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*Attorneys for Defendant-Intervenor
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

BARTELL RANCH, LLC, et al.,)	
)	Lead Case:
Plaintiffs,)	Case No. 3:21-cv-00080-MMD-CLB
v.)	
)	
ESTER M. MCCULLOUGH, et al.,)	
)	
Defendants,)	DEFENDANT-INTERVENOR
)	LITHIUM NEVADA CORP.'S
and)	UNOPPOSED MOTION FOR LEAVE
LITHIUM NEVADA CORP.,)	TO FILE SUR-REPLIES OR IN THE
Defendant-Intervenor.)	ALTERNATIVE TO STRIKE

1 Defendant-Intervenor Lithium Nevada Corp. moves for leave to file a sur-reply to
2 respond to new arguments presented for the first time in the Reply in Support of Motion to
3 Supplement the Record filed by Reno-Sparks Indian Colony (“RSIC”) and Atsa koodakuh wyh
4 Nuwu (“the People,” collectively the “Intervening Plaintiffs”), ECF No. 140. Lithium Nevada
5 met and conferred with counsel for the Intervening Plaintiffs and the Federal Defendants
6 regarding a possible motion to strike the new arguments or, in the alternative, for leave to file a
7 sur-reply. To avoid the necessity of filing a motion to strike, the Intervening Plaintiffs, Federal
8 Defendants and Lithium Nevada have agreed that, subject to Court approval, the Federal
9 Defendants and Lithium Nevada would each file a sur-reply to respond to the new arguments
10 presented by the Intervening Plaintiffs in their Reply. Subject to Court approval, Lithium
11 Nevada would submit its sur-reply by no later than December 10, 2021.

12 This Court has consistently held that new evidence and information cannot be submitted
13 after an opposition has been filed. *See, e.g., Shafer v. Moore Law Grp.*, No. 3:20-cv-00525-
14 MMD-CLB, 2021 U.S. Dist. LEXIS 174185, at *3 (D. Nev. Sep. 14, 2021) (“[T]o the extent that
15 a party raises a new argument or proffers new evidence and information in a reply brief, that
16 argument or evidence is improper because the opposing party is deprived of an opportunity to
17 respond.” (citation omitted)). The submission of new evidence or information in a final reply
18 brief is particularly inappropriate when the evidence was available when the initial motion was
19 filed. *Pacquiao v. Mayweather*, No. 2:09-cv-2448-LRH-RJJ, 2010 U.S. Dist. LEXIS 92343, at
20 *3–4 (D. Nev. Aug. 13, 2010). The Reply filed by the Intervening Plaintiffs included, by their
21 own admission, “several additional claims” relating to alleged harms under the National Historic
22 Properties Act (“NHPA”), the Archaeological Resources Protection Act (“ARPA”), and the
23 Native Americans Grave Protection and Repatriation Act (“NAGPRA”). *See* ECF No. 140 at
24 2–3. To minimize the prejudice resulting from the delayed inclusion of those arguments, the
25 parties have agreed that Lithium Nevada and the Federal Defendants should be permitted to file
26 sur-replies to respond to the new arguments, subject to Court approval. If sur-replies are not
27 allowed, then Lithium Nevada believes the new arguments should be stricken because of the
28 prejudice created by depriving Federal Defendants and Lithium Nevada the opportunity to

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1 respond and based on the availability of the information underlying the arguments at the time
2 the motion to supplement the record was filed by the Intervening Plaintiffs. *See Tovar v. U.S.*
3 *Postal Serv.*, 3 F.3d 1271, 1273 n. 3 (9th Cir. 1993) (striking portions of rely brief that presented
4 new information).

5 Specifically, Lithium Nevada’s proposed sur-reply will address the four new arguments
6 raised for the first time in the Reply relating to certain documents¹ Intervening Plaintiffs request
7 be included in the NHPA record: (1) new NHPA arguments that the documents demonstrate
8 BLM inadequately prepared to enter the Tribal consultation process, *id.* at 3–4, 6–8; (2) new
9 claims that the proffered documents demonstrate that BLM’s coordination with the State Historic
10 Preservation Officer (“SHPO”) and the resulting Cultural Resources Inventory Needs
11 Assessment (“CRINA”) are “legally a failure,” *id.* at 3–5, 7–8; (3) new claims that the documents
12 demonstrate that the separate ARPA permit issued was “legally suspect,” *id.* at 3, 7–8; and (4) the
13 new argument that the People (who were twice deemed “not a proper party” by this Court, ECF
14 No. 92 at 6, ECF No. 117 at 8) now have standing to move to supplement the NHPA record
15 under Intervening Plaintiffs’ new NAGPRA claim that “may be indicated” because the
16 documents show “there are very likely human remains” within the Thacker Pass Project area
17 (“the Project”). *Id.* at 3, 8–9. These are all new arguments that the Intervening Plaintiffs could
18 have made when they filed their original motion to supplement the record, but are instead raised
19 for the first time in their Reply in support of their motion to supplement the record. *See* ECF
20 No. 139 (stating Intervening Plaintiffs learned on September 30th that BLM issued the Project’s
21 ARPA permit on September 29, 2021); ECF No. 115 (Intervening Plaintiffs’ motion to
22 supplement the NHPA record filed November 5, 2021 referencing all the subject documents but
23 raising none of these new arguments).

24 *First*, Intervening Plaintiffs now claim that “BLM failed to identify at least four historic
25 properties eligible for inclusion in the National Register of Historic Places” and that those newly

26 _____
27 ¹ The documents that Intervening Plaintiffs seek to include in the NHPA record that they argue
28 would support their new claims are the 1868 BLM Field Notes and accompanying map, the
Owyhee Avalanche 1865 newspaper article, the 1929 *Autobiography of Big Bill Haywood*, and
Philip D. Smith’s 1981 book *The Sagebrush Soldiers*.

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1 identified areas reflected in the documents at issue “should have been included within the
2 Indirect Effects [Area of Potential Effects] APE” prior to the issuance of the Record of Decision
3 and thus “subsequent consultation efforts are seriously deficient.” *Id.* at 3, 8. If permitted to file
4 a sur-reply, Lithium Nevada will again observe that the People are not a proper party and that
5 RSIC is raising barred claims on behalf of other tribes. *See id.* at 6 (again connecting the
6 documents relating to the 1865 massacre to the interests of the Fort McDermitt Tribe). Lithium
7 Nevada would also argue that the documents still should not supplement the record under either
8 the “relevant factors” or “bad faith” exceptions to the presumption that BLM properly designated
9 the record. *Lands Council v. U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005).

10 *Second*, the Intervening Plaintiffs’ claim that the provided documents demonstrate that
11 BLM did not analyze the 1865 massacre area and consult with relevant Tribes as required under
12 the State Protocol Agreement with the Nevada SHPO. ECF No. 140 at 4, 7–8. If permitted to
13 file a sur-reply, Lithium Nevada would respond to this new claim by observing that Intervening
14 Plaintiffs cannot bring claims under the State Protocol Agreement because it specifically
15 contemplates coordination with federally-recognized Indian Tribes, of which the Intervening
16 Plaintiffs are not. Lithium Nevada would also reiterate this Court’s decision that the proffered
17 documents definitively “did not show a massacre occurred within the Project area,” and therefore
18 would not trigger consultation under the State Protocol Agreement in any event. ECF 117 at 9.
19 Furthermore, this argument does not demonstrate that the documents at issue do not fall under
20 the “relevant factors” exception or are otherwise relevant to the NHPA consultation process. *See*
21 *Lands Council*, 395 F.3d at 1030.

22 *Third*, Intervening Plaintiffs contend that “[b]y completely missing the fact of the 1865
23 massacre” BLM issued a “legally suspect” ARPA permit because the documents provided
24 “suggest[] that there are human remains” in the Project area. ECF No. 140 at 3, 7–8. If permitted
25 to file a sur-reply, Lithium Nevada would argue that the issuance of an ARPA permit creates an
26 entirely separate record under that ARPA decision and is an irrelevant argument in the present
27 NHPA context, where the record was developed according to the then-pending NHPA claims.
28 *See* ECF 92 at 6 (observing that the two processes were distinct and that “the Tribes challenge

BLM's decision to issue the ROD in contravention of the NHPA in this case, not any decision related to the ARPA process"). Lithium Nevada would again observe that the Court determined that the proffered documents did not establish a massacre occurred within the Project area, meaning the documents do not raise "relevant factors" that BLM should have considered in the ARPA or NHPA permitting processes. *See Lands Council*, 395 F.3d at 1030.

Fourth, Intervening Plaintiffs argue that the People have standing to claim that BLM violated NAGPRA by failing "to consult with the lineal descendants of possible human remains before excavation" and that the documents proffered are thus relevant and should be included in the NHPA record. ECF No. 140 at 3. If permitted to file a sur-reply, Lithium Nevada would argue that this argument under NAGPRA is irrelevant to the record developed under NHPA and not implicated by the facts of this case. These documents do not raise "relevant factors" that BLM should have considered under NAGPRA or within the NHPA permitting process. *See Lands Council*, 395 F.3d at 1030.

For the foregoing reasons, Lithium Nevada's respectfully requests that the Court grant Lithium Nevada leave to file a sur-reply by no later than December 10, 2021 to respond to the new information and arguments Plaintiff Intervenor raised for the first time in their reply. If sur-replies are not allowed, then Lithium Nevada believes the Court should strike the new arguments. *Tovar*, 3 F.3d at 1273 n. 3; *see also Martin v. Hermiston Sch. Dist.* 8R, 499 F. Supp. 3d 813, 827 (D. Or. 2020) (declining to review a declaration "because Defendants submitted it for the first time in their reply, could have filed it with their motion, and Plaintiffs did not have a chance to respond.").

DATED this 3rd day of December 2021.

By: /s/ Laura K. Granier

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Certificate of Service

I hereby certify that on December 3, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/ Laura K. Granier
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