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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WESTERN WATERSHEDS PROJECT, *et al.*, Plaintiffs, and RENO-SPARKS INDIAN COLONY and ATSA KOODAKUH WYH NUWU/ PEOPLE OF RED MOUNTAIN Plaintiff-Intervenor, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	) Case No. 3:21-cv-103-MMD-CLB)) **INTERVENORS' REPLY IN**) **SUPPORT OF MOTION TO**) **INTERVENE**

Defendants)
)
and)
)
LITHIUM NEVADA CORP.)
)
Defendant-Intervenor)

Applicant-Intervenors Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain (together "Intervenors") reply to Defendant-Intervenor Lithium Nevada Corp.'s ("Lithium Nevada") opposition to Intervenors' Motion to Intervene.

INTRODUCTION

Confronted with facial evidence of crucial breaches of bright-line requirements of § 106 of the National Historic Preservation Act and its implementing regulations, Lithium Nevada trivializes the requirements as public notice checkoffs, and blames the conspicuously excluded tribes of paying insufficient attention to protecting tribal cultural-historical interests in the midst of a devastating pandemic and lockdown, when public meetings became impossible. According to Lithium Nevada, the Intervenors' supposedly dilatory failure to seek intervention inflicts injury on the existing parties, an argument contradicted by the Bureau of Land Management's acquiescence to Intervening Plaintiffs' standing. BLM – the federal agency responsible for complying with the National Historic Preservation Act ("NHPA") and whose actions and inactions are being challenged here does not oppose the Intervenors' Motion to Intervene. The BLM's acquiescence to the Intervening Plaintiffs' standing is effectively an admission that the Federal Government is not "injured" by the timing of the Motion to Intervene.

Lithium Nevada, in its Opposition, requests that a condition of intervention be that the Intervenors must comply with the existing scheduling order approved by this Court. If Intervenors are granted intervention, they are prepared to comply with the existing scheduling order. The Intervenors understand that the BLM might need extra time to gather pertinent documentation regarding Intervenors' claims for the Administrative Record, and are prepared to agree that BLM may take a reasonable time beyond the July 30 deadline provided for in the existing scheduling order to do that.

RSIC is currently drafting a response to the BLM's July 12, 2021 letter which denied RSIC's June 3 request for consultation under NHPA. RSIC will state its intention to engage in meaningful, government-to-goverment consulting under the Archaeological Resources Protection Act (ARPA) and renew its demand for consultation under NHPA, which provides for a different set of consultation rights for both the general public and Indian Tribes (see more below). RSIC draws attention to the fact that it took BLM nearly 6 weeks to respond (with a short, 2-paragraph, cursory response) to RSIC's request for consultation under NHPA while RSIC will respond in just over 2 weeks – a third of the time it took BLM to respond.

I. Lithium Nevada identifies the wrong date for when the Intervenors learned their interests were not protected.

Because Lithium Nevada's primary argument about the timeliness of the Intervenors' motion hinges on the date the Intervenors learned about the project, the Intervenors will address the reason for delay prong of the timeliness test, first.

Lithium Nevada confuses the date that the Intervenors learned about the project with the date that the Intervenors learned that their interests would not be protected

adequately by the parties. Until July 12, 2021, when BLM denied RSIC's June 3 request for meaningful government-to-government consultation under NHPA, RSIC still had reason to believe that BLM would read the plain language of 36 CFR Part 800 and recognizing the clear obligation BLM has to consult with RSIC, would begin the Section 106 consultation process with RSIC and other Tribes who attach religious and cultural importance to the project area.

The Intervenors' hopes that BLM would fulfill its obligations under NHPA, section 106 were bolstered by BLM's comment in the Record of Decision (ROD) which stated:

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

According to the ROD, then, the NHPA, Section 106 process had not concluded. Furthermore, the 2014 BLM-State Historic Preservation Officer (SHPO) State Protocol Agreement, which governs part of NHPA's Section 106 consultation for BLM Nevada offices, contains this brightline rule:

"4. BLM will negotiate a [Memorandum of Agreement] addressing adverse effects when BLM and SHPO agree that the adverse effects are known prior to the approval of the undertaking.

a. The MOA establishes BLM-SHPO concurrence regarding the resolution of project-related adverse effects according to a [Historic Properties Treatment Plan], as well as other stipulations and measures that may be specified in the MOA. BLM must initiate consultation with SHPO regarding eligibility, effects, and resolution of adverse effects with sufficient lead time to allow for development of an MOA on a schedule meeting the undertaking's anticipated DR or ROD. BLM will also consult with Indian tribes and other consulting parties, as appropriate. The MOA must be signed by the appropriate parties prior to BLM's issuance of a DR or ROD for the undertaking.

b. Draft PAs and MOAs should be made available for public comment." (emphasis with original.) 2014 BLM-SHPO State Protocol Agreement, Section V.F.4a-b.

Because the ROD stated that the Memorandum of Agreement was still being prepared; the 2014 BLM-SHPO State Protocol Agreement, Section V.F.4a-b required BLM to consult with appropriate Indian Tribes; and no draft MOA had been made available for public comment, the Intervenors legitimately concluded that there was still time for them to consult with BLM under NHPA and in doing so, to protect their interests.

Then, when the Plaintiffs moved for a preliminary injunction on May 27, 2021, the Intervenors first learned that Lithium Nevada had plans to begin physical disturbance as soon as June 23, 2021. RSIC demanded consultation 6 days later on June 3, 2021. Then, nearly 6 weeks later, BLM responded with a short, 2-paragraph rejection of RSIC's request for consultation.

It was not until July 12 that RSIC learned its interests were not adequately protected by the parties. Therefore, RSIC's delay was only 8 days. Similarly, Atsa koodakuh wyh Nuwu/ People of Red Mountain did not receive a letter denying their June 24 request to be included in NHPA, Section 106 consultation until July 20, *the day the motion to intervene was filed.*

RSIC and Atsa koodakuh wyh Nuwu/People of Red Mountain tried to protect their interests without resorting to legal action. They moved very quickly when it was clear that their interests were threatened. Denying them intervention because of a delay in moving to intervene would punish the Intervenors for seeking a more efficient, less expensive route for all the parties, including Lithium Nevada.

II. Only Lithium Nevada claims to be prejudiced. It's concerns are alleviated by Intervenors' agreement to comply with the existing schedule order.

BLM does not oppose the Intervenors' motion for intervention so we may conclude that BLM is not prejudiced by the Intervenors' motion. Plaintiffs, Western Watersheds Project, have filed a declaration of support for the Intervenors. And, the rest of the Plaintiffs do not oppose Intervenors' motion.

The only party, then, claiming to be prejudiced is Lithium Nevada. It persists in the misguided claim that the date the Intervenors learned of the project is the same date they knew their interests weren't protected. As described above, this is the wrong date. Intervenors actually moved very quickly once they learned their interests were not protected.

Lithium Nevada also argues that it will be prejudiced by another round of briefing on a motion for preliminary injunction. Had Intervenors' and Plaintiffs' motions for preliminary injunctions been joined, however, Lithium Nevada would have had to boil its arguments down into one response. If the Court admits the Intervenors, Lithium Nevada will have the opportunity to use another 24 pages to address the Intervenors' preliminary injunction.

Lithium Nevada claims substantial prejudice "if prospective intervenors are allowed to intervene after this Court ruled that it would decide this case on the merits on an expedited basis and the existing parties have agreed to a briefing schedule – if such intervention led to a modified schedule delaying the Court's decision on the merits." However, Intervenors will agree to follow the existing schedule order thereby alleviating Lithium Nevada's concerns.

III. Intervenors seek intervention at an early stage of the proceedings.

As Intervenors explained in their Motion to Intervene, they sought intervention at an early stage of the proceedings when there had been no hearings or rulings on substantive matters. Intervenors have cited a Ninth Circuit decision directly on point. In *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, (9th Cir. 1995), the Ninth Circuit ruled that intervention by right was properly granted where intervention was sought before there were hearings or rulings on substantive matters and, although one party had moved for preliminary injunction, intervention was sought before the preliminary injunction hearing. In *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998), the D.C. Circuit found that a district court erred when it denied an applicant's motion to intervene even after "the district court had entered only a preliminary injunction, not a permanent injunction."

Lithium Nevada claims that it was impossible for the motion to intervene to be briefed before the hearing. That simply is not true. Lithium Nevada, upon receiving the Intervenors' filings, could have moved to postpone the Plaintiffs' preliminary injunction hearing. The Intervenors tried to give the parties that chance by rushing their filing only 8 days after RSIC learned its interests were not protected and the same day that Atsa koodakuh wyh Nuwu/People of Red Mountain learned their interests were not protected. Moreover, the Intervenors requested the Court's expedited review in order to shorten any delay in construction schedule Lithium Nevada might face.

Meanwhile, BLM's failure, at the Plaintiffs' Preliminary Injunction hearing, to provide even a ball-park estimate for when an archaeological permit might be issued, coupled with BLM's decision not to oppose Intervenors' motion, undermines any claim that admitting Intervenors will delay Lithium Nevada's construction schedule. Unless, of

course, Lithium Nevada is not being transparent about how quickly the archaeological permit will be issued.

IV. Intervenors clearly meet the Ninth Circuit's definition of "significant protectable interest."

Lithium Nevada does not counter the straightforward applicability of the Ninth Circuit's concept of a "significant protectable interest." In the Ninth Circuit, "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims."

Here, the Intervenors have a significant interest in ensuring that land they have often hunted, gathered, planted, and prayed on; the site of a massacre of their ancestors; a place where their ancestors hid from soldiers coming to violently force them on to reservations; artifacts created by their ancestors; an obsidian quarry used by their ancestors; burial sites, and other cultural resources, are not destroyed or desecrated by activities connected to a massive lithium mine before the Intervenors, the general public, and Indian tribes have been meaningfully consulted. This interest is clearly protected by the National Historic Preservation Act and Administrative Procedure Act.

And, there is a relationship between the Intervenors' legally protected interest and Plaintiffs' claims. Both the Plaintiffs and the Intervenors challenge the permitting process performed by BLM Winnemucca for the Thacker Pass Project.

Instead of addressing the Ninth Circuit's definition of significantly protectable interest, Lithium Nevada questions Intervenors' sincerity because they did not request consultation before. Here, the Intervenors urge BLM to consider Traditional Cultural

Properties in the project area. The National Register Bulletin No. 38 that the BLM uses to evaluate Traditional Cultural Properties warns that "knowledge of traditional cultural values may not be shared readily with outsiders" as such information is "regarded as powerful, even dangerous" in some societies." *See Pueblo of Sandia v. US*, 50 F.3d 856, 861 (10th Cir. 1995). So, BLM in honoring § 800.2(c)(2)(B)(ii)(C) which advises that "[c]onsultation with Indian tribes should be conducted in a manner sensitive to the concerns and needs of the Indian tribe..." should have recognized that meaningful consultation about Traditional Cultural Properties requires more than sending vaguely-worded letters to a fraction of the Tribes who attach cultural and religious significance to a historic property.

When you want genuine historical and cultural consultation, the prudent thing would be to deliberately seek out a tribe's cultural and historical experts. By failing to do more than send a few letters, it appears BLM was only interested in checking off a "notification" box.

V. Consultation under ARPA is not an adequate substitute for consultation under NHPA, section 106.

Lithium Nevada insists that the Intervenors can protect their interests through the ARPA consultation process. But, the ARPA consultation process is not a substitute for NHPA consultation. ARPA differs from NHPA in several important ways.

First, ARPA only offers consultation on "archaeological resources" which is defined as "any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest." 43 CFR § 7.3(a).

NHPA provides for consultation on "historic properties" which is a much bigger classification and is defined as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register [of Historic Places], including artifacts, records, and material remains relating to the district, site, building, structure, or object. 54 U.S.C § 300308. The Intervenors have protectable interests in archaeological resources, but they also have protectable interests in Peehee mu'huh as an entire historic district where their ancestors were massacred and hid from soldiers seeking to force them on to reservations.

NHPA also provides Indian tribes and the general public with a much broader interest in consultation with federal agencies about adverse effects on historic properties than ARPA does for archaeological resources. NHPA specifies that section 106 consultation must be completed "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 36 CFR § 800.1(c). NHPA's implementing regulations also specify numerous times that section 106 consultation should commence at the early stages of project planning. ARPA only provides for the federal land manager to provide notice to Tribes "at least 30 days" before issuing the permit.

Most importantly, Intervenors claim irreparable harm from activities described in the Historic Properties Treatment Plan (HPTP). The HPTP is prepared under NHPA, not ARPA. And, NHPA obligates the agency official when preparing the HPTP with ensuring that consultation provides the Indian tribe

> "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR § 800.2(c)(2)(B)(ii)(A).

ARPA contains no equivalent provisions. Therefore, ARPA is an inadequate substitute for NHPA, section 106 consultation.

VI. This Court's denial of Plaintiff's Preliminary Injunction Motion "substantially affects in a practical sense" the Intervenors' ability to protect their interest in NHPA consultation.

The Ninth Circuit follows the guidance of Rule 24 advisory committee notes "that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). This Court's ruling on the Plaintiffs' Preliminary Injunction Motion opens the door for BLM to permit the desecration of Peehee mu'huh. The Plaintiffs did not bring any claims under NHPA. The Intervenors bring claims of BLM's clear violations of NHPA. If BLM permits, and Lithium Nevada's contractor performs, archaeological digs in Peehee mu'huh, then, as a practical matter, the Intervenors' interest in consultation before physical disturbance of important cultural and historic properties occurs would be impeded.

VII. Alternatively, this Court should grant Intervenors' permissive intervention.

The Intervenors clearly have claims that share with the main action common questions of law or fact. As described above, intervention will not unduly delay or prejudice the adjudication of the original parties' rights. If this Court isn't going to rule on summary judgment until January, the parties have ample time to respond to the Intervenors' claims.

Respectfully submitted this 27th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 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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