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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BARTELL RANCH LLC, *et al.*, Plaintiffs, v. ESTER M. MCCULLOUGH, *et al.,* Defendants.	Case No. 3:21-cv-80-MMD-CLB Related Case No. 3:21-cv-103-MMD-CLB (Consolidated)
WESTERN WATERSHEDS PROJECT, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.,* Defendants.	**FEDERAL DEFENDANTS' OPPOSITION TO MOTION TO AMEND COMPLAINT**

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ABBREVIATIONS

Abbreviation	Description
APA	Administrative Procedure Act
APE	Area of Potential Effect
ARPA	Archeological Resources Protection Act
BLM	Bureau of Land Management
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
HPTP	Historic Properties Treatment Plan
NAGPRA	Native American Graves Protection and Repatriation Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ROD	Record of Decision
RSIC	Reno-Sparks Indian Colony

INTRODUCTION

Plaintiff-Intervenors Reno-Sparks Indian Colony (RSIC) and Atsa Koodakuh Wyh Nuwu/People of Red Mountain ("the People") intervened in this action to bring one claim challenging the United States Bureau of Land Management's decision approving two plans of operations for a lithium mine in Humboldt County, Nevada ("the Project") under the Administrative Procedure Act (APA) for alleged failure to comply with the National Historic Preservation Act (NHPA) and its implementing regulations. Following preliminary injunction proceedings, the Court concluded that Plaintiff-Intervenors are not likely to succeed on the merits of this claim.

Plaintiff-Intervenors now move to amend their complaint to expand their NHPA challenge and to assert claims under the APA challenging the United States Bureau of Land Management's (BLM) compliance with the Archeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act (NAGPRA), and the National Environmental Policy Act (NEPA). That motion should be denied because Plaintiff-Intervenors' new claims would be futile and prejudicial.

Specifically, Plaintiff-Intervenors' expanded NHPA claim would be futile because Plaintiff-Intervenors lack standing to assert the procedural rights of other tribes and because the Court has already rejected Plaintiff-Intervenors' speculation that a massacre occurred within the Project area. And Plaintiffs' ARPA and NAGPRA claims would be futile because Plaintiff-Intervenors have failed to state a viable claim and because Plaintiff-Intervenors have not exhausted their administrative remedies. Those claims would also be prejudicial because they challenge a new administrative action and would require preparation of a new administrative record when this case is almost at the summary judgment stage. Finally, Plaintiff-Intervenors have failed to state a claim challenging the NEPA process, rendering that claim futile as well.

BACKGROUND

As the Court is familiar with the history of this Project and this litigation,[1] Federal Defendants set forth here only the background relevant to Plaintiff-Intervenors' motion to amend their complaint.

I. NHPA consultation and the HPTP

BLM issued the Record of Decision (ROD) challenged through the existing claims in this case on January 15, 2021. Consistent with the NHPA and its regulations, before the ROD issued, BLM identified and reached out to multiple tribes with an expressed interest in the Thacker Pass area for consultation and sought public comment on the Project's potential impacts on historical properties and potential mitigation of those impacts.[2] It also shared the draft Memorandum of Agreement with those tribes.[3] RSIC and the People were not among those tribes: RSIC had not previously expressed any cultural or historical interest in the Thacker Pass area and the People are not a federally recognized Indian tribe. After completing its NHPA review, BLM, in consultation with the Nevada State Historic Preservation Office (SHPO), determined that the Thacker Pass Project would have an adverse effect on a number of historic properties within the Project's "area of potential effect" (APE), which encompasses the entire project area and extends beyond it.

Also as part of the NHPA process, a contractor prepared the Historic Properties Treatment Plan (HPTP) to further evaluate the Project's potential impacts on historical properties and potential mitigation of those impacts. The HPTP contemplates a disturbance of less than 0.25 acres—and mechanical excavation of less than 0.04 acres—in several sites located entirely within the boundaries of the

[1] A lengthier background is set forth in Federal Defendants' Opposition to Plaintiff-Intervenors' Preliminary Injunction Motion at 2–9, ECF No. 65 ("PI Opp.").

[2] *See* PI Opp. at 2–7.

[3] *See id.* at 8.

Project area.[4] On November 5, 2020, BLM and the Nevada SHPO signed a Memorandum of Agreement, which approved the HPTP and imposed conditions on the excavations conducted under it.

II. The ARPA permit and BLM's ongoing evaluation of Thacker Pass

As explained in prior briefing and at both preliminary injunction hearings, an ARPA permit was required before any excavation of the archeological sites identified in the HPTP.[5] Consistent with its ARPA regulations, BLM reached out to Native American groups that it understood to consider the "sites potentially affected as being of religious or cultural importance." 43 C.F.R. § 7.7(a)(2). Specifically, BLM sent copies of the HPTP to the Fort McDermitt Paiute-Shoshone Tribe, Summit Lake Paiute Tribe, and the Winnemucca Indian Colony on April 14, 2021, with letters requesting those tribes' assistance "in identifying cultural and social values, religious beliefs, sacred places, and traditional practices . . . which could be affected by [BLM] actions on public lands" in Thacker Pass "and where feasible to seek opinions and potential agreement on measures to protect those tribal interests."[6]

After RSIC and the People expressed an interest in the Thacker Pass area in June 2021, BLM invited RSIC to consult on the ARPA permit on July 9[7] and, on July 19, invited the People—a non-tribal entity—to submit written comments for consideration on the ARPA permit.[8] BLM reiterated its invitation to RSIC on

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[4] *See* Fed. Defs' Opp'n to Pls.' Mot. for Prelim. Inj. 7–10, *W. Watersheds Project v. Bureau of Land Management*, Case No. 3:21-cv-103-MMD-CLB (D. Nev. consolidated July 30, 2021) ECF No. 30; Decl. of Mark E. Hall ¶ 4, *W. Watersheds Project v. Bureau of Land Management*, Case No. 3:21-cv-103-MMD-CLB (D. Nev. consolidated July 30, 2021) ECF No. 30-1; PI Opp. at 20; Second Decl. of Mark E. Hall ¶ 7, ECF No. 65-26; Fed. Defs.' Surreply 3–4, ECF No. 84.

[5] *See* PI Opp. at 2, 8–9.

[6] PI Opp. at 8; *see also* ECF No. 65-26 ¶ 5; ECF No. 65-15.

[7] PI Opp. at 9; *see also* ECF No. 65-19 (July 9 Letter).

[8] PI Opp. at 9; *see also* ECF No. 65-19 (July 19 Letter).

August 10, August 12, and September 10, 2021.[9] Each time, BLM also invited RSIC to set up a meeting.[10] After having repeatedly sought RSIC's input, and when RSIC still had not confirmed a meeting date, time, or agenda, BLM informed RSIC on September 28, 2021, that the ARPA permit would issue that week.[11] It issued on September 29, 2021—more than two and a half months after BLM's July 9 letter to RSIC, and well more than the 30-day notice contemplated by 43 C.F.R. § 7.7(a).[12] As described more fully below, RSIC has taken the first steps in, but has not yet completed, the administrative process for appealing that decision.[13] The Fieldwork Authorization required before the work contemplated under the HPTP and the ARPA permit may begin issued on December 16, 2021.[14]

Even so, based on the sources recently identified by RSIC and the People, and submitted to the BLM as part of the agency's ongoing consultation efforts, BLM has decided to treat evidence of a 1865 massacre on the Quinn River and an associated Indian village site as a "post-review discovery" and intends to evaluate this information in accordance with the Project's HPTP and the NHPA regulations, 36 C.F.R. § 800.13.[15] On November 4, 2021, BLM submitted to the Nevada SHPO a plan for assessing site eligibility and potential impacts that includes a Class III

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[9] *See* ECF No. 65-20 (August 12 Letter); ECF No. 65-21 (August 10 Email); Pls' Proposed Am. Compl. Ex. 7, ECF No.139-7 (September 10 Letter).

[10] *See* ECF No. 65-20 (August 12 Letter); ECF No. 65-21 (August 10 Email); Pls' Proposed Am. Compl. Ex. 7, ECF No.139-7 (September 10 Letter).

[11] Declaration of Kathleen L. Rehberg ¶¶ 5–6, attached as Exhibit 1.

[12] RSIC finally confirmed a date and time for a meeting on September 29, the same day BLM finally issued the permit after months of outreach. Rehberg Decl. ¶¶ 6–7. The meeting was ultimately postponed until mid-November. *Id.* ¶ 8.

[13] *See* Rehberg Decl. ¶¶ 8–9; Nov. 29, 2021 Email to Will Falk, attached as Exhibit 2.

[14] Rehberg Decl. ¶ 10.

[15] *See* Dec. 7, 2021 letter to RSIC and attached Nov. 3, 2021 letter to SHPO, attached as Exhibit 3.

inventory on BLM-managed lands in the APE identified for the Thacker Pass Project, as well as collection of oral histories.[16] In a letter dated December 7, 2021 to RSIC's tribal historic preservation officer, the SHPO explained it had determined that similar issues raised to the SHPO by RSIC "have been satisfactorily addressed at this time."[17]

III. Procedural history

Upon being permitted to intervene, RSIC and the People moved immediately for a preliminary injunction against ground-disturbing activities contemplated by the HPTP. The Court denied this motion. *Bartell Ranch LLC v. McCullough* (*Bartell Ranch I*), No. 3:21-cv-80-MMDCLB, 2021 WL 4037493, at *10 (D. Nev. Sept. 3, 2021), *reconsideration denied*, No. 3:21-cv-80-MMDCLB, 2021 WL 5181750 (D. Nev. Nov. 8, 2021) (*Bartell Ranch II*). In doing so, the Court concluded that RSIC and the People were not likely to succeed on the merits of their claim challenging the NHPA process and had not demonstrated a likelihood of irreparable harm from the ground-disturbing activities contemplated by the HPTP. *Id.* at *4–10. The Court subsequently denied RSIC's and the People's motion for reconsideration of that order. *Bartell Ranch II*, 2021 WL 5181750.

BLM prepared an administrative record for the January 15, 2021 decision and mailed the administrative record for the existing NHPA claims in this action to Intervenor-Plaintiffs' counsel on October 1, 2021. Intervenor-Plaintiffs' motion challenging the completeness of that record, as with the other record-related motions, is currently pending before the Court.

IV. RSIC's and the People's Proposed Amendments

RSIC and the People now seek to expand their claims. In their existing complaint, RSIC and the People asserted a single claim, contending that BLM failed to comply with the NHPA by failing to make a "reasonable and good-faith effort" to

[16] *Id.*

[17] *See* Exhibit 3, Nov. 3, 2021 letter to SHPO.

identify Indian tribes for consultation before approving the Project and to provide "a reasonable opportunity" for those it identified to voice their concerns and advise on the Project.[18] Through the same claim, RSIC and the People also challenged BLM's efforts to seek the views of the public on the Project under the NHPA and claimed that the ROD issued before the Memorandum of Agreement with the SHPO was signed.[19]

Though their proposed amended pleading is not a model of clarity, it appears that RSIC and the People propose two new types of claims. First, RSIC and the People now seek to expand their claim challenging BLM's compliance with the NHPA.[20] Though RSIC and the People list a litany of NHPA provisions in Paragraph 124 of their proposed amended complaint, they plead facts as to only four specific alleged violations, namely that BLM failed to:

(1) Engage in meaningful consultation under the NHPA with tribes "who attach religious and cultural significance" to Thacker Pass.[21]

(2) Make a good-faith consultation with the SHPO.[22]

(3) Identify certain historic properties for inclusion in the National Register of Historic Places—specifically, the alleged September 12, 1865 massacre site, two Indian lodges identified in the 1868 Field Notes, and Sentinel Rock.[23]

(4) Adequately mitigate adverse effects to historic properties through the HPTP.[24]

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[18] Pl-Intervenors' Compl. ¶¶ 62–63, ECF No. 46.

[19] *Id.* ¶¶ 64–65.

[20] Proposed Am. Compl. ¶ 124.

[21] *Id.* ¶¶ 50–51, 60, 67–73.

[22] *Id.* ¶¶ 74–75.

[23] *Id.* ¶¶ 80–91.

[24] *Id.* ¶¶ 92–94.

In addition to this expanded NHPA claim, RSIC and the People seek leave to assert claims under the APA challenging BLM's compliance with additional statutes and regulations. Specifically, RSIC and the People now assert completely new claims challenging BLM's compliance with ARPA,[25] NAGPRA,[26] and NEPA.[27]

LEGAL STANDARD

At this stage in the litigation, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Though Rule 15 contemplates that "[t]he court should freely give leave when justice so requires," *id.*, its "underlying purpose" is "to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). "[T]he grant or denial of an opportunity to amend is within the discretion of the District Court," and that discretion is not abused if the court denies leave to amend for a reason "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Futility is one of those reasons. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile."). Amendments under Rule 15 are futile when the proposed new claims are "duplicative of existing claims or patently frivolous . . . ." *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995). Claims are likewise futile if the court finds an "inevitability of a claim's defeat on summary judgment," *California v. Neville Chem. Co.*, 358 F.3d

[25] *Id.* ¶¶ 95–96, 109–120, 125.

[26] *Id.* ¶¶ 97–105, 121, 126.

[27] *Id.* ¶¶ 106–108, 122, 127. Though Plaintiff-Intervenors' memorandum discusses a Trespass Notice issued to Will Falk, *see* Mot, to Amend at 16–18, that separate decision is not subject of this action or relevant to the claims asserted or the appropriateness of the amendment.

661, 673 (9th Cir. 2004) (quotation omitted), or if the claims would not "withstand a motion to dismiss," *Perry v. Laidlaw Transit Servs., Inc.*, 234 F. App'x 634 (9th Cir. 2007) (citing *Bonin*, 59 F.3d at 845). And "[a] district court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally." *Bonin*, 59 F.3d at 845.

ARGUMENT

Plaintiff-Intervenors' motion to amend the complaint should be denied. Plaintiff-Intervenors have not alleged their own interests underlying their new claims under the NHPA and may not assert the interests of other tribes. In any event, those claims are futile because, as pleaded, they would not withstand summary judgment. The same holds true of Plaintiff-Intervenors' new ARPA claim, which is also futile because Plaintiff-Intervenors have not exhausted their administrative remedies, and their NAGPRA claim, which is also futile because no Native American human remains or objects subject to NAGPRA have been discovered in the Project Area. Finally, Plaintiff-Intervenors have not pleaded a claim challenging BLM's compliance with NEPA.[28]

I. Plaintiffs-Intervenors' amendment to expand their claim alleging NHPA violations is futile

Plaintiff-Intervenors' first category of new claims constitutes an expansion on their existing NHPA claim. They seek to challenge: (1) BLM's identification of historic properties, and specifically allege that BLM did not identify Sentinel Rock or

[28] Plaintiff-Intervenors invoke the "agency actions unlawfully withheld or unreasonably delated" language of 5 U.S.C. § 706 as boilerplate in each of their claims. *See* Proposed Am. Compl. ¶¶ 124–127. But claims challenging an agency's alleged failure to act are "not cognizable under the APA" because Plaintiff-Intervenors do not "allege a failure to take one of the agency actions such as a rule, order, license, sanction or relief," *Quechan Tribe of Ft. Yuma Indian Rsrv. v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921, 948–49 (S.D. Cal. 2013) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–66 (2004)).

the massacre site and Indian lodges asserted by Plaintiff-Intervenors through and connection with this litigation;[29] (2) BLM's consultation with the SHPO during the NHPA consultation process, and specifically the alleged failure to tell the SHPO about the massacre site and Sentinel Rock;[30] and (3) BLM's mitigation of adverse effects through the HPTP.[31] But these proposed amendments are futile because they face an "inevitability of . . . defeat on summary judgment," *California*, 358 F.3d at 673, or if, even accepting all well-plead factual allegations as true, fail to state a claim for relief, *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

A. Plaintiff-Intervenors may not assert the interests of others

Plaintiff-Intervenors' expanded claims under the NHPA are futile for the same reason that the Court found Plaintiff-Intervenors unlikely to succeed on their existing NHPA claim. Specifically, the Court concluded that "BLM made a reasonable and good faith effort to identify the Tribes it should consult with on the Project and reasonably decided not to consult with" RSIC because RSIC had previously disclaimed an interest in the Thacker Pass area.[32] *Bartell Ranch I*, 2021 WL 4037493, at *5–8. It further concluded that the People "are not a proper party to" claims under the NHPA "because they are not a federally recognized tribe entitled to consultation" and did not argue "that they requested in writing to participate in the NHPA process regarding the Project before the ROD issued, which could have given them consultation rights." *Id.* at *3; *see also Bartell Ranch II*, 2021 WL 5181750, at *3. Though Plaintiff-Intervenors contend that they move to amend their complaint upon

[29] Proposed Am. Compl. ¶¶ 80–91.

[30] Proposed Am. Compl. ¶¶ 74–75.

[31] Proposed Am. Compl. ¶¶ 92–94. While, as explained above, Plaintiff-Intervenors list a litany of regulatory provisions in their proposed expanded NHPA claim, *see* Proposed Am. Compl. ¶ 124, these are the only new bases about which they provide any factual or record-based detail for their proposed expansion of their NHPA claims, *see id.* at ¶¶ 74–75, 80–94.

[32] *See also* Lithium Nevada's Surreply Ex. 1-E, ECF No. 87-1 (showing the distance between RSIC's expressed area of cultural interests and the Project).

having now reviewed the administrative record for the NHPA process, none of their allegations challenge these previous findings or provide any factual basis for BLM to have included either RSIC or the People in consultation under the NHPA before the ROD issued. Thus, neither RSIC nor the People have alleged a basis for challenging BLM's NHPA consultation with *them*.

Instead, Plaintiff-Intervenors continue to challenge the NHPA process ostensibly on behalf of others.[33] They specifically assert their expanded NHPA claims by invoking the interests of "all the tribes who attach religious and cultural significance to" the Thacker Pass area in the consultation procedures afforded by the NHPA.[34] And they invoke *only* other tribes' consultation rights to support their argument that BLM did not afford tribes a reasonable opportunity to consult on historic properties and concerning BLM's consultation efforts during COVID.[35] The only paragraph alleging facts in support of their argument that BLM failed to comply with the State Protocol Agreement discusses BLM's consultation efforts with four other tribes—but not RSIC.[36] Plaintiff-Intervenors likewise invoke only other tribes' interests in alleging any deficiency in BLM's review of existing information on historic properties around Thacker Pass,[37] BLM's consultation with the SHPO,[38] and

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[33] *See* Proposed Am. Compl. ¶¶ 8–10 (describing consultation with, and properties significant to, other tribes).

[34] *Id.* ¶¶ 50–53 (compliance with NHPA).

[35] *Id.* ¶¶ 76–79.

[36] *Id.* ¶ 60.

[37] *Id.* ¶¶ 67–73. RSIC does invoke its own interest in Sentinel Rock, *see id.* ¶ 72, but as explained above, BLM's decision not to consult with RSIC was reasonable and in good faith.

[38] *Id.* ¶¶ 74–74. To the extent that Plaintiff-Intervenors base this claim on actions and consultation that they contend BLM was obligated to take *after* the ROD issued in this case, such claims are not properly before the Court. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) ("Parties may not use 'post-decision information as a new rationalization either for sustaining or attacking the Agency's decision.'" (citation omitted)). In any event, such claims are premature when BLM may evaluate the

BLM's identification of potential historic properties.[39]

But as the Court has now twice acknowledged, RSIC and the People lack standing to assert the procedural interests of, or to claim violations of the procedural rights of, nonparty tribes. *Bartell Ranch I*, 2021 WL 4037493, at *4; *Bartell Ranch II*, 2021 WL 5181750, at *3–5. In doing so, RSIC and the People continue to violate the "well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties." *Coal. of Clergy, Laws., & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). And "because tribal consultation requirement[s] inure[ ] to the benefit of the tribes themselves, which suffer injury when they are not consulted," a third party cannot vindicate them. *Wishtoyo Found. v. U.S. Fish & Wildlife Serv.*, No. CV 19-03322-CJC(ASX), 2019 WL 6998665, at *6 (C.D. Cal. Oct. 16, 2019). Allowing Plaintiff-Intervenors to assert a claim for "insufficient consultation with a[nother] tribe "would vitiate the congressional goal of treating the tribes as sovereigns in the NHPA's consultation provisions" by allowing the third party "to assert whether or not the tribe's rights had been violated." *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, No. EDCV 11–1478–GW(SSX), 2012 WL 12903070, at *5 (C.D. Cal. Sept. 20, 2012). Because RSIC and the People may not assert claims on behalf of nonparty tribes, to the extent they do so, RSIC's and the People's motion to amend the complaint to add these claims should be denied as futile.

B. Plaintiff-Intervenors have not stated a viable claim challenging the NHPA process

Even setting aside the standing issues, Plaintiff-Intervenors' expansion of their NHPA claims would also be futile because they face an "inevitability of . . . defeat on

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information it has received from RSIC and others as a post-review discovery, in accordance with the Project's HPTP and the NHPA regulations, 36 C.F.R. § 800.13.

[39] Proposed Am. Compl. ¶¶ 80–91. Specifically, only paragraph 91 invokes any tribes' interest in this identification, but speaks only to the interests of "local Tribes" and "regional Tribes," not RSIC itself.

summary judgment," *California*, 358 F.3d at 673, or, even accepting all well-plead factual allegations as true, fail to state a claim for relief, *Ashcroft*, 556 U.S. at 677. As explained above, Plaintiff-Intervenors now claim that BLM failed to: (1) identify four sites as historic properties under 36 C.F.R. § 800.4; (2) consult with the SHPO about the massacre site and Sentinel Rock; and (3) mitigate adverse effects to these sites in the HPTP.[40] In essence, Plaintiff-Intervenors claim that BLM should have, but did not, consider their evidence concerning a massacre near the Project area, two Indian lodges, and Sentinel Rock and certain points during the NHPA process. But Plaintiff-Intervenors' allegations and the documents attached to their proposed amended complaint do not support such a claim.

First, as the Court has already noted, "the 1868 field notes do not show a massacre happened within the Project area."[41] *Bartell Ranch I*, 2021 WL 4037493, at *10. Nor do the other sources that Plaintiff-Intervenors assert as showing the location of the massacre—the *Owyhee Avalanche* article and the Haywood autobiography. *Bartell Ranch II*, 2021 WL 5181750, at *5–6 (characterizing this evidence as "cumulative" and as not "definitely establish[ing] that a massacre occurred within the Project area."). The two Indian lodges noted in the map accompanying the 1868 field notes also lie outside the Project area, by Plaintiffs' own admission, and are located on private land—which BLM does not regulate.[42] *See Bartell Ranch II*, 2021 WL 5181750, at *6 ("RSIC goes on to confirm the evidence

[40] Proposed Am. Compl. ¶¶ 74–75, 80–94.

[41] Plaintiff-Intervenors' allegations concerning the HPTP are also premised on the assumption, which the Court has already rejected, that the HPTP is likely to disturb human remains. *See* Proposed Am. Compl. ¶ 92; *see also Bartell Ranch I*, 2021 WL 4037493, at *10; *Bartell Ranch II*, 2021 WL 5181750, at *5–6.

[42] *See also* Proposed Am. Compl. Ex. 12, ECF No. 141-12 (map showing location of camps vis-à-vis the Project area). At best, one of them is located within the indirect APE for the project which, as Plaintiff-Intervenors have not disputed, is an area that will only be *visually* impacted by the Project. *See* HPTP at 3 Fig. 2, ECF No. 65-14.

considered and discussed in the Prior Order showed that the camps of the Paiutes who were massacred were near, but not in, the Project area."). Finally, as explained above, the record shows that BLM was aware of Sentinel Rock, which is also outside of the Project area, but also that no tribe with an expressed historical and cultural interest in the Thacker Pass area raised it during the consultation process. Because even the evidence that Plaintiff-Intervenors allege as supporting their expansion of their NHPA claim does not, this amendment would be futile.[43]

II. Plaintiff-Intervenors' amendment to assert an ARPA claim is both futile and prejudicial

Plaintiffs next seek to assert a claim challenging BLM's compliance with the consultation provisions of ARPA and its regulations.[44] ARPA governs excavation of archeological sites on public lands and removal of archeological artifacts from those sites. A permit under ARPA must issue before the cultural resources contractor can "excavate and/or remove archaeological resources from public lands" or "carry out activities associated with such excavation . . . ." 43 C.F.R. § 7.5(a). BLM issued an ARPA permit to allow the contractor to conduct mitigation under the HPTP on September 29, 2021.

The Court should deny Plaintiff-Intervenors' motion to add this claim for three reasons. First, the claim would be futile because Plaintiff-Intervenors have not pleaded a claim that could survive summary judgment. *See California*, 358 F.3d at 673. Second, any such claim would not be ripe because Plaintiff-Intervenors have not exhausted their administrative appeals. Finally, even could they plead such a claim,

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[43] In any event, as explained above, BLM may evaluate the information it has received from RSIC and others as a post-review discovery, in accordance with the Project's HPTP and the NHPA regulations, 36 C.F.R. § 800.13. This also renders premature any challenge to BLM's comportment with the State Protocol Agreement in light of newly discovered evidence. *See* Proposed Am. Compl. ¶ 93.

[44] Again, though Plaintiff-Intervenors list a litany of regulatory provisions in their proposed new complaint, *see* Proposed Am. Compl. ¶ 125, their only factual allegations concern the timing of and extent of BLM's consultation with RSIC, *id.* ¶¶ 11, 109–120.

it would challenge a separate agency action and its injection into this action at this time—after the lodging of the administrative record—would be prejudicial. Plaintiff-Intervenors' motion to amend their complaint to add a claim challenging the ARPA process should therefore be denied.

A. Plaintiff-Intervenors have not stated a claim under ARPA that could survive summary judgment

Plaintiff-Intervenors also have not stated a claim under ARPA that could possibly withstand summary judgement, rendering it futile. *See Perry*, 234 F. App'x at 634. Specifically they allege that BLM failed to comply with ARPA regulations to the extent that it failed to (1) notify RSIC (among other tribes) and the People of the ARPA permit process more than 30 days before the permit issued on September 29, 2021, and (2) consult with RSIC (among other tribes) and the People prior to issuing the permit. But Plaintiff-Intervenors' own allegations, combined with the undisputed record already before the Court, preclude any chance of success at summary judgment on either of these claims.

The record already before the Court demonstrates that BLM complied with the ARPA regulations with respect to RSIC. Under the applicable regulations, BLM is required to "seek to identify all Indian tribes having aboriginal or historic ties to the lands" in question and "seek to determine . . . the location and nature of specific sites of religious or cultural importance" to the tribes. 43 C.F.R. § 7.7(b)(1). If issuance of an ARPA permit "may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands," then BLM "shall notify any" such Indian tribe "at least 30 days before issuing such a permit . . . ." *Id.* § 7.7(a). Here, BLM was aware of RSIC's religious or cultural interest in the Thacker Pass area at least as of June 2021, when it asserted those interests in this action. BLM subsequently invited RSIC to consult on the ARPA permit and discuss ways to mitigate potential harms in

July 2021 and again in August and September 2021.[45] As Plaintiff-Intervenors allege, the permit issued on September 29, 2021,[46] more than 30 days after any of these notifications. Plaintiff-Intervenors' conclusory allegation that BLM did not notify them "at least 30 days before issuing the ARPA permit"[47] is thus directly contradicted by the undisputed evidence already considered by the Court in addressing Plaintiff-Intervenors' preliminary injunction motion. In light of this undisputed timeline, Plaintiff-Intervenors cannot succeed on summary judgment on this aspect of their claim.

Furthermore, the regulations impose no obligations on BLM to consult with the People, who are not a federally recognized Indian tribe. If it "becomes aware of a Native American group that is not an Indian tribe," but that also has historic ties to the land, it "*may* seek to communicate with official representatives of that group" to obtain the same information. 43 C.F.R. § 7.7(b)(2) (emphasis added). Though BLM "*may* provide notice to any other Native American group" that it becomes aware may "consider sites potentially affected as being of religious or cultural importance," such notice is not required. *Id.* § 7.7(a)(2) (emphasis added). After notification and before the permit issues, BLM "*may* meet with official representatives of any Indian tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area." *Id.* § 7.7(a)(3) (emphasis added). Still, even though the regulations impose no requirement on BLM to consult with the People, the agency did invite the People to provide written comment on July 19, 2021, more than 30 days before the ARPA permit issued.[48]

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[45] *See* PI Opp. at 9; *see also* ECF No. 65-19 (July 9 Letter); ECF No. 65-20 (August 12 Letter); ECF No. 65-21 (August 10 email to RSIC).

[46] Proposed Am. Compl. ¶ 109.

[47] Proposed Am. Compl. ¶ 112.

[48] *See* PI Opp. at 9; see also ECF No. 65-19 (July 19 Letter).

To the extent that RSIC contests the adequacy of BLM's consultation efforts,[49] the record equally clearly demonstrates that BLM requested RSIC's input on mitigation within the scope of the ARPA permit. The regulations state only that BLM "*may* meet" with a tribe or group's representatives "to discuss their interests, including ways to avoid or mitigate potential harm or destruction . . . ." 43 C.F.R. § 7.7(a)(3) (emphasis added). In at least its August 12, 2021 letters, the agency requested written comments from RSIC no later than August 22, 2021, and offered to set up a meeting.[50] It also requested written comments from the People on July 19.[51] BLM has complied with its regulations—and Plaintiff-Intervenors plead no actual noncompliance.

Because BLM complied with its regulations with respect to notifying RSIC and the People before the ARPA permit issued, Plaintiff-Intervenors are left to assert the consultation rights of other tribes.[52] Specifically, they allege that BLM "did not notify" some eleven *other* tribes about the ARPA permit more than 30 days before it issued,[53] and challenge BLM's ARPA consultation with several of these tribes. But, for the same reasons described *supra* as under the NHPA, Plaintiff-Intervenors lack standing to assert the consultation rights of *other* tribes under the ARPA permit notice requirement. Plaintiff-Intervenors have thus pleaded no violation of ARPA's procedures that could survive summary judgment, and their motion to amend to include it should be denied.

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[49] Proposed Am. Compl. ¶¶ 117, 119–120.

[50] ECF No. 65-20; *see also* ECF No. 65-19 (July 9 letter).

[51] ECF No. 65-19.

[52] *Id.* ¶ 11 (alleging failure to consult with "five Tribes" under ARPA); ¶¶ 96 (not limiting ARPA allegations to RSIC); ¶¶ 11, 99–100, 103, 105, 122 (not limiting NAGPRA allegations to RSIC).

[53] *Id.* ¶¶ 111–112.

B. Plaintiff-Intervenors' ARPA claim is not ripe

Even had Plaintiff-Intervenors stated a feasible claim under ARPA, that claim is not ripe because Plaintiff-Intervenors have not exhausted their administrative appeals remedies. An agency action must be final before it can be reviewed under the APA. 5 U.S.C. § 704; *see* 43 C.F.R. § 4.21(c), (d) (Interior's regulations governing exhaustion and finality). "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Reiter v. Cooper,* 507 U.S. 258, 269 (1993). Requiring exhaustion of administrative remedies ensures that, upon that review, "a court will have the benefit of the agency's experience in exercising administrative discretion, as well as a factual record to review." *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 862 F.2d 195, 199 (9th Cir. 1988). "Courts pragmatically interpret administrative finality, considering 'whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined.'" *Id.* (quoting *Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

Here, Plaintiff-Intervenors have not exhausted their administrative remedies. The Interior Department's ARPA regulations provide that "[a]ny affected person disputing the decision of a Federal land manager with respect to the issuance or denial of a permit . . . may request the Federal land manager to review the disputed decision and may request a conference to discuss the decision and its basis." 43 C.F.R. § 7.36(a). "[I]f unsatisfied with the outcome of the review or conference," they may then "request that the decision be reviewed by the head of the bureau involved." 43 C.F.R. § 7.36(b). Finally, "[a]ny disputant unsatisfied with the higher level review, and desiring to appeal the decision, pursuant to § 7.11 of this part, should consult with the appropriate Federal land manager regarding the existence of published bureau

appeal procedures. In the absence of published bureau appeal procedures, the review by the head of the bureau involved will constitute the final decision." 43 C.F.R. § 7.36(c).

Here, RSIC and the People requested the conference provided in 43 C.F.R. § 7.36(a). After that conference, Kathleen Rehberg, Field Manager, Humboldt River Field Office, denied the review.[54] RSIC and the People have not yet completed the other review and appeal procedures outlined in 43 CFR § 7.36 or the BLM Handbook 8150, including review by head of the bureau or appeal to the Interior Board of Land Appeals. The Interior Department regulations make clear that, except in circumstances not applicable here, no decision subject to appeal "shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704," 43 C.F.R. § 4.21(c); consequently, Plaintiff-Intervenors' ARPA claim is not ripe.

C. Plaintiff-Intervenors' ARPA claim challenges a separate agency action and its assertion in this action would be prejudicial

Even if Plaintiff-Intervenors had pleaded a viable ARPA claim, and even were it ripe, adding it to this action would be prejudicial. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (prejudice a "key factor" in the amendment calculus). The current claims in these consolidated cases challenge under the APA BLM's January 15, 2021 decision approving the Project, specifically by asserting a failure to comply with—among other statutes—NEPA, FLPMA, and the NHPA. A challenge to the ARPA process would constitute a challenge to a new and separate agency action—issuance of the ARPA permit some nine months later, on September 29, 2021. Injection of a new claim challenging a new, separate administrative action so near to summary judgment would prejudice Federal Defendants.

It would also require preparation of a new administrative record. As explained in Federal Defendants' surreply in opposition to Plaintiff-Intervenors' motion to

[54] Rehberg Decl. ¶¶ 8–9; Exhibit 2.

supplement the administrative record, the administrative record already compiled, served, and lodged in this action "consists of all documents and materials directly or indirectly considered by the agency decisionmakers" in making January 15, 2021 decision. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotations and citation omitted). Preparation of a new administrative record for a new agency action will take time and risks delaying resolution of the existing claims in this action, which have been pending now since February 2021 and, subject to the Court's ruling on the administrative record motions, are ripe for resolution through summary judgment. So even if not futile or unripe, such a claim added at this stage in the litigation would prejudice the other parties. *Cf. Solomon v. N. Am. Life and Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (no abuse of discretion to deny amendment on the eve of discovery deadline); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (amendment prejudicial that "would have required defendants to have undertaken, at a late hour, an entirely new course of defense.").

III. Plaintiff-Intervenors' amendment to assert a claim alleging NAGPRA violations is futile

Next, Plaintiff-Intervenors seek leave to add a claim alleging that BLM failed to engage in consultation under NAGPRA and its regulations before issuing the ARPA permit.[55] Because this claim also challenges the ARPA permit's issuance, it would be futile, as explained above, because Plaintiff-Intervenors have not exhausted their administrative remedies, because it would be prejudicial, and to the extent that they invoke other tribes' procedural rights.[56] Equally importantly, such a claim would be futile because Plaintiff-Intervenors have failed to state a plausible claim under NAGPRA.

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[55] *See* Proposed Am. Compl. ¶¶ 97–105, 121, 126.

[56] *See id.* ¶ 11 (alleging failure to consult with "five Tribes" under ARPA and NAGPRA); ¶¶ 11, 99–100, 103, 105, 122 (not limiting NAGPRA allegations to RSIC).

"NAGPRA provides a framework for establishing ownership and control of (1) newly discovered Native American remains and funerary objects (collectively 'cultural items') and (2) cultural items already held by certain federally funded museums and educational institutions." *White v. Univ. of Cal.*, 765 F.3d 1010, 1016 (9th Cir. 2014) (citing 25 U.S.C. §§ 3001–3013). It sets out the procedures that federal agencies must follow when Native American human remains or associated funerary objects are "excavated or discovered on federal or tribal lands." 25 U.S.C. § 3002(a). As such, it "governs the intentional excavation or removal of Native American human remains and objects from federal or tribal lands" as well as "the inadvertent discovery of Native American cultural items on federal or tribal lands." *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 887 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005).

Importantly here, however, it "applies to cultural and funerary objects *already* possessed or under the control of a Federal agency or museum, or those *already* discovered or excavated." *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 252 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993) (citing 25 U.S.C. § 3002–3004) (emphasis added). It "does not apply unless Native American cultural items are *actually* excavated or discovered. The mere potential for their excavation or discovery is insufficient." *Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-CV-1169-ST, 2012 WL 3637465, at *11 (D. Or. June 19, 2012), *report and recommendation adopted*, No. 3:08-CV-01169-ST, 2012 WL 3637715 (D. Or. Aug. 22, 2012) (emphasis added). Plaintiff-Intervenors simply do not allege this condition precedent: that any Native American remains or cultural or funerary objects have been discovered.[57] Instead, Plaintiff-Intervenors invoke the "mere potential" for that excavation or discovery, based on

[57] Of course, if Native American human remains or cultural objects subject to NAGPRA are found during the course of the HPTP excavations, NAGPRA and its regulations prescribe the process that BLM will follow.

evidence that a massacre may have occurred in the general area of the Project—but put forward no evidence that the massacre occurred within the Project area itself.[58]

Nor have Plaintiff-Intervenors stated a claim challenging BLM's compliance with the Department of the Interior's NAGPRA regulations.[59] Under those regulations, an agency will "take reasonable steps to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands" and, if such a result is determined, engage in consultation with appropriate tribes. 43 C.F.R. § 10.3(c). But nothing in these regulations indicates that they apply before any discovery of such objects. And even if they did, the Court has already evaluated Plaintiff-Intervenors' evidence and has itself concluded that disturbance to Native American human remains under the HPTP was "not substantiate[d]." *Bartell Ranch I*, 2021 WL 4037493, at *10; *see also Bartell Ranch II*, 2021 WL 5181750, at *5 (addressing cumulative evidence, which also "does not definitely establish that a massacre occurred within the Project area"). This conclusion was based on, among others, the conclusions that (1) "the 1868 field notes do not show a massacre happened within the Project area" and (2) "despite extensive trenching and digging in the Project area over the past 10 years, no human remains have been found."[60] *Bartell Ranch I*, 2021

[58] Though Plaintiff-Intervenors invoke the 1868 Field Notes for the proposition that "many Indian skulls and other remains" can be "found scattered over this portion of the Township," Proposed Am. Compl. ¶ 84, the Court has already concluded that the notes and other evidence invoked by Plaintiff-Intervenors do not support a likelihood of discovery of remains within the Project area. *Bartell Ranch I*, 2021 WL 4037493, at *10; *Bartell Ranch II*, 2021 WL 5181750, at *5. They certainly do not establish that remains *have* been discovered that would be impacted by the ARPA permit, despite the extensive disturbance of the area in recent years. And, in any event, the Notes actually speak to remains found over "th[e] *Junction* of the Township," that is, "[a]long the line between [sections] 22 [and] 23, and between the creek and the meadow," which is to the east of the lodge and outside of the Project Area. *See* Opp. to Mot. for Recons. at 14 n.33, ECF No. 105.

[59] *See* Proposed Am. Compl. ¶¶ 98–105.

[60] *Id.*

WL 4037493, at *10. Plaintiff-Intervenors have offered no new evidence or allegations to counter those conclusions or to undermine the same conclusion by BLM.

IV. Plaintiff-Intervenors' amendment to assert a claim alleging NEPA violations is futile

Finally, Plaintiff-Intervenors seek leave to assert a claim challenging BLM's compliance with NEPA, arguing that information they have provided to BLM after the ROD issued requires BLM to supplement the Project's Final Environmental Impact Statement (FEIS).[61] This claim is futile both because Plaintiff-Intervenors have not stated a claim under NEPA and because the law does not require supplementation of the FEIS.

As an initial matter, despite Plaintiff-Intervenors' assertion that BLM's NEPA compliance was flawed because the agency did not supplement the FEIS, the proposed amended complaint does not plead a claim under NEPA. Though the NHPA's implementing regulations encourage agency officials to conduct their NHPA consultation and coordination in connection with the NEPA process, *see* 30 C.F.R. § 800.8, "the obligations imposed by NHPA are separate and independent from those mandated by NEPA." *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994) (citation and internal quotations omitted)). The regulations under which the plans of operations were approved likewise contemplate NHPA compliance as separate from both its NEPA analysis and approval. *See* 43 C.F.R. § 3809.411(a)(3). Because Plaintiff-Intervenors cannot obtain the relief sought (*i.e.*, preparation of a supplemental environmental impact statement (EIS)) under the NHPA, their claim for additional NEPA analysis is futile.

Even had Plaintiff-Intervenors stated a claim under NEPA, however, such a claim faces inevitable defeat at summary judgment. *California*, 358 F.3d at 673. The

[61] Proposed Am. Compl. ¶ 127.

law does not require BLM to prepare a supplemental EIS under these circumstances. NEPA requires federal agencies to evaluate the potential environmental impacts of proposed "major Federal actions significantly affecting the quality of the human environment" before deciding whether to take such action. *See* 40 C.F.R. §§ 1502.5, 1502.9(c)(1)(ii), 1508.23;[62] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (discussing NEPA's "statutory requirement that a federal agency contemplating a major action prepare" an environmental analysis (citations omitted)); *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (NEPA requires "only that the agency take a 'hard look' at the environmental consequences before taking a major action" (citations omitted)). Once an agency completes a NEPA analysis, supplementation of that analysis is required only if (1) "there remains major Federal action to occur," and (2) there are changes to the proposed action or new information "sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." *S. Utah Wilderness All.*, 542 U.S. at 73 (internal quotation marks and alteration omitted); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (whether supplemental NEPA analysis is required "turns on the value of the new information to the *still pending decisionmaking process*" (emphasis added)); *see also* 40 C.F.R. § 1502.9(d)(1).

Here, no "major Federal action" remains to occur. Approval of the mining plans was the "major Federal action" that required a NEPA analysis under 42 U.S.C. § 4332(2)(C) to begin with. The ROD approving those plans has already issued and the "major Federal action" is complete. *See S. Utah Wilderness All.*, 542 U.S. at 73 (no

[62] The Council on Environmental Quality issued new NEPA-implementing regulations in 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). Because the administrative actions challenged in this case were subject to the previous regulations, *see* 40 C.F.R. § 1506.13, all citations herein are to the version of the regulations in effect at the time the relevant decisions were made, 40 C.F.R. Part 1500 (2019).

major Federal action remaining after approval of a land-use plan, which was the action that required the initial NEPA analysis). Plaintiff-Intervenors' allegations that "[m]ajor federal action" remains to occur here in the form of "mine construction" and "a Field Work Authorization" required under ARPA to allow archeological excavation under the issued ARPA permit cannot change that.[63] Mine construction is not a federal action and the Fieldwork Authorization is not a major one. Plaintiff-Intervenors' claim challenging the NEPA process would, therefore, be futile; and Plaintiff-Intervenors' motion to amend the complaint to add it should be denied.

CONCLUSION

In sum, Plaintiff-Intervenors seek leave to amend their complaint to assert claims that are both futile and prejudicial. Their motion for leave to amend the complaint should be denied.

Respectfully submitted this 23rd day of December, 2021.

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[63] Proposed Am. Compl. ¶ 122.