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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 OPPOSITION TO RENO-SPARKS INDIAN COLONY AND ATSA KOODAKUH WYH NUWU/ PEOPLE OF RED MOUNTAIN'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING PRELIMINARY INJUNCTION**

Defendant-Intervenor Lithium Nevada Corp. ("Lithium Nevada") submits these points and authorities in opposition to Plaintiff-Intervenors Reno-Sparks Indian Colony ("RSIC") and

Atsa Koodakuh wyh Nuwu/People of Red Mountain's ("the People," together with RSIC, the "Movants") Motion for Reconsideration (ECF No. 96).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

After multiple rounds of briefing and a lengthy hearing, the Court determined that Movants failed to substantiate both their claims that the Bureau of Land Management's ("BLM") tribal consultation process improperly excluded the Movants or that the Thacker Pass Project (the "Project") will cause irreparable harm to the less than 0.3 acres at issue for cultural resource mitigation work within the Project's plan boundary area. Shifting their stance in this motion for reconsideration, the Movants implicitly accept the Court's conclusion that BLM was not required to consult with them but now contend solely that, as members of the public, the Movants have standing to assert purported harms incurred as a result of what they allege to be inadequacies in BLM's consultation with other federally recognized Tribes.

Movants procedurally forfeited these standing arguments by failing to raise them in their prior motion. But even if the Court considers them now, the Movants lack standing to assert claims on behalf of other consulting tribes. To allow otherwise would subvert the sovereign authority of those tribes and nullify the regulatory requirements setting out the process the Movants could have used to participate in the consultation processes. Furthermore, the "new" pieces of evidence the Movants now provide in an effort to substantiate their claims of irreparable harm are clearly not "new"—dating from the late 1800 to early 1900s—and the Movants provide no explanation for why they only just now encountered these publicly available documents or declarant. Even if the Court ignored these procedural defects, the evidence Movants now proffer for the first time in their motion for reconsideration simply reargues the claims denied in the preliminary injunction hearing, with no more specific locational evidence to identify the area of potential concern. Movants do not and cannot refute the substantial ground disturbance that has occurred in the Thacker Pass project area for many years under prior BLM authorizations nor the extensive and intensive cultural surveying

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completed in the entire area within the Project plan boundary (more than 12,000 acres) all with no discovery of any evidence of a massacre having occurred in the Project area or any human remains. ECF 85 at 2 n.1. Accordingly, the Court should deny the motion to reconsider and allow Lithium Nevada to continue with the cultural resource mitigation for this Project that is so critical to our country's strategic national security needs.

ARGUMENT

I. Movants Lack Standing

A. Movants Should Not be Allowed to Relitigate Standing.

The Court determined that the Movants lacked prudential standing. Order Denying Prelim. Inj. at 6 ("Order"), ECF No. 92. As the Court observed, the People did not respond to Defendants and Lithium Nevada's contention that the People "are not a federally recognized tribe who must be consulted, and did not affirmatively request consultation." *Id.* Furthermore, "the People [did] not argue—much less present evidence—that they requested in writing to participate" in the tribal consultation process. *Id.* Yet in the motion for reconsideration the Movants spend eight pages delineating their prudential and Article III standing arguments. Mot. at 7–14. The People cannot now re-litigate what they ignored in the motion for preliminary injunction proceedings.

"It is well-settled that a motion for reconsideration 'may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Bracho v. Las Vegas Just. Ct.*, No. 2:20-cv-01339-RFB-NJK, 2020 U.S. Dist. LEXIS 153492, at *2 (D. Nev. Aug. 24, 2020) (quoting *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). Particularly where the Movants "give[] no reason for [their] failure to raise or argue" standing during the preliminary injunction proceedings, the district court should decline to consider new arguments that "could readily have been presented at the original hearing." *United States v. Lopez-Cruz*, 730 F.3d 803, 811–12 (9th Cir. 2013) (citation omitted). "[A]bsent highly unusual circumstances," it would be an abuse of discretion to grant a motion for reconsideration that "present[s] evidence for the first time when they could

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reasonably have been raised earlier." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted). The Movants' failure to fully develop their arguments before filing for a preliminary injunction and their subsequent shifting positions do not constitute adequate explanation for why they failed to make any standing arguments prior to this motion for reconsideration.

B. Movants Lack Article III Standing Under NHPA

Even were the Court to consider Movants' belated standing arguments, the motion should be denied. The Movants now lean into the RSIC's previously undeveloped argument that they may raise claims alleging violation of the consultation rights of other tribes that BLM properly engaged during the National Historic Preservation Act ("NHPA") process. The Movants argue the Court misunderstood their preliminary injunction arguments and that they are simply asserting their own interests, *as members of the public*, in BLM's consultation with federally recognized Indian tribes. *See* Mot. at 2, 8. Because the Movants did not participate in the consultation process in a timely manner as members of the public, they specifically do not raise claims regarding the public consultation process and focus entirely on the adequacy of consultation with other qualifying tribes. But the Movants simply cannot eschew their own regulatory opportunities and claim injury for another's. The Court should deny reconsideration of the Movants' standing to bring arguments on behalf of other tribes that were properly consulted by BLM.

1. Movants Lack Standing to Challenge BLM's NHPA Tribal Consultation

The Court previously analyzed Movants' standing and determined that "the People lack[ed] prudential standing to assert a claim under the NHPA because they are members of the Fort McDermitt Paiute Shoshone Tribe, who was consulted here, are not a federally recognized tribe who must be consulted, and did not affirmatively request consultation before the ROD issued." Order at 6. The Court further correctly concluded that RSIC could not argue "that BLM violated the consultation rights of the tribes it did consult with." Order at 7. Now after multiple rounds of briefing and oral argument, Movants argue "[i]t was improper to foreclose

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review of the BLM's lack of consultation with Fort McDermitt, Summit Lake, and the Winnemucca Indian Colony on prudential standing grounds." Mot. at 7. No longer arguing that the People and RSIC should have been consulted, Movants contend BLM's "lack of consultation with Fort McDermitt, Summit Lake, and the Winnemucca Indian Colony" is sufficient to "violate the [Movants'] procedural rights, as *interested members of the public*." Mot. at 7–8 (emphasis added).

But only federally recognized tribes have a procedural right to—and thus the requisite standing to challenge—the tribal consultation process under NHPA. Article III standing "requires a plaintiff to show … that he or she is a 'person who has been accorded a procedural right to protect [his or her] concrete interests.'" *Douglas County. v. Babbitt*, 48 F.3d 1495, 1500 (9th Cir. 1995) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). This procedural right must belong to the plaintiff who must demonstrate that "if exercised, [that right] *could* protect [his] concrete interests." *Defs. of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *rev'd in part on other grounds by Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007). Accordingly, APA claims cannot be asserted when "the plaintiff is not 'the subject of the contested regulatory action.'" *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). This is because for standing purposes "[a] free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact." *Id.* at 938.

Under the regulation at issue here, the section 106 consultation process requires the agencies consult with "any Indian tribe … that attaches religious and cultural significance to [the] historic propert[y]." 36 C.F.R. § 800.2(c)(2)(ii). "Members of the public," as the Movants term themselves, Mot. at 8, are not included in that consultation and agencies separately "seek and consider" the public's views. *Id.* § 800.2(d)(1). Thus "members of the public" do not demonstrate a procedural right under the *tribal* consultation provision of NHPA because their participation is governed separately. Courts have repeatedly and consistently rejected the

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standing argument Movants now raise, holding that non-tribal contributors to the NHPA process do not suffer an injury in fact for Article III standing to challenge tribal consultation procedures. *See Slockish v. U.S. FHA*, No. 3:08-cv-01169-YY, 2020 U.S. Dist. LEXIS 250527, at *71 (D. Or. Apr. 1, 2020) *recommendation adopted in relevant part by Slockish v. U.S. FHA*, No. 3:08-cv-01169-YY, 2021 U.S. Dist. LEXIS 32449, at *4 (D. Or. Feb. 21, 2021) ("If ODOT's [NHPA] consultation with Yakama Nation was inadequate, Yakama Nation suffered an injury, not plaintiffs. 'Nothing short of the tribe's intervention as a plaintiff would satisfy the standing requirements.' *That plaintiffs otherwise fall within NHPA's zone of interests is inapposite*.") (emphasis added) (internal citation omitted)); *Wishtoyo Found. v. U.S. Fish & Wildlife Serv.*, No. CV 19-03322-CJC(ASx), 2019 U.S. Dist. LEXIS 229219, at *12–13 (C.D. Cal. Dec. 18, 2019) ("[T]he FAC failed to adequately allege that any of the Plaintiffs had been injured by the USFWS's allegedly defective section 106 process. The NHPA violation alleged … was narrowly premised on the [lack of] … adequate[] consult[ation] with Indian tribes …. [but] none of the Plaintiffs here are tribes…." (internal citations omitted)); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm.*, No. EDCV 11-1478-GW(SSx), 2012 U.S. Dist. LEXIS 194310, at *9 (C.D. Cal. Dec. 7, 2012) ("First, this Court held that a member of the public does not have standing to sue under the consultation provisions of the NHPA. In fact, this is now the third time the Court has enunciated this ruling to the Plaintiffs."); *Winnemem Wintu Tribe v. U.S. DOI*, 725 F. Supp. 2d 1119, 1151 n.11 (E.D. Cal. 2010) ("While the NHPA does require federal agencies to consult with Indian tribes that attach religious or cultural significance to affected properties … [the Winnemem] lack standing to bring claims for alleged violations of these requirements because the Winnemem are not a federally recognized Indian tribe.").[1]

[1] Movants' citation to *Montana Wilderness Association v. Fry*, 310 F. Supp 2d 1127, 1150–51 (D. Mont. 2004), also helps illustrate this principle. *See* Mot. at 14. The Court in *Montana Wilderness* did not determine that tribal member "Youpee had Article III standing to challenge the tribal consultations." *Slockish*, 2020 U.S. Dist. LEXIS 250527, at *69. Instead, tribal member "Youpee had Article III standing to challenge the lack of public notice and comment *as a member of the public*," an argument which the Court considered and rejected in that case because the defendants *did* conduct a public notice and comment process. *Id.* (emphases added).

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Allowing the Movants to assert standing to challenge the tribal consultation process as a member of the public with a theoretical interest in the process would create a procedural end run around the NHPA regulatory requirements. If tribes that are not federally recognized are allowed to challenge the tribal consultation process without requesting consultation in writing in a timely manner, the purpose of those regulatory requirements becomes null. *See* 36 C.F.R. § 800.3(f)(3). Indeed, courts frequently acknowledge that the statutory difference between tribal members and "federally recognized tribes," 36 C.F.R. § 800.16(m) (citing 43 U.S.C. § 1602), bestows different rights within the tribal consultation process. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216 (9th Cir. 2008) ("Because the Snoqualmie Indians were not federally recognized before the closure of the administrative record, we need not evaluate the sufficiency of FERC's government-to-government consultation efforts …."). When non-federally recognized tribes do not affirmatively request consultation, they cannot suffer harms from the tribal consultation process because the tribe is then "entitled only to general notice and comment, and to have [their] views considered, as [] member[s] of the public." *Winnemen Wintu Tribe v. U.S. Forest Serv.*, No. 2:09-cv-01072-KJM-KJN, 2017 U.S. Dist. LEXIS 42690, at *7 (E.D. Cal. Mar. 22, 2017). The public comment process is entirely separate, both functionally and in regulation, from the tribal consultation process and there is no NHPA violation or harm suffered when an agency conducts the tribal consultation process without involving members of the public. *Id.* at *7–8. There is no legal basis for the Movants to ignore the requirements of the existing statutory and regulatory structure and then require agencies to restart the Section 106 tribal consultation process whenever a new group or individual claims an interest. The Court should thus deny the motion to reconsider its prior standing determinations.

2. Movants Do Not Challenge BLM's NHPA Public Consultation Process

Throughout the instant motion the Movants contend that they are raising claims relating to "BLM's lack of consultation" with federally recognized tribes under 36 CFR § 800.2(c)(2)(ii)(A). *See* Mot. at 3, 7, 13, 14–19. The Movants do not argue in the motion or

in their complaint that they were denied access to the *public* consultation process of the Project under 36 C.F.R. § 800.2(d), and thus cannot claim, for the first time on reconsideration, that they now actually challenge the public consultation piece of the regulation.[2] The Court observed that BLM properly sought public comment, and that "public notice of the Project tends to show that the Tribes could have learned about the Project and affirmatively requested [tribal] consultation." Order at 17. Thus, even if the Movants did try to claim violation of the public consultation process, Movants' "claim is rendered implausible by the NEPA documents … evidencing such public involvement opportunities." *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. DOI*, 642 F. App'x 690, 693 (9th Cir. 2016); *see also Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1140 ("[P]laintiffs do not allege … that the USFS failed to engage in required public consultation prior to acting. To the extent that plaintiffs might assert NHPA violations for failure to consult the public, plaintiffs thus fail to state a plausible claim for relief.").

II. BLM Consulted with the Federally Recognized Tribes

Instead of pursuing their claims that BLM should have consulted the Movants, the Movants' motion for reconsideration focuses exclusively on the consultation process with the other, federally recognized tribes, contending that "[a]ll BLM did here was make contact twice before the NHPA consultation process had concluded, and once after." Mot. at 18. But the Court concluded that "BLM did consult three tribes on this Project, and Nevada's SHPO signed off on that decision—additional factors that tend to support the Court's finding that BLM made

[2] While it may seem unnecessary to prospectively address this possible permutation of Movants' position, the Movants are constantly changing tack. The Movants initially claimed that COVID prevented appropriate tribal consultation with their members, Mot. for Prelim. Inj. at 13, to which the government responded that tribal consultation actually began *before* COVID, BLM Opp'n to Mot. for Prelim. Inj. at 16 n.53, ECF No. 65, causing the Court to conclude that Movants raised their concerns far too late and did not have standing to contest the consultation process. Order at 7. This conclusion should function as the law of this case relating to Movants' standing because "a court is generally precluded form reconsidering an issue that has already been decided by the same court." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (citation omitted). The Movants now make no mention of their *own* consultation timeline and focus solely on the merit of the agency's consultation with other, federally recognized tribes. The Court should not countenance this new approach to a settled issue nor allow the Movants to shift again in their Reply brief.

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a reasonable and good faith effort to identify the tribes it should consult with about the Project." Order at 17. The Movants argue on reconsideration that mere contact does not constitute consultation under NHPA. *See* Mot. at 17–19 (citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 32 (D. DC 2016); *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior (Quechan Tribe)*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010)).

The Movants do not raise new cases or make new arguments—they regurgitate the same unpersuasive caselaw the Court reviewed during the preliminary injunction hearing. The tribal consultation process for this case was reasonable and engaged the requisite tribes pursuant to the information available to the BLM. The caselaw the Movants repeat is clearly distinguishable from the iterative and collaborative process demonstrated here. Relative to the Project at issue here, the agency initiated contact with the tribes for consultation and consistently followed up with the identified tribes based on their interests, whereas in *Quechan Tribe* there were "[n]o letters from the agency initiat[ing] government-to-government contact with the Tribe, and the agency actually 'rebuffed' the tribe's request that the agency meet with the tribal council." *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 942 (D. Ariz. 2017) (citing *Quechan Tribe*, 755 F. Supp. 2d at 1119). In *Pueblo of Sandia*, the Court concluded that, unlike here, "the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations," but because the Forest Service *failed* to do so the Court determined the consultation process was inadequate. *Pueblo of Sandia*, 50 F.3d at 860. There are no such smoking guns from this case's consultation process—rather, the identified tribes consulted in and the Nevada State Historic Preservation Office concurred in BLM's Section 106 compliance. *See* Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 11. And while it is true that a single "contact … is not consultation …. *this* is not a case about empty gestures…. [T]he [agency] and the Tribe engaged in meaningful exchanges …." *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 32–33 (emphasis added). As covered extensively in Lithium Nevada's opposition to the motion for a preliminary injunction, "[f]or

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years, Lithium Nevada has provided notices and worked on community outreach and engagement with all stakeholders including the Fort McDermitt Tribe." Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 5–6. There can be no question that the Fort McDermitt Tribe has been extensively consulted for years both by the BLM and also as engaged by Lithium Nevada.

Regarding the Fort McDermitt Tribe in particular, Movants attempt to use harms from the past to that tribe claiming "[t]he Fort McDermitt Tribe was created by the American government out of the survivors of the Thacker Pass and other massacres" and thus the proposed development of that land would cause irreparable harm *to that tribe*. Mot. at 23–24. The Movants cannot claim harms to parties that they do not represent. Their attempt to usurp the Fort McDermitt Tribe's consultation authority and dictate what that tribe as a sovereign should have done in consultation is an inappropriate encroachment on the sovereign rights of the Fort McDermitt Tribe. 36 C.F.R. 800.2 (c)(2)(ii)(B)(mandating that consultation with Indian tribes be conducted in a manner "respectful of tribal sovereignty.") BLM is *required* to consult only with the "representatives designated or identified by the tribal government." *Id.* 800.2(c)(2)(ii)(C) Therefore, Movants, who are not the designated representatives of the Fort McDermitt Tribe, yet now attempt to assert what that tribe *should have done*, are unlawfully and improperly attempting to usurp the Fort McDermitt Tribe's sovereign consultation authority.

This highlights how improper it is for the Movants to try to attack the adequacy of the agencies' consultation with other tribes. "Courts have long held that allowing third parties … to assert claims on behalf of the tribe would 'in effect, be allowing the [third party] … to disregard the Tribe's right to be the final arbiter …. violat[ing] the regulatory requirement to recognize the tribe as a sovereign authority.'" Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 14 (quoting *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1293 (D.N.M. 2008)). Particularly in such cases where a federally recognized tribe explicitly *disclaims* the arguments being made by a member who "does not represent [the tribe] in any official capacity," courts in this circuit have determined that the member "cannot stand in [the] shoes" of the tribe for

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consultation purposes. *Slockish*, 2020 U.S. Dist. LEXIS 250527, at *65, 67. In this proceeding, the consulting Tribes did not join the Movants' complaint and one member affirmatively provided a declaration *disputing* the claims made therein. *See* Order at 21 (observing that "at least one member of the Fort McDermitt Paiute Shoshoe Tribe says that her ancestors would not be buried in the ground, suggesting that there are no burial sites within the Project area that would be disturbed by digging"). The tribes consulted do not oppose the Project and "Lithium Nevada has engaged with the Fort McDermitt Tribe and partners to build a local, skilled workforce for the Project…. Tribal Members are [both] supportive of the Project" and they "are concerned about the positions being asserted here contrary to their own views." Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 23.

Ultimately, the Section 106 consultation process conducted for this Project complied with the regulatory requirements and the tribes involved do not join Movants' dire predictions regarding the Project's impact. Moreover, the Fort McDermitt Tribe, in consultation, stated it is their belief the Movants' allegations that a massacre occurred in the Thacker Pass project area are erroneous. ECF 65-17 at 4. To allow the Movants to argue that the tribal consultation process was inadequate blatantly subverts the consulting tribes' sovereignty and, in the words of a seventh generation member of the Paiute Shoshone Tribe, is a misrepresentation of the Fort McDermitt Tribe's view and an insult to their commitment to protecting their religious and cultural heritage. *See* Lithium Nevada Opp'n to Mot. for Prelim. Inj., Ex. 8 at 5 ¶¶ 12, 18. The Court should not reconsider its ruling which correctly reserved arguments on behalf of the consulting tribes to those tribes alone.

III. Movants' "New Evidence" is Not New or Reviewable

A. Movants do not Demonstrate Irreparable Harm

The Movants argue that when "BLM failed to comply with … NHPA procedural requirements, … the damage done by BLM's violation" constitutes irreparable harm. Mot. at 20. The Court concluded "the NHPA does not give the Tribes the right to prevent all digging in the entire Project area," but rather simply participate in consultation. Order at 20. The Court

determined that because "the [Movants] are unlikely to prevail on the merits of their consultation claim" the evidence the Movants provided did not "constitute[] irreparable harm." Order at 20–21. As discussed above, the Court should not reconsider its determination that the Movants lack standing to assert consultation-based claims.

Furthermore, the Movants do not address that "the NHPA does not give the Tribes the right to prevent all digging in the entire Project area," rather it provides only the opportunity to request involvement in tribal consultation on relevant projects—which does not guarantee that the Project will entirely reflect the Movants' vision. *See* Order at 20, Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 1–2. And while the Movants complain that "BLM[] persistent[ly] refus[es] to take new evidence of the massacre into account or to edit the [Historic Properties Treatment Plan ("HPTP")] to reflect the evidence of the massacre," they provide no evidentiary support from the consultation process or to demonstrate that there is any evidence the 0.3 acre of surface disturbance for cultural resource mitigation work at issue will disturb any human remains.[3] And crucially, it is the Movants who persistently fail to demonstrate evidence that their claimed irreparable harms are possible, given more than a decade of substantial surface disturbance – far more than the 0.3 acres at issue here that is for the purpose of cultural resource mitigation. *See* Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 4–5 ("In over a decade of work in the area including trenching, road building, and digging test pits …. no encounters or discovery of any religious or cultural materials [occurred] … through any of the many acres of disturbance.") Nor have Movants offered any evidence to refute what is indisputable: the "intensive Class III archaeological pedestrian surveys conducted throughout the entire Thacker Pass project area that found no evidence of massacre or human remains within the project area." Lithium Nevada Surreply to Mot. for Prelim. Inj. at 3.

B. Movants do not Demonstrate Diligence in Proffering "New" Evidence

The Movants attempt to remedy the dearth of evidence supporting their claims, but it is too little too late. During the preliminary injunction hearing, the Court reviewed the Movants'

[3] In the ARPA permitting consultation, tribes do not have absolute veto but may propose "ways to avoid or mitigate potential harm or destruction" at the Project site. 43 C.F.R. § 7.7(a)(3).

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generalized irreparable harm contention that the entire Thacker Pass area was sacred and observed that the Movants "did not respond to Lithium Nevada's proffered evidence showing the authorized, extensive ground disturbance that has already occurred within the Project area." Order at 20–21. The Movants continue to ignore that evidence in their motion to reconsider, focusing instead on their specific claim that the surface disturbance at issue—0.3 acres of disturbance for cultural resource mitigation work[4]—will allegedly disturb tribal burial grounds. Mot. at 21–25. The Court previously analyzed the Movants' proffered 1868 field notes and accompanying declarations and concluded it "cannot substantiate the Tribes' allegations that digging incident to the HPTP will disturb any burial sites." Order at 21. Notably, the Movants had omitted the relevant map that accompanied the 1868 field notes reflecting the Indian camp locations were several miles away from the outer boundary of the Project area. Lithium Nevada Surreply to Mot. for Prelim. Inj. at 2-3.

In the motion to reconsider, the Movants petition the Court to consider their "new" evidence under Federal Rule of Civil Procedure ("FRCP") 62(b)(2), Local Rule 59-1(a) or in the alternative FRCP 52(b). Mot. at 2.[5] The "new" evidence the Movants proffer in their motion includes another declaration from a Fort McDermitt tribe member, a newspaper article from 1865, excerpts from a book written in 1929, and a "new" map that overlays the map that accompanied the 1868 field notes[6] with a previously-produced map of the Project area from BLM.[7] Everything the Movants offer was available at the time of the preliminary injunction

[4] Order at 19–20

[5] Movants additionally lay out the legal standards under FRCP 59(a)(1)(B), FRCP 59(a)(2), and FRCP 59(e) but do not reference those standards anywhere else in the petition. *See* Mot. at 6–7.

[6] Movants attribute this map to Lithium Nevada. Mot. at 24. As Lithium Nevada noted in its Surreply, this map accompanied the 1868 field notes that Movants produced in their Reply brief for the preliminary injunction, Movants just chose to omit the map because it "demonstrates that the [tribal] camps were found in areas that are now on private land, that are not within the Thacker Pass project area, and will not be disturbed by project facilities." Lithium Nevada Surreply to Mot. for Prelim. Inj. at 3. Layering this map over the BLM map only serves to reinforce what Lithium Nevada has maintained throughout this case—that there is *no* evidence of tribal human remains or that the massacre Movants described occurred in the Project area.

[7] The Movants attribute the underlying map to the redacted HPTP map included in an exhibit from BLM's response to the motion for a preliminary injunction. *See* ECF No. 65-14, at Appendix C - HPTP at Appendix B.

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hearing. The Movants make no attempt to demonstrate why this "new" information was previously unavailable despite their due diligence and thus fail to meet their burden under FRCP 62, 59, 52(b), or Local Rule 59-1(a). On that basis alone, the motion should be denied.

"Evidence is not 'newly discovered' under the Federal Rules [60(b)(2) and 59] if it was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence." *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 212 (9th Cir. 1987) (citation omitted).[8] In this circuit, the Movants must show under Rule 60(b) that they "exercised due diligence to discover this evidence" and that the "new" evidence is "of 'such magnitude that production of it earlier would have been likely to change the disposition of the case.'" *Future Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (citation omitted). But the Movants do not address diligence at all in their motion, only noting the "new" evidence is what they've uncovered "[s]o far." Mot. at 5. The Movants argue that the "new" evidence demonstrates that their claimed harms are "much more likely," Mot. at 21, but do not claim that the new, persistently vague evidence would have changed the Court's conclusion that it lacked *specific* evidence to "substantiate the [Movants'] allegations that the digging incident to the HPTP will disturb any burial sites." Order at 21.

The requirements are even stricter under Local Rule 59-1(a)(1), which does not consider a party's diligence and simply mandates that "[a] party seeking reconsideration … must state with particularity …. if there is newly discovered evidence that was *not available when the original motion or response was filed*." D. Nev. R 59-1(a)(1) (emphasis added). The Movants do not allege this "new evidence" was unavailable when they filed the original motion for a preliminary injunction and fail to carry their burden under this rule. *See Bracho v. Las Vegas Just. Ct.*, No. 2:20-cv-01339-RFB-NJK, 2020 U.S. Dist. LEXIS 153492, at *2 (D. Nev. Aug. 24, 2020) (denying a "disfavored" motion under Local Rule 59-1(a), the Court observed that "a motion for reconsideration 'may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation'" (citation omitted)).

[8] In laying out the requirements under FRCP 62(b)(2) in their motion, the Movants tellingly omit the "reasonable diligence" requirement. *See* Mot. at 5.

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Similarly, under FRCP 52(b) while "the Court may amend its findings" and such a "motion may accompany a motion for new trial under Rule 59," reasonable diligence is still required under both rules to satisfy the Movants' burden. *See Goodworth Holdings, Inc. v. Suh*, 239 F. Supp. 2d 947, 966 (N.D. Cal. 2002) (denying a motion under Rule 59(e) and concluding that "Plaintiff fails to demonstrate that the exercise of due diligence would not have resulted in the evidence being discovered before the judgment. In fact, … plaintiff provided no reasonable rationale for why it did not discover the … evidence earlier"); *see also Far Out Prods. v. Oskar*, 247 F.3d 986, 998 (9th Cir. 2001) (rejecting a motion to amend the judgment under 52(b) because the "appellants could have obtained that [supposedly new] evidence sooner" and observing FRCP 52(b) motions "cannot raise arguments that could have been raised prior" (citation omitted)). The Court should deny the motion to reconsider because Movants failed to address diligence in their motion altogether.

The intent of the restrictions within FRCP 52, 59 and 60 is to confirm the finality of a court's judgments and avoid endless litigation and re-litigation of issues—like the Movants are attempting to do here. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. 3:01-cv-0640-SI, 2017 U.S. Dist. LEXIS 231979, at *10 (D. Or. Nov. 21, 2017) ("A motion for reconsideration '"may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior"' in the litigation." (citations omitted)). The Movants present no reason why any of the information now proffered could not have been produced during the preliminary injunction proceedings or the attendant hearing. The Court previously declined to consider a declaration from a member of the Fort McDermitt Tribe submitted by the People, and the Movants do not explain why their new Fort McDermitt declarant in Exhibit 1 was unavailable during the preliminary injunction proceedings or demonstrate that it should be considered at all given that the People still lack standing. *See* Mot. At Ex. 1, ECF No. 96. The public records in Exhibits 2 and 3 have been available at least since 1929. *Id.*, Ex. 2, 3. And while Movants now attempt to use the 1868 field notes' map to claim the Project's excavation will occur *near enough* to identified remains of Paiute camps (outside of the Project area) to

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uncover further remains, they do not substantiate their claim that nearness will equate to remains—other than to vaguely observe that one of the camps is within "easy running distance," without recognition of the raw and steep terrain. Mot. at 24, *see also* ECF No. 96, Ex. 4. The map provides no basis for concluding a massacre occurred within the plan boundary for the Project or that tribal remains exist within the Project boundaries.

While adamant that they are attempting to prevent the Project from causing irreparable harm, the Movants do not explain why they are still in the process of finding pieces of publicly available information to identify the allegedly sacred areas of Thacker Pass if the area has been important to Movants for decades. Furthermore, the entire theory of their case contradicts what the Fort McDermitt Tribe itself has represented in communications with BLM since 2009, when "Fort McDermitt Tribal Chairman Dale Barr stated that the Tribe had no concerns about" the then-pending Kings Valley Lithium Exploration Project. *See* BLM Opp'n to Mot. for Prelim. Inj. Ex. 4, Kings Valley Lithium Exploration Project Environmental Assessment (Dec. 2009), at 3-6, ECF No. 65. That project covered "the same area [Movants] assert should not be disturbed" in this case—but the Fort McDermitt Tribe did not assert any of the concerns that Movants now claim. Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 4. Representatives from the Fort McDermitt Tribe have collaborated with Lithium Nevada regarding this specific Project since at least 2018. *See id.* at Ex. 8 at 5 ¶ 17 (asserting that the Fort McDermitt Tribe "community has been involved in discussions about the project, and … have been consulted about its development and informed about what it will mean for creating jobs and opportunity for the Paiute Shoshone tribe"); *id.* at Ex. 4 at 4 ¶ 12–13 (Lithium Nevada Community Relations Manager describing the "job opportunities and job fairs" created by the Project in conjunction with Fort McDermitt Tribe representatives). The Movants' claims lack consistency and they provide no reasonable explanation for why this previously available information was never mentioned by any Tribes in the past nor produced by Movants during the preliminary injunction hearing. The Court should decline to consider this belated information and deny Movants' motion for reconsideration.

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C. Even were Movants Diligent, the Evidence is Vague Speculation

In addition to the serious procedural barriers to review, the information in the Movants' exhibits does not provide any further clarity to the location of any alleged burial grounds. Just as correlation is not causation, purported proximity does not prohibit the proposed cultural resource mitigation involving disturbance of 0.3 acre. "To constitute irreparable harm, 'the injury must be both certain and great; it must be actual and not theoretical.'" *San Diego Bev. & Kup v. United States*, 997 F. Supp. 1343, 1347 (S.D. Cal. 1998)(citation omitted). The Movants' newly provided information still does not demonstrate that their claimed harms within the boundaries of the Project are "certain" to occur, and the Court should accordingly deny the motion for reconsideration—particularly considering, as the Court has repeatedly recognized, that what is at issue in the current motion is the 0.3 acres of surface disturbance for cultural resource mitigation.

The publicly available information the Movants now proffer simply restates the basic principles of their claims, but does not provide the requisite specificity needed to establish irreparable harm. It is undisputed that the Project area has been developed extensively with exploration drilling, trenching, a test pit, removal of more than 3,000 tons of materials and building roads for over eleven years and no human remains or evidence of a massacre have beend discovered. Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 1. The newspaper account in Movants' Exhibit 2 indicates only that a calvary pursued tribal members "over several miles" in an area east of Thacker Pass. Mot. at 22. The news article further places the massacre in the Queen River Valley, not within the mountain pass. *See id.*. Movants connect that account back to the previously analyzed 1868 field notes, which the Court already determined did "not necessarily put BLM on reasonable notice" that burial grounds were within with the Project area—the notes only describe "scattered" remains, without a specific location. Order at 14. The secondhand accounts described in Haywood's[9] autobiography simply indicated that a

[9] Haywood escaped arrest by fleeing to Soviet Russia where he became Lenin's labor advisor. *See* Nick Shepley, *The Palmer Raids and the Red Scare: 1918–1920: Justice and Liberty for All* § 2 (2011),

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massacre occurred generally "in the direction of what is now called Thacker Pass," Mot. at 23, and state that the tribe's camp was "down the pass" into a valley, not *within* the Thacker Pass are itself, much less the much smaller are of the Thacker Pass project boundary. *See* Mot. at 23, Ex. 3 at 6.[10] Moreover, the texts provided are inconsistent; notably, the two Haywood accounts give the impression that almost all of the action occurred at the camps, with no specific evidence to support Movants' speculation of a "logical escape route to the west." Mot. At 4. All this evidence is inadmissible and of questionable reliability but, most importantly, says nothing to specifically delineate the Thacker Pass Project area where the facilities will be located because the general reference to "Thacker Pass" encompasses an *18,000 acre* area. *See* BLM Opp'n to Mot. for Prelim. Inj. at 2. Moreover, the 1868 Field Notes Movants submitted to the Court with their Reply in Support of Motion for Preliminary Injunction indicated that any movement went to the east, toward and across the Quinn River – not to the west in the direction of the Thacker Pass area. ECF 73-1 at 6. Finally, the redacted maps in Exhibit 4 do not identify specific burial grounds, rather Movants vaguely allege that particular areas on the maps are "likely within" or "close enough" to the as-yet unspecified massacre location to warrant irreparable harm if those sites are disturbed for the completion of no greater than 0.3 acres of surface disturbance for cultural resource mitigation. Mot. at 24. The only available evidence demonstrates that tribes camped *outside* of the Thacker Pass area in a valley, *see* Lithium Nevada Surreply to Mot. for Prelim. Inj. at Ex. 1-D (map identifying tribal lodgings outside the Project area), which Movants' proffered testimony corroborates, *see* Ex. 2 ("Capt. P. … took nine [calvary] on the valley side."), and the majority of the Project Area was "plowed for the Thacker Pass Seeding Project in 1963" and identified no remains. BLM Opp'n to Mot. for Prelim. Inj. Ex. 4, Kings Valley Lithium Exploration Project Environmental Assessment (Dec.

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https://books.google.com/books?id=EIe_BAAAQBAJ&lpg=PT14&dq=haywood%20lenin%20labor%20advisor&pg=PT14#v=onepage&q=haywood%20lenin%20labor%20advisor&f=false.

[10] These statements offered for "the truth of the matters asserted therein" were provided by individuals who have long since passed away to a second individual who has also passed away and therefore constitute inadmissible hearsay within hearsay and should be excluded. *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986).

2009), at 3-4, ECF No. 65. Ultimately, the "new" evidence and maps are not "meaningfully distinguishable from the 1868 field survey notes," Order at 12, and simply validate information available had all along.

The motion for reconsideration pointedly does not engage with the evidence Lithium Nevada provided during the preliminary injunction proceedings. Although the Movants repeat that the oral histories they submitted describing how their people "hid in Thacker Pass" in caves, Mot. at 21, the Movants do not address that Lithium Nevada demonstrated that "there are no caves in the Thacker Pass Project area." Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 21. This unrefuted evidence before the Court establishes that Movants are mistaken in asserting the massacre or fleeing therefrom occurred in the Project area—as does the more than a decade of work, including removal of 3,000 tons of dirt in the same area and more than 12,000 acres of the most intensive pedestrian Class III cultural surveys completed with no discovery of any evidence that a massacre occurred or human remains. *See id.* at 7.

Ultimately, none of the documents proffered "describe a specific location for the massacre and/or burial sites they believe exist within the Project area with information sufficiently specific to place those sites within the Project area." Order at 21. The Movants accordingly still fail to "substantiate [their] allegations" and have "not met their burden to show irreparable harm." *Id.* Courts in this circuit decline to find irreparable harm where the only proof offered does not conclusively demonstrate a risk of damage to culturally sensitive areas. *See La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. DOI*, No. LA CV11-04466 JAK (OPx), 2011 U.S. Dist. LEXIS 161316, at *13–14 (C.D. Cal. Aug. 11, 2011) (concluding Plaintiffs "failed to offer sufficient evidence to support their claims of irreparable harm" when the photos provided did not enable the Court to "determine whether … the new images[] show[ed] damage" to a sacred site or merely "show[s] some physical proximity" between the site and the planned Project). The information Movants bring for reconsideration should be rejected both as inappropriate for consideration and insufficient to "change the disposition of the case." *Coastal Transfer Co.*, 833 F.2d at 211.

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CONCLUSION

For all of these reasons Movants' motion for reconsideration should be denied.

DATED this 15th day of October, 2021.

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Certificate of Service

I hereby certify that on October 15, 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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