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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BARTELL RANCH, LLC, et al., Plaintiffs, v. ESTER M. MCCULLOUGH, et al., Defendants, and LITHIUM NEVADA CORP., Defendant-Intervenor.	***Lead Case:*** **Case No. 3:21-cv-00080-MMD-CLB** **DEFENDANT-INTERVENOR LITHIUM NEVADA CORP.'S SUR-REPLY IN RESPONSE TO INTERVENING PLAINTIFFS' MOTION TO SUPPLEMENT THE RECORD**

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Lithium Nevada Corp. files this sur-reply to respond to the new arguments the Reno-Sparks Indian Colony ("RSIC") and Atsa koodakuh wyh Nuwu ("the People," collectively the "Intervening Plaintiffs") raise for the first time in their Reply, ECF 140. None of these arguments support that Intervening Plaintiffs' proffered documents should supplement the National Historic Properties Act ("NHPA") Administrative Record ("AR").

In their Reply the Intervening Plaintiffs included "several additional claims" from their simultaneously filed motion to amend their complaint relating to alleged harms under the NHPA, the Archaeological Resources Protection Act ("ARPA"), and the Native Americans Grave Protection and Repatriation Act ("NAGPRA"). *Id.* at 2–3. These newly proposed claims are not before the Court and should not be considered relative to the AR on the claims that are pending.[1] These new claims should be considered separately from and not delay the existing claims for which briefing will commence very soon after resolution of this AR dispute.

1. Historic Properties NHPA Claim

Intervening Plaintiffs now argue BLM "failed to identify at least four" properties before issuing the Record of Decision: the 1865 massacre site, two Indian lodgings noted in the 1868 Field Notes, and Sentinel Rock. *Id.* at 4. This is incorrect. The record reflects BLM did have information on these areas. *See, e.g.*, TPNHPA-0092; ECF 115 at 5-6 (acknowledging BLM included in the AR two sources that "contain[] mention of the 1865 massacre"). Intervening Plaintiffs contend that because BLM did not add these four sites to the National Register and specifically evaluate them in surveying the Area of Indirect Effects ("APE") of the Project, BLM failed to consult with the affected "descendants of the members of the Fort McDermitt Tribe" – some of whom are members of the People -- or "mitigate the probable adverse affects" from the Project to the sites. ECF 140 at 6–8. But these arguments suffer at least three fatal flaws Intervening Plaintiffs ignore: (i) BLM did consult with the Fort McDermitt Tribe and they are supportive of the Project; (ii) the People failed to timely avail themselves of the consultation

[1] Intervening Plaintiffs attested that they learned the facts underlying these new claims over two months ago, *see* ECF 139, but they withheld these arguments until their Reply. *See* ECF No. 115 (Intervening Plaintiffs' motion to supplement the NHPA record filed November 5, 2021 referencing all the subject documents but raising none of these new arguments).

process and, lack standing in this case to make claims under NHPA, ECF 92 at 6, ECF 117 at 8; and, (iii) RSIC may not raise claims based on the Fort McDermitt Tribe's consultation rights, ECF 92 at 7, ECF 117 at 6. Intervening Plaintiffs argue that the Fort McDermitt Tribe is harmed by the "omission" of these four properties, but they cannot usurp another Tribe's sovereignty by raising claims for another Tribe. ECF 140 at 6, 8, 10.

Nor do the documents Intervening Plaintiffs seek to add to the AR demonstrate deficiencies in BLM's information gathering about historic properties. Intervening Plaintiffs only now argue these four properties are of such importance that they should have been considered for listing in the National Register. Intervening Plaintiffs fail to explain why they have never before identified the properties to BLM for consideration, in prior resource management planning or during the course of numerous prior BLM authorizations for substantial surface disturbance previously approved in the project area. ECF 66 at 3–5 (describing thousands of acres of exploration, digging, and trenching authorized under multiple prior projects in the same area). The record demonstrates that RSIC never provided BLM any notice it considered the four properties important. Moreover, RSIC affirmatively represented to BLM that the Project area and these four properties were not of cultural interest to it. ECF 92 at 10 ("representatives of [RSIC and Burns Tribe] disclaimed an interest in the area including the Project area in discussions regarding the Winnemucca RMP"); ECF 87-1, Ex. 1-E. RSIC fails to explain how BLM would make the connection between the Project area or these four properties and RSIC without such notice. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999) (determining where "the Tribe had many opportunities to reveal more information to the Forest Service" but did not explain their concerns, the Court was "unable to conclude the Forest Service failed to make a reasonable and good faith effort to identify historic properties"); *cf. Battle Mt. Band of the Te-Moak Tribe of W. Shoshone Indians v. U.S. BLM*, 302 F. Supp. 3d 1226, 1237 (D. Nev. 2018) ("[O]nly an Indian Tribe has the authority to identify its own [traditional cultural properties ("TCPs")] . . . the mere identification of a TCP by a tribe does not automatically make it eligible for inclusion on the National Register." (internal citation omitted)). RSIC has presented no evidence that it ever identified the four

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properties as TCPs or that prior to June 2021, long after the ROD issued, it ever provided BLM notice it changed its position that the project area was not of cultural interest to it.

BLM took "the steps necessary to identify historic properties within the area of potential effects." 36 C.F.R. § 800.4(b); *cf. Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 880 (D. Ariz. 2006) (observing "[n]omination of a specific historic property to the National Register is a separate process that need not be complete in order for the agency to meet its consultation obligations under the NHPA"). For example, BLM asked RSIC during the 2010 Winnemucca Resource Management Plan consultations to identify resources of cultural importance to RSIC and they did not "identif[y] the Project area as containing a massacre site" or "indicate[] they had any particular cultural interest in the Project area." ECF 92 at 10–11. In 2015, RSIC provided BLM a map detailing areas RSIC had cultural interests in, and neither the Project area nor the 1865 massacre area were encompassed by the large area indicated as containing RSIC's cultural interests. *Id.* at 11; ECF 87-1, Ex. 1-E (map showing great distance between RSIC's area of cultural interests and the project). The most direct source of information about culturally sensitive areas and resources is the Tribes themselves, and RSIC never, before June of this year, identified the Project area or the surrounding APE as encompassing any historic properties.

BLM fulfilled its regulatory duty to "gather information from any Indian Tribe" identified pursuant to 36 CFR 800.3(f) to assist in identifying properties which may be of religious and cultural significance to them and may be eligible for the National Register as required under 36 C.F.R. 800.4(a)(4). Section 800.3(f)(2) requires BLM to make a reasonable and good faith effort to identify any Indian Tribes that might attach religious and cultural significance to historic properties in the APE. While Intervening Plaintiffs have claimed BLM acted unreasonably by not identifying them for consultation, they present no evidence of having provided BLM notice of their interest in the project area. Now they seek to rely on information not in the record and that they admittedly never brought forward, to assert that lands they never identified as important should have been listed in the National Register. Their efforts to belatedly introduce this information and supplement the AR should be rejected. *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. DOI*, 608 F.3d 592, 607–08, 610 (9th Cir. 2010) (concluding the agency

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adequately consulted a Tribe on a 2004 project where the agency only waited a month for the Tribe to respond because "the Tribe responded to the BLM's [previous] inquiries [in 2001] by submitting a map outlining the boundaries of what it called 'traditional cultural property'" and "the Tribe has made no showing that it would have provided new information had it been consulted again earlier in the Amendment's approval process").

The provided documents do not raise "entirely new" subject matter under the "relevant factors" exception to supplement the AR. *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013) (citation omitted); *Lands Council v. U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005) (observing supplementation of the record is only appropriate if the information "is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision … or when plaintiffs makes a showing of agency bad faith"). The books, article, and 1868 Field Notes and Map all are cumulative of the two books BLM already included in the record, meaning that although BLM had notice of the possibility of a massacre outside of the boundary of the Project, neither RSIC nor the People ever provided BLM notice they considered these areas or the Project area important prior to June 2021, long after the ROD issued. BLM conducted a focused archival data collection, "intensive pedestrian surveys" over 12,963 acres of the Project area, ECF 65, Ex. 14, App'x C at 7, 38, 66, and numerous consultations to find culturally significant artifacts, which more than satisfied their regulatory duty to "review existing information" and "seek information" related to "historic properties in the area." 36 C.F.R. § 800.4(a)(1)–(2). Importantly, BLM also sought this type of information from RSIC who twice confirmed that it had no cultural interest or concerns in that area, by virtue of omitting any reference to the area encompassed by the Project or these four properties, and also affirmatively through its map provided to BLM of its identified areas of cultural interest that excluded the Project area. *See* ECF 92 at 13–14. BLM also consulted at length with the Fort McDermitt Tribe, which is the only Tribe that RSIC could allege would be impacted as the alleged decedents from the survivors of a massacre within the Project area, and that Tribe supports the Project. ECF 66-8; ECF 66-10 (Fort McDermitt Tribal elder and member

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explaining the Tribe supports the Project and concern that RSIC misrepresents the Tribe's position).

RSIC also "fails to demonstrate how and to what extent those [cumulative documents] were sufficiently relevant or necessary to the decision...rendered in this case." *Jackson v. Jewell*, No. 3:13-cv-00113-RRB, 2015 U.S. Dist. LEXIS 27344, at *15 (D. Alaska Mar. 3, 2015); *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 1:09-CV-1053 OWW DLB, 2010 U.S. Dist. LEXIS 61083, at *25 (E.D. Cal. June 21, 2010) (concluding "so long as [an issue is] not entirely omitted (or are so cursorily considered as to be effectively omitted) from the analysis, additional information on the impact of [that issue] cannot come in under the relevant factors exception."). The two documents referencing a massacre in the AR are sufficient for the Court to determine, as it indicated in its order denying a preliminary injunction, that BLM's search for documents and consultation with various Tribes was "reasonable … based on the information that it [had]." ECF No. 92 at 18. Because "plaintiffs make no showing the court would need to go outside the administrative record to determine whether the agencies ignored the information" they claim should have necessitated further consultation, these documents are inappropriate for inclusion in the AR. *Californians for Alts. to Toxics v. U.S. Fish & Wildlife Serv.*, No. 2:10-cv-1477 FCD CMK, 2011 U.S. Dist. LEXIS 21586, at *10 (E.D. Cal. Mar. 3, 2011).

Nor do these documents demonstrate bad faith by BLM. As discussed in prior filings, there is no evidence that the BLM, in its work concerning the area, literature review, and seeking the input of nearby recognized tribes, acted in an unreasonable manner or in bad faith. ECF 87 at 3; *id.* at Ex. 1 ¶6; ECF 128 at 7–8 (describing the Project's extensive physical cultural surveys and consultation efforts). This Court previously determined that even though the 1868 Field Notes indicated there may be remains "fall[ing] just within the area of indirect impacts, …. [t]he 1868 field notes do not necessarily put BLM on reasonable notice that it should have consulted with RSIC on the Project." ECF 92 at 14. And the Court observed that "RSIC … confirm[ed] the evidence [they present] … showed that the camps of the Paiutes who were massacred were near, but not in, the Project area." ECF 117 at 10. Thus, the 1868 Field Notes do "not reasonably put BLM on notice that it should have consulted RSIC about the Project because they lie outside

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the Project area." ECF 92 at 15. The mere existence of those documents does not create even the "specter" of bad faith such that they should supplement the AR under that exception. *Protect Lake Pleasant, Ltd. Liab. Co. v. Johnson*, No. CIV 07-0454-PHX-RCB, 2008 U.S. Dist. LEXIS 118275, at *24–25 (D. Ariz. May 5, 2008). Nor do these documents bear on or change the fact that RSIC represented to BLM that the project areas was not within its mapped area of cultural interest and, if it wanted consultation in areas outside that identified area of cultural interest it would notify BLM and request consultation which it never did here until long after the ROD issued.

2. SHPO Consultation NHPA Claim

The Intervening Plaintiffs argue that BLM did not analyze the 1865 massacre area and consult with them as relevant Tribes under the State Protocol Agreement with the Nevada State Historic Properties Officer ("SHPO"). ECF 140 at 4, 7–8. But, as discussed above, Intervening Plaintiffs provided no notice to BLM they had any interest in the project area or that RSIC had changed its position submitted to BLM that it was outside its cultural area of interest. RSIC has not shown that BLM's review was unreasonable. Even if BLM had located the two pieces of literature or the 1868 Notes, it was only required under the State Protocol to consult with the implicated federally-recognized tribes—not RSIC which had led BLM to believe that it had no interest in the Project area or these four properties. RSIC repeatedly indicated to BLM that it had no cultural interest in or near the Project area. ECF 87-1, Ex. 1-E. Because this claim under the State Protocol still fails to demonstrate that the documents at issue raise "entirely new" subject matter separate from the two books mentioning a massacre already in the record, RSIC cannot supplement the AR under the "relevant factors" exception. *Pinnacle Armor*, 923 F. Supp. 2d at 1234 (citation omitted). The Court can evaluate BLM's efforts to consult with relevant parties in the NHPA process based on the AR provided. *Ctr. for Env't. Sci. Accuracy & Reliability v. Nat'l Park Serv.*, No. 1:14-cv-02063 LJO MJS, 2015 U.S. Dist. LEXIS 122294, at *14 (E.D. Cal. Sep. 14, 2015) ("The moving party must make a viable argument that failure to supplement the record will 'effectively frustrate[] judicial review.'" (citation omitted)).

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3. ARPA Claim

Intervening Plaintiffs contend that "[b]y completely missing the fact of the 1865 massacre" BLM issued a "legally suspect" ARPA permit because the documents provided "suggest[] that there are human remains" in the Project area. ECF 140 at 3, 7–8. This argument inappropriately claims that alleged issues in the ARPA permitting process constitute reasons to supplement the entirely separate NHPA AR. As this Court observed, the NHPA record was specifically developed without inclusion of BLM's ARPA deliberation and consultations. ECF 92 at 6 (observing the two processes were distinct and that "the Tribes challenge BLM's decision to issue the ROD in contravention of the NHPA in this case, not any decision related to the ARPA process"). As such, both the ARPA and NAGPRA claims are irrelevant to the AR dispute, because the current record was developed in response to the pending NHPA claims, not to address any possible future claims under different statutes. *Cf. Franco v. U.S. Forest Serv.*, No. 2:09-cv-01072-KJM-KJN, 2016 U.S. Dist. LEXIS 44266, at *7 (E.D. Cal. Mar. 31, 2016) (declining to consider a NHPA claim on summary judgment where the Fourth Amended Complaint only pled ARPA and APA claims).

Intervening Plaintiffs also overstate the significance of these documents. BLM did not "completely miss" the 1865 massacre, as it included two books that mentioned the massacre in the AR. ECF 115 at 5. And the documents themselves do not "suggest[] that there are human remains" in the Project area, ECF 140 at 7, as this Court determined that the proffered documents "did not show a massacre occurred within the Project Area," ECF 117 at 9, and BLM has exhaustively inventoried the area. TPNHPA at AR-000007-9. Were human remains to be discovered in the APE (miles from any planned construction), pursuant to the Historic Properties Treatment Plan "all work will cease immediately within 50 (165 feet) meters of the find," "BLM will notify the appropriate tribes," and Lithium Nevada "will secure the area and move work to another location until appropriate Tribes and agencies make decisions regarding proper disposition of the remains." ECF 65-14, App'x C at 51. Thus, the documents do not raise "relevant factors" that BLM should have considered in the ARPA or NHPA permitting processes and do not demonstrate BLM's decision "is missing any fundamental components simply

because [Intervening Plaintiffs] believe[] otherwise." *Friends of the Bitterroot v. Marten*, No. CV 20-19-M-DLC, 2020 U.S. Dist. LEXIS 179369, at *9 (D. Mont. Sep. 29, 2020) (declining to supplement the record with a declaration documenting the plaintiff's "belief that the Forest Service violated the Forest Plan's road building restrictions …. because there are other existing routes" under either the "relevant factors" or the "complex subject matter" exceptions).

4. NAGPRA Claim

The People argue they have standing to claim that BLM violated NAGPRA by failing "to consult with the lineal descendants of *possible* human remains before excavation" and that the documents proffered are thus relevant to and should be included in the NHPA record. ECF No. 140 at 3 (emphasis added). The People are not a federally recognized tribe and, therefore, absent timely written request to BLM for consultation, there was no basis for BLM to identify them for consultation. ECF 92 at 6. In addition, they once again improperly try to usurp the Fort McDermitt Tribe's sovereignty by proposing claims on behalf of a Fort McDermitt tribal member. ECF 66 at 13-14; ECF 117 at 8 (maintaining that "[t]he Court does not wish" to "be perceived as disregarding the government-to-government relationship between the federal government and the Fort McDermitt Tribe").

Moreover, this NAGPRA claim is meritless and not implicated by the facts of this case. *See Slockish v. U.S. FHA*, No. 3:08-cv-1169-ST, 2012 U.S. Dist. LEXIS 118718, at *34 (D. Or. June 19, 2012). "NAGPRA does not apply unless Native American cultural items are actually excavated or discovered. The mere potential for their excavation or discovery is insufficient." *Id.* As Intervening Plaintiffs acknowledge that the documents at most "suggest[]" that it is "very likely" that "possible" human remains exist outside the Project area, ECF 140 at 3, 7, this only serves to allege "mere potential" and the NAGPRA claim fails because no remains or related cultural items were "actually excavated." *Slockish*, 2012 U.S. Dist. LEXIS 118718, at *34. As this Court has observed multiple times, this is unsurprising as "there has been significant ground disturbance within the Project area for some time that had never located any human remains." ECF No. 117 at 9. Moreover, there is no excavation or disturbance proposed in the areas where Intervening Plaintiffs assert that the documents indicate the incident occurred.

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Furthermore, as with the ARPA claim, this NAGPRA claim is irrelevant to this record developed under NHPA and cannot demonstrate that BLM neglected to consider "relevant factors" in making its NHPA determination. The Intervening Plaintiffs are once again claiming their historical documents show that a massacre occurred, creating obligations under ARPA and NAGPRA where this Court has *definitively* stated none exists—those documents "did not show a massacre occurred within the Project area." *Id.* Intervening Plaintiffs fail to point to any actual discovery of remains that would trigger NAGPRA. *See* ECF 140. Thus, because these documents do not raise "relevant factors" that BLM should have considered under NAGPRA or within the NHPA permitting process. *See Friends of the Bitterroot*, 2020 U.S. Dist. LEXIS 179369, at *9.

For all the above reasons, Intervening Plaintiffs' motion to supplement the NHPA record should be denied.

DATED this 10th day of December 2021.

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Certificate of Service

I hereby certify that on December 10, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

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