7.

26 ⁸ *Id.* at 7.

27 ⁹ *Id.* at 10.

28 ¹⁰ *Id.* at 21–22.

1 amounts to irreparable harm and (2) new evidence supports their position that a
2 massacre occurred near the Project area.

3 But the Court need not revisit well-trod ground. RSIC and the People have not
4 demonstrated any clear error of law in the Court's decision or that newly discovered
5 evidence would alter the landscape in their favor. To the contrary, these arguments
6 were appropriately rejected the first time around. And the new evidence—most of
7 which could have been submitted previously—is merely cumulative of that already
8 before the Court during the preliminary injunction proceedings. The Court should
9 therefore deny Plaintiff-Intervenors' motion for reconsideration.

10 LEGAL STANDARD

11 “Motions for reconsideration are disfavored” in this District. LR 59-1(b). Still,
12 they “may be brought under Rules 59(e) and 60(b).” *Addington v. Bank of Am., N.A.*,
13 No. 3:12-CV-00548-MMD, 2013 WL 5888146, at *1 (D. Nev. Oct. 31, 2013) (citing
14 *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th
15 Cir.1993)). A motion for reconsideration under Rule 59(e) should not be granted
16 “absent highly unusual circumstances, unless the district court is presented with
17 newly discovered evidence, committed clear error, or if there is an intervening change
18 in the controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma. GmbH & Co.*, 571
19 F.3d 873, 880 (9th Cir. 2009) (citation omitted). “A Rule 59(e) motion may not be
20 used to raise arguments or present evidence for the first time when they could
21 reasonably have been raised earlier in the litigation.” *Kona Enters., Inc. v. Est. of Bishop*,
22 229 F.3d 877, 890 (9th Cir. 2000).

23 “Under Rule 60(b), a court may relieve a party from a final judgment, order or
24 proceeding only in the following circumstances: (1) mistake, inadvertence, surprise,
25 or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is
26 void; (5) the judgment has been satisfied; or (6) any other reason justifying relief from
27 the judgment.” *On Demand Direct Response, LLC v. McCart-Pollak*, No. 2:15-CV-01576-
28

1 MMD-GWF, 2019 WL 1413294, at *1 (D. Nev. Mar. 28, 2019), *aff'd sub nom. On*
2 *Demand Direct Response, LLC v. Shana Lee McCart-Pollak*, 842 F. App'x 151 (9th Cir.
3 2021).

4 “Mere dissatisfaction with the court's order, or belief that the court is wrong in
5 its decision,” on the other hand, “is *not* grounds for reconsideration.” *Bird v. Recontrust*
6 *Co.*, No. 3:10-CV-00649-RCJ, 2014 WL 3696703, at *1 (D. Nev. July 23, 2014) (citing
7 *Twentieth Century–Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir.1981))
8 (emphasis added). Likewise, such motions are not “an avenue to re-litigate the same
9 issues and arguments upon which the court already has ruled,” *Brown v. Kinross Gold,*
10 *U.S.A.*, 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005) (citation omitted), or “the proper
11 vehicles for rehashing old arguments, and are not intended to give an unhappy litigant
12 one additional chance to sway the judge,” *Addington*, 2013 WL 5888146, at *1
13 (internal quotations omitted). Finally, “[m]otions for reconsideration are disfavored”
14 in this District. LR 59-1(b).

15 ARGUMENT

16 RSIC and the People cannot satisfy the reconsideration standard. They have
17 not raised any legal error committed by the Court. To the contrary, they merely
18 rehash arguments already presented to and properly rejected by the Court. Nor do
19 they present any newly discovered evidence that would alter the Court’s decision.
20 They fail to meet their burden of explaining why the evidence could not previously
21 have been presented and the evidence is cumulative of evidence already considered
22 by the Court in any event. Even if the “new” evidence had timely been presented,
23 and even if it could alter the Court’s analysis and conclusions regarding irreparable
24 harm, Plaintiff-Intervenors have not established and cannot establish a likelihood of
25 success on the merits. Thus, they cannot change the outcome of the Court’s
26 preliminary-injunction decision, and their motion for reconsideration should be
27 denied.
28

I. The Court did not commit any legal error

RSIC and the People seek reconsideration on the basis that the Court committed two legal errors. Neither merits reconsideration. Both of these arguments were presented to the Court during the preliminary injunction proceedings, and so are not proper grounds for reconsideration. And both positions are wrong as a matter of law.

A. RSIC and the People cannot succeed on the merits of claims premised on the sufficiency of consultation with *other* tribes

RSIC and the People first argue that the Court erred in concluding that they cannot succeed on the merits of claims predicated on the consultation rights of other tribes.¹¹ To the contrary, they argue, they may assert claims alleging procedural error during consultation with other tribes because RSIC and the People are “interested members of the public” with their own interests in the Thacker Pass area such that the alleged procedural errors violate RSIC’s own “procedural rights.”¹²

First, RSIC and the People have not satisfied the reconsideration standard with respect to this argument, which they raised during the preliminary injunction proceedings. Specifically, they argued that BLM’s consultation with the tribes it determined to consult with failed to satisfy the procedural requirements of the NHPA and its implementing regulations¹³ and that RSIC and the People had standing to assert claims deriving from procedural injury.¹⁴ The parties discussed, and RSIC and the People had an opportunity to address, the authority on which the

¹¹ See Mot. for Recons. at 2–3, 7 (citing Order at 7).

¹² *Id.* at 7–8.

¹³ Pl.-Intervenors’ Mot. for Prelim. Inj. at 10–18.

¹⁴ *Id.* at 3–7.

1 Court based its ruling.¹⁵ And the Court rejected RSIC’s position that it could assert
2 claims that BLM failed to satisfy its consultation obligations with *other* tribes.¹⁶

3 RSIC and the People thus fall afoul of the requirement that motions for
4 consideration not be used as “an avenue to re-litigate the same issues and arguments
5 upon which the court already has ruled.” *Brown*, 378 F. Supp. 2d at 1288 (citation
6 omitted). RSIC and the People are not “entitled to reconsideration” because they
7 “merely repeat[] arguments [they] already raised, and which the Court considered
8 and rejected—either explicitly or impliedly,” in the earlier order. *Walker v. Intelli-*
9 *heart Servs., Inc.*, No. 3:18-CV-00132-MMD-CLB, 2020 WL 1694771, at *2 (D. Nev.
10 Apr. 7, 2020).

11 Equally important, RSIC and the People are not entitled to reconsideration of
12 the Court’s decision on this point because the law does not support their position.
13 The Court therefore committed no legal error, let alone “clear error.” Rather, the
14 Court properly rejected their argument that “procedural standing” allows them to
15 assert such claims because their own interests may be harmed if the Project proceeds
16 with *any* error in consultation.¹⁷

17 RSIC and the People cannot establish “procedural standing” to assert claims
18 of insufficient consultation with *other* tribes. In the Ninth Circuit, “[a] plaintiff
19 alleging procedural harm can demonstrate injury in fact by showing (i) the agency
20 violated certain procedural rules, (ii) those rules protect a concrete interest of the
21 plaintiff, and (iii) it is ‘reasonably probable’ that the challenged action threatens that
22 concrete interest.” *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1160 (9th Cir.
23

24 ¹⁵ See Order at 7 (relying on *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270, 1294
25 (D.N.M. 2009)); Lithium Nevada’s Opp’n to Pl.-Intervenors’ Mot. for Prelim. Inj. at 13–14,
26 ECF No. 66 (citing *San Juan Citizens Alliance*); Pl.-Intervenors’ Mot. for Prelim. Inj. at 4–5
(citing *Montana Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127 (D. Mont. 2004));

27 ¹⁶ Order at 7.

28 ¹⁷ See Mot. for Recons. at 9–14.

1 2017). “It is a well-established rule that a litigant may assert only his own legal
2 rights and interests and cannot rest a claim to relief on the legal rights or interests of
3 third parties.” *Coal. of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th
4 Cir. 2002) (citations omitted). Similarly, Plaintiffs alleging procedural injury must
5 show “that *they* have a procedural right that, if exercised, *could* protect *their* concrete
6 interests.” *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir.
7 2008) (quotations and citations omitted) (emphasis added).

8 Here, RSIC and the People describe their own interests in the Thacker Pass
9 area—but the Court has already correctly concluded that they lack standing to
10 protect those interests by asserting the procedural rights of others.¹⁸ With respect to
11 NHPA consultation, the procedural consultation requirements are designed to
12 protect the “concrete interest” of the party asserting a right to consultation. That is,
13 its “tribal consultation requirement inures to the benefit of the tribes themselves,
14 which suffer injury when they are not consulted.” *Wishtoyo Found. v. U.S. Fish &*
15 *Wildlife Serv.*, No. CV 19-03322-CJC(ASX), 2019 WL 6998665, at *6 (C.D. Cal.
16 Oct. 16, 2019) (quoting *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v.*
17 *W. Area Power Admin.*, No. EDCV 12–0005–VAP(SP_x), 2012 WL 6743790, at *6 (C.D.
18 Cal. Nov. 29, 2012)). In light of that, courts have consistently concluded that “only
19 the tribe itself may bring a claim for failure to comply with the consultation
20 provision.” *La Cuna De Aztlan.*, 2012 WL 6743790, at *6. If an agency’s “tribal
21 consultation process was indeed defective, any injury stemming from its defects was
22 suffered by the parties who were entitled to consultation, not by” third-parties.
23 *Wishtoyo Found.*, 2019 WL 6998665, at *6.

24 This makes sense. The NHPA establishes a procedure for government-to-
25 government consultation between the United States and federally recognized Indian
26 Tribes. *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1216 (9th Cir. 2008)

27 ¹⁸ Order at 6–7.
28

(citing implementing regulations). As multiple courts in this Circuit have acknowledged, allowing one party to assert that BLM failed to fully consult with *another* tribe “would, in effect, be allowing Plaintiffs to disregard [that] Tribe’s right to be the final arbiter and, thereby, the final spokesman for intra-tribal affairs through a procedure characterized by one court as a ‘back door method of . . . attempting to represent the tribe without approval or authority.’” *San Juan Citizens All.*, 586 F. Supp. 2d at 1293 (quoting *National Indian Youth Council v. Andrus*, 501 F.Supp. 649, 684 (D.N.M.1980)); *see also Wishtoyo Found.*, 2019 WL 6998665, at *6; *La Cuna De Aztlan*, 2012 WL 6743790, at *6. Allowing a third party to sue under NHPA alleging insufficient consultation with a tribe “would vitiate the congressional goal of treating the tribes as sovereigns in the NHPA’s consultation provisions” by allowing the third party “to assert whether or not the tribe’s rights had been violated.” *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep’t of the Interior* No. EDCV 11–1478–GW(SSx), 2012 WL 12903070, at *5 (C.D. Cal. Sept. 20, 2012); *see also San Juan Citizens All.*, 586 F. Supp. 2d at 1293 (allowing such a claim “would violate the regulatory requirement to recognize the tribe as a sovereign authority.” (citing 36 C.F.R. § 800.2(c)(2)(ii))).

In fact, though alleging a “clear error,” RSIC and the People cite no case in which a third party has established standing under the NHPA to challenge the sufficiency of an agency’s consultation with another tribe. They merely reassert *Montana Wilderness Ass’n*, 310 F. Supp. 2d 1127 (D. Mont. 2004), which they cited and argued during the preliminary-injunction proceedings.¹⁹ But that case remains inapposite. In response to BLM’s argument that a given plaintiff was not a member of a tribe that would be consulted and so lacked standing to challenge its compliance with the NHPA, the court clearly situated that plaintiff’s standing in the alleged

¹⁹ Mot. for Recons. at 13; *see* Pl.-Intervenors’ Mot. for Prelim. Inj. at 5 (discussing *Montana Wilderness Association*).

1 deprivation of *his own* opportunity to participate, as a member of the public, in the
 2 NHPA process. *Mont. Wilderness*, 310 F. Supp. 2d. at 1151 (citing 30 C.F.R.
 3 §§ 800.1(a) (describing the purpose of the NHPA process), 800.2(a)(4) (describing
 4 consultation requirement); 800.2(d) (describing nature of the *public's* involvement in
 5 the NHPA process)). And it grounded its merits decisions in its conclusion that
 6 BLM failed to engage in an NHPA process that included the public—not on the
 7 basis that BLM failed to consult sufficiently with any given tribe. *Id.* at 1153–54.

8 Here, by contrast, the Court has determined that BLM was not required to
 9 consult with the People, who are not a federally recognized tribe, and that BLM's
 10 determination of which tribes to consult with—which excluded RSIC—was
 11 reasonable and in good faith.²⁰ Plaintiff-Intervenors do not seek to disturb these
 12 rulings. Their own interests in Thacker Pass do not entitle them to assert claims
 13 challenging processes in which they are not entitled to participate and, in so doing,
 14 abrogate *other* tribes' sovereignty.

15 Because RSIC and the People cannot establish standing to assert the claims
 16 they describe, the Court need not reach their arguments concerning the zone-of-
 17 interest test or prudential standing.²¹ But even if it did, the applicable prudential
 18 considerations are not satisfied here. A plaintiff “must assert his own legal rights
 19 and interests, and cannot rest his claim to relief on the legal rights or interests of
 20 third parties.” *Valley Forge Christian Coll. v. Americans United for Separation of Church &*
 21 *State, Inc.*, 454 U.S. 464, 474 (1982). To the extent that “Congress created a cause of
 22 action for” RSIC and the People,²² it permitted RSIC and the People to assert their
 23 own legal rights to participate in the NHPA process—claims on which the Court
 24 has determined they are not likely to succeed.

25
 26 ²⁰ See Order at 7, 9–18.

27 ²¹ See Mot. for Recons. at 12–16.

28 ²² See Mot. for Recons. at 16.

1 Finally, even if RSIC and the People satisfied the reconsideration standard—
 2 which they do not—and established *any* legal error—which they have not—and had
 3 standing to assert such claims—which they do not—reconsideration is not
 4 warranted because, as explained in Federal Defendants’ opposition to Plaintiff-
 5 Intervenor’s motion for a preliminary injunction, Federal Defendants’ consultation
 6 with the tribes it identified for consultation satisfied the NHPA’s procedural
 7 requirements.²³

8 **B. Mere procedural injury does not create irreparable harm**

9 RSIC and the People next argue that reconsideration is warranted because the
 10 “Court overlooked the irreparable, procedural harm” that they claim to have
 11 established.²⁴ Specifically, they contend that an agency’s failure to follow a
 12 procedure, without anything more, can establish irreparable harm to RSIC and the
 13 People.²⁵

14 Like the last, this argument does not merit reconsideration because RSIC and
 15 the People merely restate arguments already raised and rejected. *See Brown*, 378
 16 F. Supp. 2d at 1288. The Court clearly did not “overlook” this argument, as RSIC
 17 and the People contend: it acknowledged this argument directly in its Order.²⁶ Yet it
 18 ultimately concluded that RSIC had not satisfied the irreparable harm element.²⁷

19 In any event, the Court did not err because violation of a procedural statute
 20 like the NHPA, without more, does not create irreparable harm. *See Summers v.*
 21 *Earth Island Inst.*, 555 U.S. 488, 496 (2009) (discussing procedural injury *in vacuo*);

22

²³ *See* Opp’n to PI Mot. at 16–18.

23 ²⁴ Mot. for Recons. at 19.

24 ²⁵ *Id.* at 19–21.

25 ²⁶ Order at 18–19 (“[t]he Tribes argue they will be irreparably harmed . . . because they have
 26 suffered a procedural injury by not being consulted before BLM issued the ROD
 27 Defendants counter that there is no presumption of irreparable harm from the violation of a
 28 procedural statute like the NHPA.”).

²⁷ *Id.* at 22.

1 *Cloud Found. v. U.S. Bureau of Land Mgmt.*, 802 F. Supp. 2d 1192, 1208 (D. Nev.
 2 2011) (“*Winter* made clear that in order to obtain a preliminary injunction, the
 3 plaintiffs must show a likelihood of irreparable harm—NEPA violation or not.”). In
 4 fact, the cases on which RSIC and the People rely support this position. For
 5 example, in *Northern Mariana Islands v. United States*, the court acknowledged that a
 6 party “experiences actionable harm when ‘depriv[ed] of a procedural protection to
 7 which he is entitled’ under the APA,” but required an additional showing of
 8 “irreparable harm that cannot be cured by ultimate success on the merits” before
 9 issuing a preliminary injunction. 686 F. Supp. 2d 7, 17-20 (D.D.C. 2009). The court
 10 in *Save Strawberry Canyon v. Department of Energy* relied on a finding of imminent
 11 environmental injury, not mere procedural injury alone. 613 F. Supp. 2d 1177, 1189
 12 (N.D. Cal. 2009).

13 Finally, even if RSIC and the People could prevail on this point,
 14 reconsideration of this conclusion is not merited because RSIC and the People have
 15 not established procedural injury. They do not seek reconsideration of the Court’s
 16 conclusion that BLM made a reasonable and good faith effort in deciding which
 17 tribes to reach out to for consultation and, as explained above, they are not entitled
 18 to reconsideration on their sole merits-based argument presented here. To establish
 19 procedural injury they must show that BLM failed to follow applicable procedures
 20 under the NHPA in a manner that injured them, and they have not done so.²⁸

21 **II. New evidence does not merit reconsideration**

22 As their final argument for reconsideration, RSIC and the People invoke
 23 what they describe as “an abundance of new evidence” in support of their
 24

25 ²⁸ For the same reasons, any reconsideration of their arguments going to the irreparable harm
 26 element of the *Winter* analysis would not alter the outcome because they still have not
 27 demonstrated a likelihood of success on the merits of their claims. See *Winter v. Nat. Res. Def.*
 28 *Council*, 555 U.S. 7, 22, 24 (2008).

1 contention that the narrow, limited archeological surveys conducted under the
 2 HPTP will cause them irreparable harm.²⁹ But reconsideration is not warranted
 3 because they have not made the requisite showing to obtain reconsideration based
 4 on new evidence and, in any event, the new evidence does not alter the harms
 5 analysis or the ultimate outcome here.

6 First, in order to obtain reconsideration based on new evidence, Plaintiff-
 7 Intervenorers are “obliged to show not only that this evidence was newly discovered
 8 or unknown to” them during the preliminary injunction proceedings, “but also that
 9 it could not with reasonable diligence have discovered and produced such
 10 evidence.” *Frederick S. Wyle Profl Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th
 11 Cir.1985); *see also Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n. 6 (9th Cir.1994)
 12 (“Evidence is not newly discovered if it was in the party's possession at the time of
 13 [the decision] or could have been discovered with reasonable diligence.” (citation
 14 omitted)); *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) (“The
 15 overwhelming weight of authority is that the failure to file documents in an original
 16 motion or opposition does not turn the late filed documents into ‘newly discovered
 17 evidence.’”) (citation omitted). They have not even attempted to do so here.

18 Even if they were able to do so, however, this “new” evidence does not
 19 situate a massacre site within the Project Area or render it more likely that
 20 excavation under the HPTP will disturb human remains. RSIC and the People rely
 21 on this evidence to support the argument—one that this Court has already rejected
 22 as a basis for irreparable harm—that some individuals fled a massacre into the
 23 Project Area such that “the specific excavations planned for the project area [under
 24

25 ²⁹ Mot. for Reconsideration at 4–5, 21–25. Because this evidence was not before the agency
 26 during the NHPA process, and because Plaintiff-Intervenors have not established the
 27 necessary prerequisites for its consideration as an exception to that rule, it is not properly
 28 before the Court on the merits. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d
 971, 992-93 (9th Cir. 2014); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008).

the HPTP] will likely disturb these human remains and cause irreparable harm.”³⁰

At oral argument, counsel for RSIC and the People argued that even though their evidence placed the alleged massacre site outside of the Project Area, people may have fled through the Project Area.³¹ Relying on previous archival research, an ethnographic study, extensive pedestrian surveys, prior disturbance in the Project Area, and unrebutted evidence concerning Paiute manner of burial, the Court concluded that the limited excavation under the HPTP was not likely to encounter human remains. And even if it did, as the Court observed, the HPTP and NAGPRA impose requirements for handling human remains should they be encountered.³²

The Court ultimately still found sufficient evidence that the limited excavation under the HPTP will not irreparably harm RSIC. New evidence supporting only the possibility that people *may* have run into the Project Area cannot alter these conclusions.

This is especially true when the evidence does not, in fact, establish that people were killed within the Project Area. First, like the 1868 surveyor notes that the Court already considered, the *Owyhee Avalanche* article at best sites the massacre in the Quinn River Valley—to the southeast of, downhill from, and outside of the Project Area.³³ Though the autobiography of Bill Haywood and its accounts from

³⁰ Mot. for Recons. at 22–24.

³¹ Order at 21.

³² *Id.* at 21 (citing HPTP, ECF No. 65-14 at 32); *see also* Fed. Defs’ Opp’n to Pl.-Intervenors’ Mot. for Prelim. Inj. at 21.

³³ *See* Order at 13–14; Pl.-Intervenors’ Exhibit 2. The *Owyhee Avalanche* further notes that the cavalry placed soldiers “between the mountain and the camp,” rendering it less likely that those in the camp would have fled into the Project Area—that is, uphill and in the direction of soldiers. The 1868 survey notes supports this interpretation, locating remains as “scattered over *this Junction of the Township*,” that is, “[a]long the line between [sections] 22 [and] 23, and between the creek and the meadow,” which is to the east of the camp *and* the Project Area. *See* Pl.-Intervenors’ Exhibit 1 at 298–99, ECF No. 73-1 (emphasis added to indicate language omitted from Plaintiff-Intervenors’ quotation); Schonlau Decl., ECF No. 87-1

1 Jim Sackett and Ox Sam mention Thacker Pass by name, this hearsay-within-
 2 hearsay published long after the events recounted does not situate the camp in the
 3 Project area—or in any specific location in the vicinity of Thacker Pass vis-à-vis the
 4 Quinn River.³⁴ Locating it within in the Project area would contradict the other
 5 evidence Plaintiff-Intervenors have presented. Finally, Plaintiff-Intervenors’ map
 6 merely supports the fact that all excavations under the HPTP will occur within the
 7 Project Area—and that the camp described in the 1868 survey falls outside that
 8 area.³⁵ None of this “new” evidence contradicts or requires reconsideration of the
 9 Court’s conclusion that, despite extensive disturbance and surveys, *no* indication of
 10 human remains has been found within the Project area³⁶ and that, in the unlikely
 11 event that they *are* found, the HPTP imposes strict requirements to mitigate any
 12 harm.³⁷

13 Ultimately, this “new” evidence goes only to the irreparable harm element of
 14 the *Winter* test and would not disturb the Court’s conclusion that RSIC and the
 15 People have not demonstrated a likelihood of success on the merits. Because
 16 Plaintiff-Intervenors must carry their burden on both elements to obtain preliminary
 17 injunctive relief, it cannot, alone, support issuance of a preliminary injunction.
 18 *Winter*, 555 U.S. at 24.

19
 20
 21 Exhibit 1-A (indicating meadows to the south and east of the described camp); *id.* Exhibit 1-
 22 D (showing camp relative to Project Area).

23 ³⁴ ECF No. 96-3 at 27 (indicating that the cavalry as riding down or up the pass to reach the
 24 encampment); *id.* at 29 (describing the Paiute as at the Quinn River to hunt ducks and geese).

25 ³⁵ See ECF No. 96-4. BLM provided an unredacted copy of the HPTP to RSIC pursuant to an
 26 information-sharing agreement with the tribe. For their own protection, the locations of the
 27 artifacts described in the HPTP, and thus the locations of proposed excavation, are protected
 28 from public disclosure under at least 16 U.S.C. § 470hh.

³⁶ See Order at 21; *see also* Fed. Defs’ Opp’n to Pl.-Intervenors’ Mot. for Prelim. Inj. at 20; Fed.
 Defs’ Surreply at 3–4; *see generally* HPTP, ECF No. 65-14.

³⁷ See Order at 21.

CONCLUSION

Plaintiff-Intervenors have not demonstrated any error of law, let alone “clear error,” or new evidence that would entitle them to preliminary injunctive relief. Federal Defendants therefore respectfully request that the Court deny their motion for reconsideration.

Respectfully submitted this 15th day of October, 2021.

TODD KIM
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Div.

/s/ Arwyn Carroll
ARWYN CARROLL (MA Bar 675926)
LEILANI DOKTOR (HI Bar 11201)
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: 202-305-0465
Fax: 202-305-0506
arwyn.carroll@usdoj.gov
leilani.doktor@usdoj.gov

Attorneys for Federal Defendants