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UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,	)	Case No.: 3:21-cv-80-MMD-CLB
	)	<b>(LEAD CASE)</b>
Plaintiffs,	)	
	)	
v.	)	
	)	
ESTER M. MCCULLOUGH, et al.,	)	<b>INTERVENING PLAINTIFFS'</b>
	)	<b>REPLY IN SUPPORT OF THEIR</b>
Defendants,	)	<b>MOTION TO RECONSIDER</b>
and	)	
	)	
LITHIUM NEVADA CORPORATION,	)	
	)	
Intervenor-Defendant.	)	

WESTERN WATERSHEDS PROJECT, et al.,	)	Case No.: 3:21-cv-103-MMD-CLB
	)	<b>(CONSOLIDATED CASE)</b>
Plaintiffs,	)	
	)	
RENO SPARKS INDIAN COLONY, et al.,	)	

Intervenor-Plaintiffs,

and

BURNS PAIUTE TRIBE,

Intervenor-Plaintiff.

v.

UNITED STATES DEPARTMENT OF THE  
INTERIOR, et al.,

Defendants,

and

LITHIUM NEVADA CORPORATION,

Intervenor-Defendant.

Reno-Sparks Indian Colony (RSIC) and Atsa Koodakuh wyh Nuwu/People of Red Mountain (People of Red Mountain) (together “Intervening Plaintiffs”) respectfully submit these points and authorities in reply to Federal Defendant Bureau of Land Management’s (BLM) and Intervening Defendant Lithium Nevada Corporation’s (Lithium Nevada) Response to Intervening Plaintiffs’ Motion to Reconsider this Court’s Order Denying the Intervening Plaintiffs’ Motion for Preliminary Injunction.

**I. The Intervening Plaintiffs’ theory of standing is well-established and commonly accepted in Ninth Circuit and Supreme Court jurisprudence.**

The Intervening Plaintiffs’ theory of standing is simple: The Administrative Procedure Act (APA), through the the National Historic Preservation Act (NHPA), bestows on any member of the public, who can demonstrate a sufficiently concrete interest in the historic properties affected by a federal agency’s undertaking, standing to

1 ensure that the federal agency follows the proper procedures in making decisions that  
2 affect the historic property at issue.

3 This theory involves satisfying Article III standing through the procedural standing  
4 test often articulated as “To establish procedural standing, the plaintiff must show: (1)  
5 that it has been accorded a procedural right to protect its concrete interests, and (2) that  
6 it has a threatened concrete interest that is the ultimate basis of its standing. *Churchill*  
7 *County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998). “The requisite weight of proof  
8 for each element of the test [for standing] is lowered...for ‘procedural standing.’” *Id.*  
9 “Procedural standing is standing based on a plaintiff’s procedural injury. A plaintiff may  
10 claim ‘procedural standing’ when, for example, it seeks ‘to enforce a procedural  
11 requirement the disregard of which could impair a concrete interest of the plaintiffs.” *Id.*

12 BLM argues that “RSIC and the People cannot establish ‘procedural standing’ to  
13 assert claims of insufficient consultation with other tribes” and states one of the Ninth  
14 Circuit’s articulations of the procedural standing test. But that is false. “A plaintiff  
15 alleging procedural harm can demonstrate injury in fact by showing (i) the agency  
16 violated certain procedural rules, (ii) those rules protect a concrete interest of the  
17 plaintiff, and (iii) it is ‘reasonably probable’ that the challenged action threatens that  
18 concrete interest.” *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1160 (9th Cir.  
19 2017).

20 The Intervening Plaintiffs have clearly alleged that BLM violated certain  
21 procedural rules. However, BLM confuses the Intervening Plaintiffs’ concrete interest  
22 which those Plaintiffs allege has been harmed. The Intervening Plaintiffs’ concrete  
23 interest is in the preservation of historic properties – an interest that Congress explicitly

1 created when enacting NHPA -- in using and enjoying Thacker Pass as their ancestors  
2 have done for millennia. Intervening Plaintiffs further have a concrete interest in  
3 ensuring that the BLM follows the procedures described in the NHPA's implementing  
4 regulations so that BLM possesses adequate knowledge of the historic properties in  
5 Thacker Pass before allowing Lithium Nevada to destroy those properties. Rounding out  
6 the Ninth Circuit's test, it is reasonably probable that BLM's failure to follow the  
7 procedural rules threatens the Intervening Plaintiffs' concrete interest.

8 "Congress may create a statutory right or entitlement the alleged deprivation of  
9 which can confer standing to sue even where the plaintiff would have suffered no  
10 judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514  
11 (1975). A plaintiff seeking to demonstrate, as the Intervening Plaintiffs seek here, that  
12 they have been denied the benefits of information exchange from consultation, has  
13 standing generally and "need not allege any additional harm beyond the one Congress  
14 has identified." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549, 194 L.Ed.2d 635 (2016)

15 Conveniently, BLM leaves out the rest of the Ninth Circuit's procedural standing  
16 analysis. In fact, in the case BLM cites, *Navajo Nation v. Dept. of the Interior*, the Ninth  
17 Circuit repeated the well-established rule statement: "Where plaintiffs allege a  
18 'procedural injury' – that is, that the government's violation of a procedural requirement  
19 could impair some separate interest of the plaintiffs' – the 'normal standards for...[the]  
20 immediacy' of injury are relaxed." *Id.* at 1160 (quoting *Lujan v. Defs. of Wildlife*, 504  
21 U.S. 555 at 572 n. 7 (1992)).

22 Instead of citing the entirety of the Ninth Circuit's procedural standing analysis –  
23 an entirety which clearly supports the Intervening Plaintiffs' position on standing – BLM

1 jumps right into a prudential standing analysis in the very next sentence when it states  
 2 “[i]t is a well-established rule that a litigant may assert only his own legal rights and  
 3 interests and cannot rest a claim to relief on the legal rights or interests of third parties.”.  
 4 ECF 105 at 7-8 (quoting *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d  
 5 1153, 1163 (9th Cir. 2002)).

6 In fact, in *Coalition of Clergy*, after the Ninth Circuit stated the rule that BLM  
 7 quotes, the Court characterized that rule as “prudential, rather than constitutional.” But,  
 8 the Supreme Court foreclosed application of traditional prudential standing principles in  
 9 the APA context with the ruling in *Federal Election Comm’n v. Akins*, 524 US 11, 20  
 10 (1998) when it ruled that in reviewing claims under the APA, “prudential standing is  
 11 satisfied when the injury asserted by a plaintiff arguably falls within the zone of interests  
 12 to be protected or regulated by the statute in question.” Regardless, the Intervening  
 13 Plaintiffs rely on no one’s rights but their own.

14 **A. The procedural right the Intervening Plaintiffs assert is the right to ensure**  
 15 **BLM followed the NHPA’s implementing regulations.**  
 16

17 The Intervening Plaintiffs have been accorded at least one procedural right: the  
 18 right to ensure BLM followed the procedures described in the NHPA’s implementing  
 19 regulations, 36 CFR 800 *et seq*, before BLM allows land the Intervening Plaintiffs are  
 20 strongly connected to to be destroyed.

21 This right originates in the APA. Originally, sovereign immunity jurisprudence  
 22 precluded most citizens from challenging agency actions. So, Congress enacted the  
 23 Administrative Procedure Act (APA) with an “evident intent” to “make agency action  
 24 presumptively reviewable.” *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399-400  
 25 (1987). For a long time, at least since 1970, “Where statutes are concerned, the trend is

1 toward enlargement of the class of people who may protest administrative action.”  
2 *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 US 150, 154  
3 (1970).

4 Under the APA, “a person...adversely affected or aggrieved by agency action  
5 within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. §  
6 702. The Supreme Court has interpreted this section of the APA as imposing a standing  
7 requirement that “the interest sought to be protected by the complainant [must be]  
8 arguably within the zone of interests to be protected or regulated by the statute...in  
9 question.” *Ass’n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 US 150, 153 (1970).

10 It is here, in its procedural rights analysis, where Lithium Nevada misquotes  
11 precedent. ECF 106, pg. 5. Lithium Nevada writes: “Accordingly, APA claims cannot be  
12 asserted when ‘the plaintiff is not the ‘subject of the contested regulatory action,’ (citing  
13 *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (quoting  
14 *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). But, the whole quote from  
15 *Ashley Creek* states:

16 But when, as here, the plaintiff is not the ‘subject of the contested regulatory action, the  
17 test denies a right of review *if the plaintiff’s interests are so marginally related to or*  
18 *inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed*  
19 *that Congress intended to permit the suit.’ Id.* (emphasis added to highlight how much of  
20 the rule statement Lithium Nevada left out)

21  
22 It’s obvious why Lithium Nevada wishes the part of the rule statement it left out  
23 did not exist. It’s because the Intervening Plaintiffs’ interests are much more than  
24 marginally related to the purposes implicit in the statute and it can be reasonably  
25 assumed that Congress intended to permit the suit.

1 The Supreme Court held in *Lexmark v. Static Control*, 134 S. Ct. 1377, 1387  
2 (2014): “Whether a plaintiff comes within ‘the zone of interests’ is an issue that requires  
3 us to determine, using traditional tools of statutory interpretation, whether a legislatively  
4 conferred cause of action encompasses a particular plaintiff’s claim.” And, in *Lexmark*,  
5 the Supreme Court looked to the “detailed statement of [the Lanham Act’s] purposes” to  
6 determine the interest protected by the Lanham Act. *Lexmark*, at 1389.

7 Congress also provided a “detailed statement” of the NHPA’s purposes. When  
8 Congress enacted NHPA, it declared that “the spirit and direction of the Nation are  
9 founded upon and reflected in its historic heritage,” that “historic properties significant to  
10 the Nation’s heritage are being lost or substantially altered often inadvertently, with  
11 increasing frequency,” and that “the preservation of this irreplaceable heritage is in the  
12 public interest so that its vital legacy of cultural, educational, aesthetic, inspirational,  
13 economic, and energy benefits will be maintained and enriched for future generations of  
14 Americans.” Section 1 of the NHPA, Pub L. No. 89-665, as amended by Pub. L. No. 96-  
15 515.

16 Furthermore, the Ninth Circuit has ruled that:

17  
18 Congress enacted NHPA based on its findings that ‘historical and cultural foundations of  
19 the Nation should be preserved as a living part of our community life and development in  
20 order to give a sense of orientation to the American people.’ NHPA was enacted to  
21 ‘encourage the public and private preservation of all usable elements of the Nation’s  
22 historic built environment.

23  
24 *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1158 (9th Cir. 1998)  
25 (internal  
26  
27 citations to the NHPA omitted).

28  
29 The Intervening Plaintiffs are part of the American people. In some senses,  
30 restricting the People of Red Mountain’s standing, because many of them are members

1 of the Fort McDermitt Tribe and the Fort McDermitt Tribe is not a party, reduces the  
2 People of Red Mountain to only tribal members. They are tribal members, of course.  
3 But, they are also part of the American people, part of the public whose interests  
4 Congress enacted the NHPA to protect. A similar logic applies to RSIC. Yes, they are a  
5 federally recognized tribe. But, their rights are not restricted to their rights as a federally-  
6 recognized tribe. RSIC is also part of the American people -- the public who have  
7 demonstrated particularized harm from the planned project. Regardless, Intervening  
8 Plaintiffs allege that BLM is on the verge of substantially altering historic properties  
9 significant to the Nation's heritage, inadvertently. The use of the word "inadvertently" is  
10 apt here because BLM failed to uncover evidence of the September 12, 1865 that it  
11 possibly would have learned about had it followed the NHPA's procedures. *This is*  
12 *precisely why procedural standing exists.*

13 Congress says that "the preservation of this irreplaceable heritage is in the public  
14 interest;" the Intervening Plaintiffs are members of the public with an interest in the  
15 specific heritage that Thacker Pass represents. They satisfy the zone of interests test,  
16 and it's not even close.

17 **B. Viewing the Intervening Plaintiffs' standing theory through the lens of other**  
18 **contexts shows how commonly accepted this theory is.**  
19

20 The Intervening Plaintiffs' standing theory in this case is a completely  
21 uncontroversial theory in other contexts. Consider how often environmental nonprofits  
22 sue federal agencies like the Bureau of Land Management for failing to consult with  
23 other federal agencies like the United States Fish and Wildlife Service under the  
24 Endangered Species Act, for example. In that context, it's not the Fish and Wildlife  
25 Service's rights at issue. It's the environmental nonprofit's members' rights to ensure



1 that the law is followed that are at issue. Here, the Intervening Plaintiffs are not  
2 complaining about the Fort McDermitt, Summit Lake, or Winnemucca Indian Colony  
3 tribes' rights anymore than environmental nonprofits complain about the Fish and  
4 Wildlife Service's rights. They claim that the required information exchange of adequate  
5 consultation has not taken place. A plaintiff suffers sufficiently concrete and  
6 particularized "informational injury" where the plaintiff alleges that: "(1) it has been  
7 deprived of information that, on its interpretation, a statute requires the government or a  
8 third party to disclose to it, and (2) it suffers, by being denied access to that information,  
9 the type of harm Congress sought to prevent by requiring disclosure." *Friends of*  
10 *Animals v. Jewell* ("*Friends of Animals II*"), 828 F.3d 989, 992 (D.C.Cir. 2016) (citation  
11 omitted). Consequently, a "plaintiff seeking to demonstrate that it has informational  
12 standing generally need not allege any additional harm beyond the one Congress has  
13 identified." *Id.*

14 The NHPA required that BLM consult with Fort McDermitt, Summit Lake, and the  
15 Winnemucca Indian Colony because these "Indian tribes...possess special expertise in  
16 assessing the eligibility of historic properties..." 36 CFR § 800.4(c)(1). In this way, Fort  
17 McDermitt, Summit Lake, and the Winnemucca Indian Colony are similar to experts in  
18 the Fish and Wildlife Service, which possesses special expertise in assessing effects to  
19 endangered species. The tribes are presumed to be most familiar with the physical  
20 environment of their lands. And like other laws requiring federal agencies to consult with  
21 experts in different situations while considering different agency actions, under NHPA,  
22 BLM was required to consult with these tribal experts. BLM did not do this and  
23 consequently the Intervening Plaintiffs (and all Americans) were deprived of a

1 procedural right to see BLM follow Congressionally-mandated procedures, and they are  
2 threatened with the loss of at least 57 historic properties.

3 It is not left to the Fish and Wildlife Service to sue BLM for failing to consult with  
4 FWS when applicable laws require that BLM do so. Similarly, the Intervening Plaintiffs  
5 do not have to be Fort McDermitt, Summit Lake, or the Winnemucca Indian Colony to  
6 sue BLM for failing to consult with those Tribes as required by NHPA. If only those  
7 tribes identified by BLM as being affected by a project were afforded standing to  
8 challenge BLM's consultation efforts, then all BLM would have to do -- as it did here -- is  
9 rush through a project's approval before all affected tribes learn of the project, and then  
10 hide behind prudential standing jurisprudence to limit those tribes' ability to challenge  
11 BLM's bad faith deprivation of their involvement in the process to project approval.  
12 Surely this is not what Congress intended in enacting the APA and NHPA.

13 The NHPA does not protect historic properties for only the Fort McDermitt,  
14 Summit Lake, and Winnemucca Indian Tribes. It protects historic properties for all  
15 Americans. This is not to say that federal courts have opened the door to just anyone to  
16 sue federal agencies for procedural violations of laws like the NHPA. The Intervening  
17 Plaintiffs understand this Court has an interest in denying some would-be plaintiffs  
18 standing on prudential grounds. Someone who has never been to Thacker Pass should  
19 not have standing to challenge BLM's section 106 procedural failures when considering  
20 historic properties in Thacker Pass. But that's not the circumstance here. Regardless,  
21 the prudential standing the Court has applied to the Intervening Plaintiffs has been  
22 specifically invalidated by the Supreme Court.

1 When federal agencies fail to follow Congressionally-mandated procedures while  
2 making decisions about property, and those decisions harm a person's concrete interest  
3 in that property, that person should be allowed to seek court review of the federal  
4 agency's failure to follow those procedures. If a person cannot seek court review of  
5 these failures, Congressionally-mandated procedures become nothing more than  
6 suggestions that federal agencies are free to follow or to ignore as they see fit. The  
7 Executive Branch then gains an improper power to disregard the Legislative Branch and  
8 American democracy collapses.

9 **II. BLM should have found the massacre information the Intervening Plaintiffs**  
10 **offer so criticizing Intervening Plaintiffs for not finding this information sooner is**  
11 **ironic.**

12 The BLM and Lithium Nevada criticize the Intervening Plaintiffs for not finding the  
13 new evidence of the massacre site earlier. But that criticism is grossly misdirected. The  
14 BLM is a massive federal agency, with massive resources at its disposal, employing  
15 many professional archaeologists and historians. BLM was legally obligated to find this  
16 publicly available information; the Intervening Plaintiffs were not. Meanwhile, the  
17 Intervening Plaintiffs were misled by the BLM.

18 FRCP 60(b)(2) states: "On motion and just terms, the court may relieve a party or  
19 its legal representative from a final judgment, order, or proceeding for...newly  
20 discovered evidence that, with reasonable diligence, could not have been discovered in  
21 time to move for a new trial under Rule 59(b)." And, the time to move for a new trial  
22 FRCP Rule 59(b) is 28 days. The Intervening Plaintiffs moved for relief from this Court's  
23 Order Denying the Intervening Plaintiffs' Motion for Preliminary Injunction, and the new  
24 evidence of the massacre was discovered, within 28 days.

25 LR 59-1(a) further clarifies:

1 Changes in legal or factual circumstances that may entitle the movant to relief also  
2 must be stated with particularity. The court possesses the inherent power to reconsider  
3 an interlocutory order for cause, so long as the court retains jurisdiction. Reconsideration  
4 also may be appropriate if (1) there is newly discovered evidence that was not available  
5 when the original motion or response was filed, (2) the court committed clear error or the  
6 initial decision was manifestly unjust, or (3) if there is an intervening change in controlling  
7 law.  
8

9 Considering the totality of the facts here, the Court may properly reconsider the  
10 new evidence the Intervening Plaintiffs have offered. The BLM was legally obligated to  
11 find the massacre information early in the Thacker Pass permitting process. According  
12 to the BLM, it has been researching cultural resources in the area for years. The BLM  
13 has been, and is currently, representing to the Tribes and to the American public in a  
14 number of documents including the Draft EIS, Final EIS, Federal Register notices, and  
15 the HPTP that the Thacker Pass mine “does not have the potential to directly or  
16 indirectly affect any resources of Native American religious importance.” FEIS, 4-120.  
17 The BLM has, numerous times, stated that consultation with the Tribes has been  
18 initiated and is ongoing. However, the BLM Handbook on Tribal Relations defines  
19 consultation “to mean direct two-way communication between the agency and an  
20 American Indian or Alaska Native tribal government regarding proposed BLM actions.  
21 The purpose of consulting is to obtain substantive tribal input and involvement during  
22 the decisionmaking process.” H-1780-1, III-2. This contrasts sharply with what  
23 happened here: BLM sent two certified letters to the Tribes, provides no record of tribal  
24 responses, and deemed the NHPA Section 106 process concluded.

25 Originally, the Intervening Plaintiffs took the BLM at its word. If BLM really had  
26 done all the research and consultation it claims it did, the Intervening Plaintiffs would  
27 have been left with no reason to have to locate the evidence they have provided in the

1 course of this lawsuit. The BLM and Lithium Nevada have had years to turn up this  
2 evidence. They can ill object when the Intervening Plaintiffs, with nowhere near the  
3 agency's resources or expertise, produce profound evidence of this massacre in a  
4 matter of weeks, starting with the BLM's own archives.

### 5 **III. Conclusion**

6 The Intervening Plaintiffs have successfully established Article III standing  
7 through the Ninth Circuit's and Supreme Court's procedural standing analysis. The  
8 Intervening Plaintiffs meet the zone of interests test that the Supreme Court has ruled  
9 fulfills prudential standing in the APA context. And, the Intervening Plaintiffs have  
10 brought the new evidence about the September 12, 1865 massacre in Thacker Pass in  
11 time for this Court to reconsider its Order denying the Intervening Plaintiffs' Motion for  
12 Preliminary Injunction. Therefore, this Court should grant the Intervening Plaintiffs'  
13 Motion for Reconsideration.

14 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

8 I hereby certify that on Friday, October 1 2021, I filed the foregoing using the United  
9 States District Court CM/ECF, which caused all counsel of record to be served  
10 electronically.  
11

12 /s/Terry J. Lodge  
13 Terry J. Lodge, Esq. (Ohio Bar No. 29271)  
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