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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 WESTERN WATERSHEDS
11 PROJECT; GREAT BASIN
12 RESOURCE WATCH; BASIN AND
13 RANGE WATCH; and WILDLANDS
DEFENSE,

14 Plaintiffs,

15 v.

16 UNITED STATES DEPARTMENT
OF THE INTERIOR; U.S. BUREAU
17 OF LAND MANAGEMENT; and
ESTER M. McCULLOUGH, District
Manager, BLM's Winnemucca Office,

18 Defendants,

19 and

20 LITHIUM NEVADA CORP.,

21 Defendant-Intervenor.
22

Case No. 3:21-cv-00103-MMD-CLB

**DEFENDANT-INTERVENOR
LITHIUM NEVADA CORP.'S SUR-
REPLY IN OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

23 Pursuant to the Court's July 15, 2021 Minute Order (ECF 38), Defendant-
24 intervenor Lithium Nevada Corp. files this sur-reply to respond specifically to Plaintiffs'
25 arguments in its Reply in Support of Motion for Preliminary Injunction ("Reply") based
26 on the May 3, 2021 letter from Michelle Griffin of the Nevada Department of
27 Environmental Protection ("NDEP"), Exhibit 35 (ECF 32, 32-4). Plaintiffs
28 mischaracterize both the content of and the legal significance of the NDEP letter, which

1 ultimately supports Lithium Nevada's prior assertion that the project must comply with
2 Nevada water quality standards and demonstrates the iterative process contemplated by
3 the adaptive management process to ensure compliance.

4 ARGUMENT

5 Plaintiffs moved to enjoin the Thacker Pass Lithium Mine Project ("Project")
6 arguing in part that BLM approved the Project without fully developing a mitigation and
7 monitoring plan. As Lithium Nevada explained in its opposition, BLM's reliance on an
8 adaptive management approach, backstopped by mandated compliance with Nevada state
9 water quality standards, was reasonable in light of the long lead time before impacts to
10 water quality *might* occur and the inherent uncertainties in predicting the extent of
11 impacts. Lithium Nevada Opp. at 33.

12 In its reply, Plaintiffs cite for the first time the May 3, 2021 NDEP letter, which
13 provides comments as part of the technical review of Lithium Nevada's parallel request
14 for a water pollution control permit from NDEP under Nevada law. The letter provides
15 that because the water quality modeling predicts groundwater exceedances of some
16 contaminants up to 300 years post closure, a permit limitation must be imposed "to restrict
17 mining below the water table (regional aquifer) until additional studies can be completed"
18 demonstrating that mining will "not result in the degradation of waters of the State." ECF
19 32-4, at 1-2. Plaintiffs claim that the NDEP letter proves that the Project is "illegal" under
20 Nevada law, and that BLM's authorization of the Project in light of this finding violates
21 NEPA.

22 First, as a procedural matter, BLM was not required to consider this post-
23 decisional information as part of the NEPA process for approval of the Project. A
24 fundamental tenet of administrative law is that "the focal point for judicial review should
25 be the administrative record already in existence, not some new record made initially in
26 the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Citizens to Pres.*
27 *Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971), *abrogated on other grounds by*
28 *Califano v. Sanders*, 430 U.S. 99 (1977) (judicial review "is to be based on the full

1 administrative record that was before the [agency] at the time [it] made [its] decision”).
2 Thus, there can be no NEPA violation for failure to account for or discuss opinions that
3 did not exist at the time of BLM’s decision. That is the case here where the NDEP letter
4 was written months after the challenged agency decision.

5 Second, as a substantive matter, the NDEP letter does not state that issuance of a
6 water pollution control permit for the Project would be “illegal.” Rather, it clarifies that
7 a permit limitation will be imposed to restrict mining below the water table until additional
8 information can be developed that mining at those depths would not lead to exceedances
9 of state groundwater standards. Issuance of a permit with those terms, and addressing the
10 other technical comments set out in NDEP’s letter is perfectly legal under Nevada law.

11 Third, where Plaintiffs trumpet a parade of horrors from alleged impacts to water
12 quality of mining, NDEP’s letter ultimately demonstrates the opposite by reinforcing
13 Lithium Nevada’s position that by virtue of Nevada law, and BLM’s requirement that the
14 project adhere to NDEP standards, water quality will be protected. Here, NDEP’s concern
15 is potential groundwater exceedances that may occur *after* the mining is complete in 2065,
16 *after* the mine pit is entirely backfilled, *after* the pit fills with water, and *after* seepage
17 back into the aquifer might occur. In addition, the backfill that *might* create the impacts
18 will not be placed below the water table for approximately twenty years. In other words,
19 NDEP will base its permit condition on potential groundwater exceedances that may occur
20 decades or even centuries into the future. By taking a cautionary stance to require
21 additional study and mitigation development prior to mining below the water table, NDEP
22 demonstrates its commitment to ensuring protection of Nevada water quality standards,
23 and reinforces BLM’s reliance on the operation of those state processes to protect
24 groundwater quality.

25 Moreover, the NDEP letter and protective permit condition are consistent with
26 BLM’s ROD and adaptive management approach. BLM’s ROD requires LNC to update
27 the groundwater model with firsthand information and data at least every five years, and
28 to reexamine assumptions regarding impacts of the backfilled pit on water quality. ROD

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1 at 11. Mitigation strategies will be adopted early and determined by BLM with NDEP
2 concurrence. *Id.* The adaptive management plan incorporated into the ROD similarly
3 contemplates establishment of a Water Resources Technical Advisory Group (“TAG”)
4 managed by BLM, in which NDEP would participate. FEIS at 4-25. The TAG would
5 provide input regarding the groundwater monitoring network and appropriate mitigation
6 measures under the adaptive management plan. *Id.* at 4-25 to 4-26. Thus, BLM
7 contemplated that ongoing collection of data, updates to the groundwater model, and
8 adaptation and development of mitigation strategies based on real world information. The
9 condition set out in NDEP’s letter is no different. It merely limits Lithium Nevada from
10 mining below the water table--which is not anticipated to be reached during the first
11 twenty years of mining-- until the additional modeling and mitigation plans can be fully
12 developed with the benefit of operational data, and NDEP determines they are sufficiently
13 protective of groundwater quality. *See, e.g.*, FEIS Appendix P, Part 2 Figures 4.1, 4.25
14 (showing mining is entirely above the water table on the west side), 6.2, 6.5.

15 Nor does the NDEP letter change the applicability of the Ninth Circuit’s holding
16 in the *Great Basin* case. The facts of most importance to the Court in *Great Basin*
17 *Resource Watch v. BLM*, 844 F.3d 1107 (9th Cir. 2016) – a potential adverse impact that
18 would not occur for decades – are very similar to the facts here where impacts are decades
19 down the road and may never occur and, therefore, in both instances the “BLM reasonably
20 decided to rely on a monitoring scheme to develop future mitigation measures.” The
21 NDEP letter is further demonstration of the reasonableness of the BLM’s decision and
22 case law supports an agency’s reliance on state permitting to ensure impacts are properly
23 mitigated. *Moapa Band of Paiutes v. BLM*, 2011 WL 4738120, *19-20 (D. Nev. Oct. 6,
24 2011) (it was “reasonable” for BLM to “assume[] in its determination that regulatory
25 agencies charged with permit enforcement would ensure compliance with the permit
26 requirements”); *Okanogan Highlands Alliance v. Williams*, 1999 WL 1029106, at *4 (D.
27 Or. Jan. 12, 1999) (finding that the Forest Service could reasonably rely on the EPA and
28 the Washington Department of Ecology “to administer and enforce regulatory

1 requirements within their jurisdiction to protect the environment.”); *Okanagan Highlands*
2 *Alliance v. Williams*, 236 F.3d 468, 476-77 (9th Cir. 2000) (upholding mitigation
3 discussion that relied in part of compliance with state permitting requirements).

4 In sum, the NDEP letter does not undermine BLM’s adaptive approach. Rather,
5 it confirms that BLM was justified in relying on the state’s protective standards and
6 process for ensuring updated information demonstrates adequate protection of
7 groundwater through appropriately relied upon adaptive management, particularly in an
8 instance where data rather than modeling can allow for more precise and meaningful
9 mitigation to be developed if necessary.

10 Dated: July 16, 2021.

11 /s/ Laura K. Granier

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/ Laura K. Granier

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