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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 MOTION TO STRIKE ENVIRONMENTAL PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFF-INTERVENORS' MOTION FOR PRELIMINARY INJUNCTION, AND MEMORANDUM IN SUPPORT** **EXPEDITED CONSIDERATION REQUESTED**

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Defendant-intervenor Lithium Nevada Corp. moves to strike the unsanctioned, fugitive reply ("Reply") filed by nonmoving parties, Environmental Plaintiffs, in support of Plaintiff-Intervenors' motion for preliminary injunction. (ECF 74).[1]

INTRODUCTION

Plaintiff-Intervenors moved to enjoin the Thacker Pass Lithium Project proposed by Lithium Nevada, claiming that the BLM skirted certain tribal consultation requirements under the National Historic Preservation Act ("NHPA"). (ECF 45). Environmental Plaintiffs did not join Plaintiff-Intervenors' motion for preliminary injunction. They instead chose to submit a four-page non-opposition styled as a "Statement of Support for Reno-Sparks Indian Colony, et al.'s Motion for Preliminary Injunction" ("Non-Opposition"). (ECF 61). After Lithium Nevada and the BLM opposed Plaintiff-Intervenors' motion for preliminary injunction (ECF 65, 66), Environmental Plaintiffs as nonmoving parties filed a substantive Reply that included 167 pages of exhibits, without seeking leave of court and with a total disregard for this Court's local rules. Environmental Plaintiffs' Reply should be stricken because (a) they are not entitled to tribal consultation and they have challenged the BLM's decision for alleged violations of NHPA, (b) nonmoving parties are not allowed to submit replies in support of a moving party's motion, and (c) the Reply contains arguments, documents, and other information raised for the first time on reply.

ARGUMENT

A. Environmental Plaintiffs Have Never Challenged the BLM's Decision for Alleged NHPA Violations, and Even if They Had Tried to Do So, They Lack Standing

Although the Court consolidated the *Bartell Ranch LLC* and *Western Watersheds Project* actions (ECF 44), each plaintiff maintains independent claims and the consolidation does not cause plaintiffs to all merge into a single party. When cases are consolidated under Rule 42, the "constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (internal quotation marks omitted). "[C]onsolidation does not merge separate suits into one cause of action."

[1] "Plaintiff-Intervenors" refers collectively to the Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain, and the Burns Paiute Tribe.

Harris v. Ill.-Cal. Express, Inc., 687 F.2d 1361, 1368 (10th Cir. 1982); *see Hall*, 138 S. Ct. at 1125 (recognizing that consolidation does not effect a "complete merger," and that the statutory history of Rule 42(a) "makes clear that one of multiple cases consolidated under the Rule retains its independent character . . . regardless of any ongoing proceedings in the other cases"). Consolidation is just an administrative device used for convenience to "accomplish[] those considerations of judicial economy and fairness." *Harris*, 687 F.2d at 1368 (internal quotation marks omitted).

Plaintiff-Intervenors ask this Court to enjoin archeological surveys and data collection, including excavation, because they allege that the BLM failed to complete the NHPA's section 106 consultation process. (ECF 45, at 9; *see also* Plaintiff-Intervenors' Compl., ECF 46, ¶¶ 62–65). Environmental Plaintiffs, however, have never sought judicial review of alleged violations of NHPA under the APA. (*See* Environmental Plaintiffs' Compl., ECF 1 in the related case 3:21-cv-103-MMD-CLB). Because consolidation did not merge the claims[2] and Environmental Plaintiffs have never sought judicial review of alleged violations of NHPA, Environmental Plaintiffs have no right to pursue unpled claims—i.e., alleged violations of NHPA's consultation rights. *See MAO-MSO Recovery II, LLC v. Mercury Gen.*, 2021 U.S. Dist. LEXIS 156674, at *15–16 (C.D. Cal. Aug. 12, 2021) ("[T]o the extent Plaintiffs attempt to procure standing from the additional potential seven (7) exemplars of injury-in-fact in their briefing, the Court declines to address the assertions because they are not pled in the Second Amended Complaints. The Court "must examine [plaintiff's] original complaint to determine whether the claim[s] alleged therein was one over which [the Court] had jurisdiction[.]") (citation omitted); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 558-59 (6th Cir. 1990) (holding that even under the standards requiring liberal construction of pleadings, a party cannot pursue unpled claims).

Even if Environmental Plaintiff pled alleged violations of NHPA's consultation process, they would lack standing to pursue them. The issue of whether Environmental Plaintiffs who do

[2] *See*, *e.g.*, ECF 59 1 in related case 3:21-cv-103-MMD-CLB ("It is further ordered that proposed Plaintiff-Intervenors are admitted into this case as Plaintiff-Intervenors, with full rights of participation limited to the claims asserted in their proposed complaint[.]").

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not have consultative roles under 36 C.F.R. § 800.2(c) have standing to challenge alleged defects in the tribal consultation process was addressed in *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 2012 WL 12904993 (C.D. Cal. May 3, 2012). In that case—much like here—plaintiffs were environmental organizations and individual Native Americas. They alleged that the Department of Interior violated the NHPA by "failing to adequately consult with native traditional leaders and organizations" before approving the construction of a solar power generation project. *See id*. *2. The court held that none of the named plaintiffs had standing to sue under the NHPA, given that the consultation provisions are intended to facilitate "government-to-government" discussion between federal agencies and Native American tribes. *See id*. at *6. The Ninth Circuit affirmed the district court's finding that the plaintiffs lacked standing to challenge the alleged NHPA violations, holding that "regulations extend the right to government-to-government consultation to the Tribe, not its individual members." *See La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 642 Fed. Appx. 690, 693 (9th Cir. 2016) (unpublished). Because Environmental Plaintiffs have never challenged the BLM's decision for alleged NHPA violations, and because they lack standing to even challenge it, their arguments should be rejected and their Reply stricken.

B. Environmental Plaintiffs' Reply Brief Should Be Stricken Because It is an Unsanctioned, Fugitive Document

The Court "has the inherent power to strike a party's submissions other than pleadings" as well. *Mazzeo v. Gibbons*, 2010 U.S. Dist. LEXIS 105798, at *8 (D. Nev. Sept. 30, 2010) (citing *Metzger v. Hussman*, 682 F. Supp. 1109, 1110 (D. Nev.1988)). This "alternative basis for striking improper filings is the district court's inherent power over the administration of its business[,]" which includes the "inherent authority to strike [a] fugitive document." *Mazzeo*, 2010 U.S. Dist. LEXIS 105798, at *8 ("Although [plaintiff] argues that the Court lacked the authority to [strike a non-pleading] under Rule 12(f), the Court had inherent authority to strike the fugitive document. Any other result would render the Court's orders completely ineffective and cripple the Court's ability to manage its docket or regulate insubordinate attorney conduct."); *see also Goltz v. Univ.*

of Notre Dame du Lac, 177 F.R.D. 638, 641 (N.D. Ind. 1997) ("[U]nauthorized submissions could properly be excluded from consideration.").

Nevada courts have held that "[a]ny filing that is not sanctioned by Local Rule or court order is a fugitive document and must be stricken from the record." *See*, *e.g.*, *Tagle v. Bean*, 2017 U.S. Dist. LEXIS 75922, at *9 (D. Nev. May 18, 2017); *Cottle v. Gillespie*, 2012 U.S. Dist. LEXIS 54837, *1 n.1 (D. Nev. April 19, 2012) (striking improperly filed document because neither the Rules of Civil Procedure, nor the local rules permitted such a filing). "Any other result would render the Court's orders completely ineffective and cripple the Court's ability to manage its docket or regulate insubordinate attorney conduct." *Mazzeo*, 2010 U.S. Dist. LEXIS 105798, at *9–10.

> By rule, a fully briefed matter consists of a motion, a response, and a reply.
>
> For all other ***motions***, the deadline to file and serve any points and authorities in ***response*** to the motion is 14 days after service of the motion. The deadline to file and serve any ***reply*** in support of the motion is seven days after service of the response. Surreplies are not permitted without leave of court; motions for leave to file a surreply are discouraged.

LR 7–2(b) (emphasis supplied). Three days before oppositions were due, Environmental Plaintiffs filed a Non-Opposition. (ECF 61). After Lithium Nevada and the BLM opposed the preliminary injunction motion (ECF 65, 66), Environmental Plaintiffs as nonmoving parties filed a substantive Reply that included 167 pages of exhibits. There is nothing in the Federal Rules of Civil Procedure or this Court's Local Rules that authorizes a nonmoving party to file a reply in support of a moving party's motion. Because nonmoving parties are not allowed to file replies, Environmental Plaintiffs' Reply is an unsanctioned, fugitive document that should be stricken. *Reiger v. Nevens*, 2014 U.S. Dist. LEXIS 15912, at *7 (D. Nev. Feb. 7, 2014) ("A document not allowed by Local Rule 7-2, or otherwise permitted by order of this Court, is a fugitive document and must be stricken from the record."); *United States v. Gila Valley Irrigation Dist*., 2011 U.S. Dist. LEXIS 163642, at *11 (D. Ariz. July 6, 2011) (striking a reply filed by a nonmoving party). Environmental Plaintiffs' Reply should thus be stricken.

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C. Environmental Plaintiffs' Reply Should Be Stricken Because It Contains New Evidence and Information Not Raised in their Non-Opposition nor Plaintiff-Intervenors' Opening Briefs

This Court's rules do not allow a party—even a moving party—to submit a reply containing new arguments, evidence, or information after an opposition has been filed, because doing so deprives the opposing party of the ability to respond to the new material. *See e.g.*, *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (a "district court need not consider arguments raised for the first time in a reply brief"); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("'Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.'") (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (9th Cir. 1990)). It is especially inappropriate to include new evidence and information in a final reply brief, where the evidence was available when the initial motion was filed. *Pacquiao v. Mayweather*, 2010 U.S. Dist. LEXIS 92343, at *3 (D. Nev. Aug. 13, 2010). If allowed, the Court effectively would be endorsing sandbagging. *West v. Foster*, 2010 U.S. Dist. LEXIS 102147, at *18 n.7 (D. Nev. Sep. 9, 2010) ("[T]his Court repeatedly has admonished the Federal Public Defender in prior cases that the reply is not a proper vehicle for amending the petition and that the Court will not countenance such attempted improper 'sandbagging' in the reply."); *see also State v. Jackson*, 2014 Del. Super. LEXIS 451, at *10 (Del. Super. Ct. Sept. 3, 2014) ("The Supreme Court disdains sandbagging in reply briefs. . . .").

In their Reply brief, Environmental Plaintiffs submitted new arguments about BLM's actions, the NHPA and NEPA processes and characterizations of BLM's acts based on statements made by Lithium Nevada, for example, along, with a 167- pages of exhibits, that were not raised by Plaintiff-Intervenors in their opening briefs—let alone by the Environmental Plaintiffs in their Non-Opposition. (*Compare* ECF 74 *with* ECF 45, 61, 62). Environmental Plaintiffs' Reply is effectively a new motion containing substantive arguments raised on reply thus preventing Lithium Nevada and the BLM from even addressing them. This is improper, highly prejudicial to Lithium Nevada and the BLM, and candidly, now it appears to be part of the Environmental Plaintiffs' litigation strategy. (*See* ECF 38, 42 in the related matter, Case No. 3:21-cv-00103-MMD-CLB).

Environmental Plaintiffs, like all litigants, had a sufficient opportunity to present their positions in a fair, balanced manner. Unfortunately, Environmental Plaintiffs chose to submit a watered-down version of their position through a Non-Opposition, and later provide a more substantive version that included 167 pages of exhibits on reply. Environmental Plaintiffs' Reply should thus be stricken. *See* LR 7–2(b) ("[M]otions for leave to file a surreply are discouraged.").

CONCLUSION

For these reasons, Lithium Nevada's motion should be granted, and Environmental Plaintiffs' Reply (ECF 74) should be stricken in its entirety.

DATED this 24th day of August 2021

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Certificate of Service

I hereby certify that on August 24, 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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