Will Falk (Utah Bar No. 16678)
[Pro Hac Petition Submitted and Pending]
2980 Russet Sky Trail
Castle Rock, Colorado 80108
Telephone: (319) 830-6086
Email: falkwilt@gmail.com

Terry J. Lodge (Ohio Bar No, 29271)
[Will Comply with L.R. 1a 11-2 within 14 days]
316 N. Michigan St., Suite 520
Toledo, OH 43604-5427
Telephone: (419) 205-7084
Email: tjlodge50@yahoo.com

Attorneys for Reno-Sparks Indian Colony and Summit Lake Paiute Tribe

Rick Eichstaedt (Washington Bar No. 36487)
[Will Comply with L.R. 1a 11-2 within 14 days]
EICHSTAEDT LAW OFFICE, PLLC
421 W. Riverside Avenue. Suite 1004
Spokane, Washington 99201-0410
Telephone: (509) 251-1424
Email: rick@eichstaedtlaw.net

Attorney for Burns Paiute Tribe

Louis M. Bubala III, Bar No. 8974
KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Facsimile: (775) 327-2011
Email: lbubala@kcnvlaw.com

Local Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RENO-SPARKS INDIAN COLONY, a federally-recognized Tribe; and SUMMIT LAKE PAIUTE TRIBE, a federally-recognized Tribe; BURNS PAIUTE TRIBE, a federally-recognized Tribe; Plaintiffs, vs. DEB HAALAND, Secretary of the Interior; ANNE-MARIE SHARKEY, Acting Director of the Bureau of Land Management Winnemucca District Office; KATHLEEN REHBERG, Field Manager of the Bureau of Land Management Winnemucca District Humboldt River Field Office; Defendants, LITHIUM NEVADA CORP. Defendant-Intervenor.	Case No. 3:23-cv-00070-LRH-CLB **PLAINTIFFS EMERGENCY MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** **HEARING REQUESTED**

1 Plaintiffs Reno-Sparks Indian Colony ("RSIC"), Summit Lake Paiute Tribe ("SLPT"), and
2 Burns Paiute Tribe ("BPT") (together "Plaintiffs"), pursuant to FRCP 65(b), hereby move the
3 Court, on an emergency basis, by counsel, for a Temporary Restraining Order ("TRO")
4 prohibiting Defendants from causing or occasioning any ground disturbance or construction
5 work under the Thacker Pass Lithium Mine Project ("the Project") Record of Decision ("ROD"),
6 the Kings Valley Lithium Exploration Plan of Operations, the Kings Valley Clay Mine Plan of
7 Operations, or any other permit the Lithium Nevada Corporation ("LNC") holds for work in
8 Thacker Pass until the Court makes a preliminary injunction ruling.. Plaintiffs further move the
9 court for an order requiring defendants to show cause, if any exists, why a preliminary injunction
10 order should not continue and remain in effect during the entire pendency of this action.

11 Plaintiffs seek emergency relief to prevent any further irreparable harm before the Court
12 can rule on a motion for a preliminary injunction. Plaintiffs' counsel Will Falk will be on standby
13 for a virtual hearing on these matters whenever is convenient to the Court. With a day's notice to
14 make the drive to Reno, Mr. Falk can appear in person.

15 The nature of the emergency, the office addresses and telephone numbers of movant and
16 all affected parties, and a statement certifying that, after participating in the meet-and-confer
17 process to resolve the dispute, the movant has been unable to resolve the matter without court
18 action included in counsel's attached Declaration. (Exhibit 1, Declaration of Will Falk).

19 Construction has already begun under permits that the Thacker Pass Mine Plan of
20 Operations represented would be terminated upon authorization of the Thacker Pass ROD. And,
21 despite the Bureau of Land Management's ("BLM") recent determination that all of Thacker
22 Pass is a Traditional Cultural District ("TCD"), construction under the Thacker Pass ROD is
23 imminent. Plaintiffs, in this case, can demonstrate – through documents obtained from the
24 Nevada State Historic Preservation Office ("NV SHPO") and the Advisory Council on Historic

Preservation ("ACHP") – that BLM's Section 106 efforts that both pre-date and post-date the ROD were rife with misrepresentations and withheld information. BLM is also in substantial breach of the Thacker Pass historic properties memorandum of agreement – a legally enforceable contract.

On February 22, 2023, BLM accepted LNC's surety bond for Phase I of the Thacker Pass Lithium Mine Project Plan of Operations. LNC's counsel in *Bartell Ranch LLC v. McCullough* (Case No.3:21-cv-00080-MMD-CLB) informed the parties that construction under the Thacker Pass Project ROD will commence as early as February 28, 2023.

Additionally, despite the Project Plan of Operations stating that authorization of the Plan would terminate the older permits LNC possesses for work in Thacker Pass, those permits were never terminated. (ECF No. 2 at 158-222). On December 1, 2022, BLM authorized new construction and ore removal in Thacker Pass under those permits. And, as late as December 12, 2022, BLM received LNC's request for authorization to complete work to install a pump to water well, install associated equipment to run the well, and erect fencing, gates, and barriers that restrict the Plaintiffs' ability to use their traditional cultural property. (ECF No. 2 at 199).

On February 23, 2023, over a year and 8 months after RSIC informed BLM that all of Thacker Pass is RSIC's traditional cultural property, BLM finally determined that all of Thacker Pass is a National Register of Historic Places (NRHP)-eligible TCD. (Exhibit 2, BLM's February 23, 2023 Letter to RSIC, pg. 1). Notwithstanding the National Historic Preservation Act's (NHPA) implementing regulations at 36 C.F.R. § 800.13(b)(1) obligating BLM to complete the "post-review discovery process" for the TCD before allowing the Project to proceed, BLM indicated on February 23 that it will allow LNC "to begin permitted construction activities associated with previous authorizations in the area." (Exhibit 2, pg. 2) If construction is allowed to proceed in Thacker Pass, the Plaintiffs and the Thacker Pass TCD will be immediately and

irreparably harmed. In addition to the physical harm caused by construction, construction will restrict and directly affect the requisite consideration of alternatives to avoid, minimize, or mitigate adverse effects to the TCD.

The factual and legal bases for these Motions is further set forth in detail in the Plaintiffs' Complaint and the following Memorandum in Support of Plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS

In considering a preliminary injunction motion, courts in the 9th Circuit consider:

> (1) whether the [injunction] applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a [injunction]; (3) whether the issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Sierra Club v. Trump, 929 F.3d 670, 687 (9th Cir. 2019). The 9th Circuit focuses on harms that will result during the full pendency of the case while the injunction is in place when deciding whether to grant a preliminary injunction. See *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2004). The Plaintiffs successfully meet all four aspects of the preliminary injunction standard.

ARGUMENT

I. In the absence of preliminary relief, imminent construction will irreparably harm the Plaintiffs.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Courts have consistently recognized that "[d]amage to or destruction of any" cultural or religious sites "easily" meets the irreparable-harm

requirement. *See Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010); *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (finding irreparable harm where a development would "threaten the integrity of the cultural and archeological resources").

Here, Plaintiffs will be irreparably harmed by construction of the Thacker Pass Lithium Mine, which will begin in the absence of preliminary relief. All of the Thacker Pass project area is encompassed by the Thacker Pass TCD. This also means that all of the Kings Valley Lithium Exploration project area and all of the Kings Valley Clay Mine project area, which are encompassed by the Thacker Pass project area, are encompassed by the TCD. Therefore, any construction work associated with those projects will harm the Plaintiffs' traditional cultural property. The erection of gates, barriers, fences, and security cameras in Thacker Pass also limit the Plaintiffs' ability to hunt, gather, camp, hike, and perform ceremonies (religious strictures forbid the filming or photographing of certain ceremonies) in the TCD.

II. The Plaintiffs make a strong showing that they are likely to succeed on the merits.

A. Plaintiff Summit Lake Paiute Tribe is likely to succeed on the merits of its claim that BLM breached the MOA.

SLPT is likely to succeed on its breach of contract claim because BLM has failed to comply with the "Memorandum of Agreement Between the [BLM] and the [NV SHPO] Regarding the Lithium Nevada Thacker Pass Project Humboldt County" (MOA). BLM breached the MOA by failing to initiate the MOA's bright-line dispute resolution process after it was invoked by SLPT and the Winnemucca Indian Colony. BLM still has not initiated this process. BLM also failed to initiate an amendment or termination of the MOA despite BLM's knowledge that the MOA's terms – especially "to resolve all adverse effects to historic properties anticipated from the Project" – cannot be carried out. (ECF No. 3 at 142).

1 The MOA is a contract and BLM is bound by its terms. *See Battle Mountain Band of the*
2 *Te-moak Tribe of Western Shoshone Indians v. BLM*, 302 F.Supp.3d 1226, 1235 (D. Nev. 2018);
3 see also *Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000) (holding that a memorandum of
4 agreement entered into by a city "is a contract" and that "the City is bound by its terms" where
5 the city entered into the MOA to satisfy its NEPA and NHPA requirements).

6 SLPT is listed as a concurring party to the MOA. (ECF No. 3 at 148). And, according to
7 both 36 C.F.R. § 800.6(c) and the terms of the MOA itself, execution of the MOA and
8 implementation of its terms is supposed to serve as evidence that BLM has taken into account the
9 effects of the Project on historic properties.

10 Stipulation V states:

11 Should any signatory or concurring party object to any proposed actions or to the way the
12 terms of this MOA are implemented, BLM shall consult with the objecting party to resolve the objection. If either the objecting party or BLM determines the objection cannot be resolved, the following actions may be taken:

13 1. BLM shall forward all the documentation relevant to the dispute to the ACHP. The
14 ACHP shall provide BLM and the objecting party its advice on resolution of the objection within 30 days of receipt of adequate documentation. Prior to reaching a final decision on
15 the dispute, BLM shall prepare a written response that takes into account the advice provided by the ACHP and any comments from signatories or concurring parties to this
16 MOA. BLM shall provide the written response to all signatories and concurring parties. BLM shall then proceed according to its final decision.

17 2. If the ACHP does not provide advice regarding the dispute within 30 days, BLM may
18 make a final decision provided it has taken into account the comments provided by the signatories and concurring parties. BLM shall provide all parties and ACHP with the final
19 written decision and proceed accordingly.

20 3. BLM's responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of a dispute will remain unchanged.

21 (ECF No. 3 at 145).

22 On October 31, 2022, SLPT wrote to BLM invoking the MOA's dispute resolution
23 process with a number of objections to how the MOA's terms were being implemented. These
24

objections included BLM's failure to amend and revise the HPTP despite all of the new information about historic properties in the Project Area presented to BLM; failure to amend and revise the HPTP despite the fact that the current HPTP does not resolve all adverse effects to historic properties from the Project; and BLM's refusal, despite an ongoing post-review discovery process, to stop LNC from harming the properties subject to that post-review discovery process. (ECF No. 2 at 151-54).

BLM has never acknowledged SLPT's October 31, 2022 letter, much less taken the steps described in Stipulation V of the MOA. Despite this, BLM has cleared the way for LNC to begin construction under the Thacker Pass ROD by adjudicating the reclamation bond, which was the last step LNC needed to begin construction. BLM also authorized "Work Plan Modifications" to the Kings Valley Lithium Exploration Project and Kings Valley Clay Mine Plans that have caused adverse effects to the Plaintiffs' traditional cultural property.

Similarly, on October 11, 2021, the Winnemucca Indian Colony ("WIC"), which is also listed as a concurring party, invoked the MOA's dispute resolution process. BLM failed to acknowledge this letter, much less take the steps described in Stipulation 5 of the MOA. BLM was obligated, under Section V.A.1, to provide SLPT with "a written response that takes into account the advice provided by the ACHP and any comments from signatories or concurring parties to this MOA."

When the ACHP learned about WIC's invocation and learned that BLM had never informed the ACHP about this, the ACHP wrote to BLM on October 11, 2022: "The ACHP had not previously been made aware of this letter or request. Per Stipulation V.A of the Agreement, any Concurring Party may object to the way its terms are being implemented, requiring BLM to consult with that party to resolve the objection." (ECF No. 3 at 90). Despite never resolving (or

1 even beginning to resolve) WIC's dispute, BLM implemented the first stage of the HPTP. This
2 first stage involved extensive excavation of, and damage to, SLPT's traditional cultural property.
3 Stipulation II.A.2 to the MOA states:
4 If BLM determines that either additional historic properties would be adversely affected by the Project modifications or additional previously unmitigated adverse effects to
5 known historic properties will occur, BLM shall notify the SHPO and the Tribes, as appropriate, and initiate the development of an amendment to the MOA and the HPTP
6 per Stipulation VI.
7
(ECF No. 3 at 143).
8 RSIC informed BLM on June 3, 2021 that unmitigated adverse effects to known historic
9 properties would occur under the MOA and HPTP. Since then, BLM has only received more
10 information about unmitigated adverse effects to known historic properties from the Plaintiffs.
11 However, BLM still has not initiated the development of an amendment to the MOA and the
12 HPTP. Without this amendment, BLM has not committed itself to implementing any mitigation
13 for adverse effects to the Plaintiffs' traditional cultural property.
14 Both the terms of the MOA and 36 C.F.R. § 800.6(c)(8) require that "[i]f any signatory to
15 this MOA determines that its terms will not or cannot be carried out, that signatory shall
16 immediately consult with the other signatories to develop an amendment…" (ECF No. 3 at 146).
17 Without amending the MOA and revising the HPTP, the MOA and HPTP do not "resolve all
18 adverse effects to historic properties anticipated from the Project" and implementation of the
19 Project cannot proceed. (ECF No. 3 at 142).
20 **B. SLPT is likely to succeed on the merits of its claims that BLM violated NHPA in**
21 **issuing the Thacker Pass ROD.**
22 SLPT is likely to succeed on the merits of its claim that BLM violated NHPA in issuing
23 the Thacker Pass ROD for a number of reasons. First, despite identifying SLPT as a tribe it
24

1 needed to consult with before issuing the ROD, BLM failed to consult with SLPT before issuing
2 the ROD. (ECF No. 2 at 17-18).

3 BLM will likely contend that letters it claims it sent to SLPT on December 12, 2019; July
4 29, 2020; and August 28, 2020 are "consultation." However, this characterization of consultation
5 contradicts case law and BLM policy. At best, these letters might be characterized as "contact,"
6 but "[c]ontact, of course, is not consultation." *Standing Rock Sioux Tribe v. US Army Corps*, 205
7 F. Supp. 3d 4, 32 (D.C. 2016) (*quoting Quechan Tribe of Fort Yuma Indian Reservation*, 755
8 F.Supp.2d at 1112, 1118).

9 In *Quechan Tribe*, the court preliminarily enjoined a solar project, finding that the
10 Quechan Tribe was likely to win on the merits of its claim that BLM didn't offer it meaningful
11 consultation prior to issuing the ROD despite BLM offering *fourteen* contacts regarding the
12 project with the Tribe's president – including letters, follow-up calls, and emails – over a nearly
13 3 year time period. 755 F.Supp.2d at 1112-13. BLM also offered records of *thirty-one* contacts
14 with the Tribe's Tribal Historic Preservation Officer (THPO). *Id.* at 1113. But, the court found
15 this wasn't enough.

16 The *Quechan* court stated:

17 First, the sheer volume of documents is not meaningful. The number of letters, reports,
18 meetings, etc. and the size of the various documents doesn't in itself show the NHPA-
required consultation occurred. Second, the BLM's communications are replete with
recitals of law (including Section 106), professions of good intent, and solicitation to
19 consult with the Tribe. But mere *pro forma* recitals do not, by themselves, show BLM
actually complied with the law.

20 755 F.Supp.2d at 1118.

21 BLM policy reflects the principle found in case law that "contact, of course, is not
22 consultation." BLM Handbook (H) 1780-1, *Improving and Sustaining BLM-Tribal Relations*,
23 states: "The Department Tribal Consultation Policy notes that sending a letter to a Tribe and
24

receiving no response does not constitute a sufficient effort to initiate tribal consultation." (H-1780-1, Chapter 3.A.3).

Second, BLM failed to provide SLPT a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects, as required under 36 C.F.R. § 800.2(c)(2)(ii)(A). BLM similarly failed to conduct consultation with SLPT in a manner sensitive to SLPT's concerns and needs, as required by 36 C.F.R. § 800.2(c)(2)(ii)(D).

BLM deprived SLPT of a reasonable opportunity to consult about all the things described in 36 C.F.R. § 800.2(c)(2)(ii)(A) while COVID-19 – the worst pandemic the world has experienced in 100 years – disproportionately affected the tribe and forced tribal offices to close. BLM's diminutive efforts to consult, which would be suspect absent a pandemic, are inadequate in the midst of one. Conducting consultation in a manner sensitive to SLPT's needs required more.

BLM knew the COVID-19 pandemic forced SLPT's offices to close, forced tribal employees to either stop working or to work from home, and overall, made it much more difficult for SLPT to conduct routine tribal governance, much less to offer nation-to-nation consultation and comment. (Exhibit 3, BLM's COVID Consultation Tracking List, pg. 3). Yet the only effort BLM made to contact – much less consult – SLPT was by sending two more letters with no follow-up email or phone call to ensure SLPT had even received them. Whether or not this effort might have been adequate in the absence of a global pandemic (and case law and BLM policy suggest it would not have been), it certainly fell short during the pandemic.

BLM pointedly ignored authoritative advice from the ACHP regarding NHPA § 106 compliance during the COVID-19 pandemic:

> The Section 106 deadlines for the response of State and Tribal Historic Preservation Officers, and Indian tribes…that attach religious and cultural significance to historic properties affected by the undertaking, regardless of its location (collectively, States/Tribes/NHOs), will be considered paused while, due to the COVID-19 outbreak, an office is closed or work conditions are such that the States/Tribes/NHOs are unable to carry out their Section 106 duties or statutory rights to consultation in a timely fashion (e.g., staff unavailability due to health reasons; restricted access to records; state or tribal laws requiring hard copy records; lack of Internet access or telework capabilities.) The clock will resume once the conditions are no longer in effect.

(Exhibit 4, BLM's April 13, 2020 Email Discussing ACHP COVID-19 Guidance).

The Court in this particular case could justifiably hold that BLM did not give SLPT a reasonable opportunity to consult because BLM should have done more *while a global pandemic was raging.*

Third, BLM failed to make a reasonable and good faith effort to identify historic properties and Indian tribes to be consulted cooperatively with NV SHPO, before issuing the ROD. "Affording the SHPO an opportunity to offer input on potential historic properties would be meaningless unless the SHPO has access to available, relevant information. Thus, 'consultation' with the SHPO mandates an informed consultation." *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 862 (10th Cir. 1995).

Irrespective of whether sending a few letters and receiving no responses counts as consultation, BLM falsely informed the NV SHPO, multiple times, that "Tribal consultation with the Fort McDermitt Paiute-Shoshone Tribe, Summit Lake Paiute Tribe, and Winnemucca Indian Colony began in 2017 and is ongoing for the current undertaking" (ECF No. 3 at 23, 26, and 28) and that "BLM has met with tribes to discuss the project" (ECF No. 3 at 28) while soliciting the NV SHPO's required concurrence on various cultural resources determinations.

Not only did this tribal consultation never happen, but BLM ignored NV SHPO's requests for documentation of this consultation. According to Rebecca Palmer, the Nevada State Historic Preservation Officer, "[BLM has] not provided us with a summary of the results of the consultation as we requested. It is the results of the consultation that documents the federal agency's identification efforts. As the federal agency is required to determine the scope of the identification effort in consultation with the SHPO, and this scope includes consultation with Tribes, we should receive a summary of these efforts." (ECF No. 3 at 39).

On September 29, 2021, Palmer met with Bill Marzella, a BLM Liaison with the ACHP to discuss the Project. (ECF No. 3 at 43-44). At that meeting, the ACHP provided information about documents possessed by BLM that were never provided to the NV SHPO. Palmer explained in an email that same day:

> From the information you provided today, the BLM has documentation related to the identification of properties with traditional religious and cultural significance that was not provided [to] my office despite our repeated requests for a summary. As I have indicated, such a summary would have included some information related to the nature of resources, dates of consultation, nature of comments provided by tribal governments (not including information deemed confidential by the Tribe). Keep in mind that none of the documentation we were provided included any descriptions of the activities the BLM was undertaking that you received. Neither the MOA nor the HPTP contain any reference to these efforts as my office was never informed of these activities. Just as in the Yellow Pine case, we request information, and the request is ignored. The ACHP requests the same information, and this information is provided without hesitation. We are not able to provide our assistance if the agency does not disclose information necessary for us to make an informed decision.

(ECF No. 3 at 43).

In *Bartell Ranch v. McCullough*, BLM argued that the NV SHPO signed off on BLM's decision about the three tribes to consult with, which this Court relied on as one of the reasons why BLM's failure to consult with RSIC and BPT was reasonable. (September 3, 2021 Order Denying Preliminary Injunction Motion, pg. 17). However, Palmer, after reading this Court's decision, emailed the ACHP on September 29, 2021 that "[t]he Justice [sic] Du decision [is] also

1 attached where the BLM stated that we 'signed off' on their tribal consultation (page 17) which
2 in no way represents what our review of a CRINA [cultural resource inventory needs
3 assessment] entails." (ECF No. 3 at 43).

4 In NV SHPO's responses to BLM's letters seeking concurrence, the NV SHPO never
5 stated that it concurred with BLM's tribal consultation efforts. What NV SHPO actually stated
6 was: "The SHPO notes that there will be tribal consultation for this undertaking in keeping with
7 the Purpose § B and Part 1 § V.A.4 of the Protocol…As the BLM states consultation will
8 continue with the tribes regarding this undertaking; please continue to forward summaries of
9 consultation efforts for the SHPO administrative record." (ECF No. 3 at 33 and 37).

10 In fact, the October 24, 2019 email that the court cited in its *Bartell Ranch* Summary
11 Judgment Order the proposition that NV SHPO "concurr[ed] that BLM had initiated tribal
12 consultation" used the same statement. NV SHPO simply wrote: "The SHPO notes that there
13 will be tribal consultation for this undertaking in keeping with the Purpose § B and Part 1 §
14 V.A.4 of the Protocol." (Exhibit 5 NV SHPO's October 24, 2019 email to BLM, pg. 1)

15 "Noting" is not the same as "concurring." In this context, "noting" is simply
16 acknowledging that BLM represented that it would conduct tribal consultation. NV SHPO's
17 phrasing "As the BLM states consultation will continue with the tribes…" makes this even more
18 clear. NV SHPO did not say, "We agree tribal consultation happened." NV SHPO only noted
19 that the BLM stated consultation will continue with the tribes. NV SHPO also specifically
20 requested that BLM "forward summaries of consultation efforts." (ECF No. 3 at 33 and 37).
21 BLM did not – *could not* – honor this request because no tribal consultation happened.

22 BLM's unreasonable and bad faith consultation involving NV SHPO also extends to the
23 manner in which BLM sought NV SHPO's concurrence. Palmer accused BLM of "report
24 dumping" and explained:

> Please note, this is also one of those projects where the inventories had originally been submitted as exempt from SHPO review, so we only sent [BLM] our inventory with no review. Once the Adverse Effect was identified, [BLM] was obliged to request our review of all the previous inventories in one letter. Meaning, in this case, that we had a stack of paper at least two feet high to review in one 30-day period."

(ECF No. 3 at 43).

After meeting with BLM and NV SHPO, on October 12, 2021, the ACHP wrote a letter to BLM "under 36 C.F.R. § 800.9(a) to assist the BLM in complying with the Section 106 implementing regulations…" (ECF No. 3 at 83). ACHP wrote, "[T]he SHPO has informed the ACHP that substantive information on tribal consultation is routinely withheld from them, which is problematic considering the SHPO's role in providing concurrence on the eligibility of historic properties which may be of significance to Indian tribes off tribal lands." *Id.*

C. Plaintiffs are likely to succeed on the merits of their claims that BLM violated FLPMA.

Despite the terms and conditions of the Thacker Pass Lithium Mine Project Plan of Operations specifically stating that authorization of that Plan "will terminate" the older permits LNC possesses for work in Thacker Pass, it was not until September 2022 that Plaintiffs learned that these permits were never actually terminated and instead BLM was authorizing new construction work under those permits. This violated multiple laws.

First, authorizing new construction work under the old permits violated the Federal Land Policy and Management Act ("FLPMA"), which directs that "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). BLM's Surface Management Regulations define "unnecessary or undue degradation" as "conditions, activities, or practices that fail to comply with…the terms and conditions of an approved plan of operations…" 43 C.F.R. § 3809.5. Furthermore, 43 C.F.R. § 3809.415 explains to operators that "you prevent unnecessary

1 or undue degradation while conducting operations on public lands by complying with…the terms
2 and conditions of your notice or approved plan of operations…"
3 The Thacker Pass Mine Plan of Operations was authorized on January 15, 2021. This
4 Plan of Operations' terms and conditions include, in two places, statements that authorization of
5 the Thacker Pass Mine Plan of Operations "will terminate the KVCM POO (N91547), Kings
6 Valley Lithium Exploration Project (N85255), the Quinn River Valley Test Wells NOI
7 (N94510), the Far East NOI (N95396) and all reclamation requirements." FEIS, Appendix B,
8 Section 2.2.6, pg. 4; *see also* FEIS, Appendix B, Section 2.4, pg. 21[1].
9 So, BLM's failure to terminate these older permits and authorization of new construction
10 work under these permits is a violation of the Thacker Pass Mine Plan of Operations' terms and
11 conditions. This is, by definition, unnecessary or undue degradation. And, BLM's failure to
12 terminate the older permits while authorizing new work under those permits violated FLPMA.
13 Second, by September 2022, prior to BLM's authorization of new work under the Kings
14 Valley Lithium Exploration and Kings Valley Clay Mine Plans, the Plaintiffs had informed BLM
15 that all of Thacker Pass is NRHP-eligible as the Plaintiffs' traditional cultural property. This
16 information caused BLM to initiate the NHPA's implementing regulations' post-review
17 discovery process for the Thacker Pass Project but BLM never initiated post-review discovery
18 processes for the older projects. This violated NHPA.
19 Third, BLM's authorization of new work under the old permits violated 36 C.F.R. §
20 800.13(b)'s requirement that "the agency official shall make reasonable efforts to avoid,
21 minimize or mitigate adverse effects" to properties subject to the post-review discovery process.
22 The work BLM authorized under the old permits caused adverse effects to the Plaintiffs'
23
24

[1] Available at https://eplanning.blm.gov/public_projects/1503166/200352542/20030640/250036839/Thacker%20Pass_FEIS_Apx%20B_Mine%20Plan_508.pdf (visited on March 1, 2023).

1 traditional cultural property. Authorization of new work under the old permits was unnecessary
2 and undue degradation of public lands. A reasonable effort to avoid, minimize or mitigate
3 adverse effects does not mean causing or allowing unnecessary degradation to historic
4 properties.

5 Finally, prior to BLM's authorization of new work under the old permits, BLM had
6 informed Plaintiffs, NV SHPO, and ACHP that it would consult with them as required by 36
7 C.F.R. § 800.13(b)(1). But, BLM did not inform Plaintiffs, NV SHPO, and ACHP that LNC and
8 BLM were planning on resurrecting permits that had purportedly been terminated to do work that
9 would affect historic properties subject to the post-review discovery process. Consultation is
10 meaningless unless consulting parties have access to available, relevant information. See *Pueblo*
11 *of Sandia*, 50 F.3d at 862.

12 **D. The Plaintiffs are likely to succeed on the merits of their claims that BLM's handling of the post-review discovery process violated NHPA.**

13 *1. BLM unilaterally determined which resources in Thacker Pass were NRHP-eligible so*
14 *that HPTP implementation wouldn't be delayed.*

15 On November 3, 2021, a few weeks after the court's ruling on RSIC's and BPT's
16 preliminary injunction motion in *Bartell Ranch LLC v. McCullough* (Case No. 3:21-cv-00080-
17 MMD-CLB), in a letter to the NV SHPO, BLM acknowledged that land involved with a
18 September 12, 1865 massacre of Paiutes by the US cavalry extended into the Thacker Pass
19 Lithium Mine Project Area. (ECF 3 at 93). In this letter, BLM notified NV SHPO that BLM
20 would comply with the post-review discovery process described at 36 C.F.R. § 800.13(b)(1).
21 BLM informed the ACHP of the same thing on November 16, 2021. (ECF 3 at 95).

22 It is important, however, to understand exactly what BLM communicated in these two
23 letters and what BLM did not. Without providing to the NV SHPO or ACHP the extensive
24 information provided by the Plaintiffs about why all of Thacker Pass is religiously, culturally,

1 and historically significant to them, BLM unilaterally and conveniently decided that the only
2 land significant to the Plaintiffs was the Indian village noted in the 1868 General Land Office
3 surveyor notes that RSIC located in BLM's own records and that were offered to counter BLM's
4 and LNC's insinuations that no massacre happened in Thacker Pass. BLM then told NV SHPO
5 and ACHP that the site sits exclusively on private land and that BLM cannot conduct Class III
6 cultural surveys on private land.

7 BLM did not copy the Plaintiffs on these letters, so Plaintiffs could not clarify to the NV
8 SHPO and ACHP that they considered much more than just the Indian Village sites to hold
9 traditional religious and cultural importance in Thacker Pass. Perhaps BLM failed to copy the
10 Plaintiffs because BLM had knowingly skipped a crucial step in the post-review discovery
11 process.

12 The first step in the 36 C.F.R. § 800.13(b)(1) post-review discovery process is
13 determining if newly discovered properties are NRHP-eligible. ("If historic properties are
14 discovered or unanticipated effects on historic properties found after the agency official has
15 completed the section 106 process…" § 800.13(b)(1); and "historic property means any
16 prehistoric district, site, building, structure or object included in, or eligible for inclusion in [the
17 NRHP]...the term includes properties of traditional religious and cultural importance to an Indian
18 tribe…." 36 C.F.R. § 800.16(l)(1)).

19 This is why the ACHP explained to BLM that "determining which resources are eligible
20 for NRHP listing as historic properties…are determinations an agency *cannot* make unilaterally
21 but must rather consult with the SHPO/THPO and any Indian tribes that attach religious and
22 cultural significance to the identified properties." (ECF No. 3 at 85 (emphasis with original)).

23 In an October 12, 2021 letter in which ACHP advised BLM to initiate the post-review
24 discovery process for the massacre site, ACHP noted "that this location may have significance to

1 contemporary tribal communities even absent tangible remnants of the massacre" and
2 "[t]herefore, continued consultation and integration of traditional knowledge is paramount for
3 evaluating the eligibility of this property." (ECF No. 3 at 82). Most importantly, ACHP told
4 BLM: "Once the BLM has fulfilled these procedural requirements [including revising the
5 Historic Properties Treatment Plan] and committed itself to any necessary resolution measures, it
6 could proceed with implementing the undertaking." *Id.*

7 2. *BLM failed to make reasonable efforts to avoid, minimize, or mitigate adverse effects to the Plaintiffs' traditional cultural property subject to the post-review discovery process.*

8 ACHP's advice reflects 36 C.F.R. § 800.13(b), which obligates agency officials with
9 making "reasonable efforts to avoid, minimize, or mitigate adverse effects" to properties subject
10 to the post-review discovery process while BLM consults to resolve adverse effects to these
11 properties pursuant to 36 C.F.R. § 800.6.

12 BLM ignored ACHP's advice and NHPA's statutory requirements. Instead, BLM
13 proceeded with authorizing excavations that harmed the Plaintiffs' traditional cultural property
14 under the obsolete HPTP; authorizing construction work under the Kings Valley Lithium
15 Exploration Plan and Kings Valley Clay Mine that should have been terminated upon
16 authorization of the Thacker Pass ROD; and adjudicating a surety bond which was the last hurdle
17 Lithium Nevada needed to clear before beginning work under the Thacker Pass ROD.

18 It was unreasonable for BLM to approve construction work that harmed and continues to
19 harm the Plaintiffs' traditional cultural property under permits that the terms and conditions of
20 the Thacker Pass Lithium Mine Plan of Operations stated would be terminated upon approval of
21 the Thacker Pass Record of Decision.

22 It was not until July 18, 2022 that BLM sent letters to RSIC, SLPT, and BPT notifying
23 them that BLM would comply with 36 C.F.R. § 800.13(b)(1) and seeking consultation about the
24

NRHP-eligibility of the massacre site. (ECF 3 at 98-99). It is likely BLM waited until July 18, 2022 to send these letters so that any additional information provided by the Tribes would not frustrate LNC's ability to proceed with Stage 1 of the HPTP. If BLM would have recognized the Thacker Pass TCD in 2021 when the Tribes informed BLM about the TCD, BLM would have had to revise the HPTP before proceeding. Regardless, BLM must revise the HPTP, now, before proceeding.

3. *BLM withheld from, and misrepresented, crucial information to the Plaintiffs, NV SHPO, and ACHP while conducting the post-review discovery process.*

36 C.F.R. § 800.6 requires consultation with Tribes and the NV SHPO. Consultation with parties that the NHPA obligates BLM to consult with, especially when BLM must secure the concurrence of one of those parties (NV SHPO), "mandates an informed consultation." *Pueblo of Sandia*, 50 F.3d at 862. Withholding and misrepresenting information violates the NHPA.

As described above, BLM's November 3, 2021 letter to NV SHPO was misleading. While RSIC did bring the 1868 General Land Office surveyor notes to BLM's attention, the Plaintiffs brought much more information to BLM's attention than just the surveyor notes. (ECF 2 at 136-138; ECF 3 at 9 and 10; ECF 3 at 51-53; ECF 3 at 66-79). RSIC had previously informed BLM that RSIC considered all of Thacker Pass to be a traditional cultural district; presented a number of historical accounts of the 1865 massacre including contemporary news articles and the *Big Bill Haywood* accounts to BLM; and informed BLM that Paiutes had hunted, gathered, camped, created tools, sought shelter, were massacred, mourned the fallen, and performed ceremony in Thacker Pass from time immemorial. BLM did not provide this information to NV SHPO. It only provided the 1868 surveyor notes.

BLM also did not inform the NV SHPO that all three of the Tribes that BLM told NV SHPO that BLM had been consulting with since 2017 had written letters contradicting BLM's

statements and demanding Section 106 consultation. Nor did BLM inform NV SHPO that RSIC, SLPT, BPT, and the Pyramid Lake Paiute Tribe had all demanded Section 106 consultation for the Thacker Pass Project, too. Making matters worse, NV SHPO had specifically requested summaries of these tribal consultation efforts in 2020. (ECF No. 3 at 33 and 37).

In BLM's July 18, 2022 letter to the Tribes, BLM told the Tribes, "In accordance with 36 CFR 800.13, the BLM, the State Historic Preservation Office (SHPO), and the Advisory Council on Historic Preservation (ACHP), reached an agreement in which a Class III survey of the un-surveyed BLM land would be conducted and would be used in determining the eligibility of the Indian village and massacre site." However, this statement was false. On September 2, 2022, SHPO wrote to ACHP, quoted BLM's statement above about reaching an agreement for a Class III survey, and called it "a false statement made by the BLM." SHPO also stated that "[n]o such agreement exists with the SHPO. The BLM should not make, or have made, any assumption of agreement by my office with the proposal under any circumstances." (ECF No. 3 at 101).

On October 12, 2022, BLM wrote to NV SHPO about field work summaries BLM conducted in the Plaintiffs' traditional cultural property in Thacker Pass. Despite all of the information provided by the Plaintiffs, BLM informed NV SHPO that "[t]he only comment received was from the Reno-Sparks Indian Colony who said they could not review the letter reports in 30 days." (ECF No. 3 at. 119).

On November 3, 2022, after RSIC specifically informed BLM that it considered the properties at issue to be NRHP-eligible in RSIC's August 5, 2022 letter, (ECF No. 2 at 146), BLM notified SHPO that it determined that these properties were not NRHP-eligible. BLM failed to inform SHPO about RSIC's position on these properties.

Inexplicably, in this November 3 letter, after BLM had informed ACHP, SHPO, and the Tribes that BLM was following the 36 C.F.R. § 800.13(b)(1) post-review discovery process,

BLM reported to NV SHPO that "this project is under-threshold." Under-threshold is not a term found in 36 C.F.R. § 800 *et seq*. and is, instead, a term used in the BLM-SHPO State Protocol Agreement, which did not apply to BLM's obligations under 36 C.F.R. § 800.13(b)(1).

Upon reviewing this November 3 letter from BLM, ACHP emailed BLM stating, "As you know there are no thresholds in the regulations that would exempt an undertaking from completing the Section 106 review process…" and, "because these determinations are being conducted as part of a larger undertaking for which an MOA was executed, I question whether these thresholds would apply in this case." (ECF No. 3 at 135). ACHP also noticed BLM's failure to describe the Tribes' position to NV SHPO and wrote, "Reno-Sparks Indian Colony and Summit Lake Paiute Tribe have expressed significant concern to the ACHP, both regarding the undertaking itself but also the methodology used to document the massacre site." *Id.*

On November 8, 2022, SHPO responded to BLM's November 3 letter and withheld concurrence that the subject historic properties were not NRHP-eligible. SHPO wrote:

> The HPTP is a negotiated and legally-binding document attached to the MOA as Appendix C. Any modifications to the mitigation described in that HPTP required consultation with the SHPO prior to implementation. The SHPO has no record of any consultation with the BLM for the modifications to the HPTP for the above four (4) historic properties.

(ECF No. 3 at 139).

On November 17, 2022, Cedric Streater, BLM Humboldt River Archaeologist responded to ACHP's questions about BLM's sudden switch to the under-threshold determination as opposed to proceeding under 36 C.F.R. § 800.13(b)(1). Streater clarified that it was a mistake to state the Project would be regulated under any thresholds and that the Project was following 36 C.F.R. § 800.13(b)(1). (ECF No. 3 at 135).

Then, on November 18, 2022, without copying any of the Tribes, Kathleen

1 Rehberg, Humboldt River Field Manager, informed ACHP that instead of following 36 C.F.R. §
2 800.13(b)(1), BLM would "be going forward with the regulations under 36 C.F.R. §
3 800.13(b)(3)." The post-review discovery process described at 36 C.F.R. § 800.13(b)(3) is
4 truncated and only gives Tribes 48 hours to provide comments about postreview discoveries. So,
5 Rehberg falsely stated that BLM would proceed under 36 C.F.R. § 800.13(b)(3) based on RSIC's
6 request to incorporate the previous two Plans of Operations into the unanticipated discovery
7 process. (ECF No. 3 at 134). RSIC made no such request. In fact, RSIC had specifically
8 requested that BLM proceed under 36 C.F.R. § 800.13(b)(1). (ECF No. 3 at 109-10).

9 **E. Issuing the TRO will not substantially injure the other parties interested in the proceeding.**

10 Here, injury to cultural resources is imminent, while there is no countervailing harm to
11 Federal Defendants. In the Court's recent Order denying an emergency motion for an injunction
12 pending appeal in *Bartell Ranch v. McCullough*, the Court noted "delay is likely neutral for
13 Federal Defendants." (Order at 10). The same is true for Federal Defendants in this case. LNC,
14 for its part, has not demonstrated any irreparable harm that would justify withholding emergency
15 relief. As the Court noted in its recent Order, there was never an injunction against work under
16 the Thacker Pass ROD. (Order at 3). LNC could have submitted the surety bond application for
17 BLM to adjudicate at any time. LNC has waited over two years since the Thacker Pass ROD was
18 issued to begin construction. If delaying construction would cause LNC such a substantial injury,
19 it could have started construction long ago.

20 The same is true for the older permits LNC possesses for work in the Plaintiffs' TCD.
21 LNC delayed construction under those permits for years. It appears that LNC and BLM only
22 resurrected those older permits to avoid the 60 days notice for ground disturbance under the
23 Thacker Pass ROD that a stipulation in *Bartell Ranch v. McCullough* required. Plaintiffs' claims
24

cannot permanently block construction of the mine, anyway. They can only force BLM to do the consultation it was always supposed to do. If BLM does that consultation, LNC will have its mine. LNC will destroy a whole Paiute Traditional Cultural District. And, LNC will make its billions.

F. An injunction is in the public interest.

The Ninth Circuit recognizes "the public interest in careful consideration of environmental impacts before major federal projects go forward, and . . . [has] held that suspending such projects until that consideration occurs 'comports with the public interest.'" *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1138 (9th Cir. 2011) (citation omitted). A TRO in this case is vital to protecting the public interest by preventing ongoing harm to cultural sites.

It is not as clear as LNC's marketing strategies would have the public believe that, on balance, the Thacker Pass lithium mine will be environmentally beneficial. Electric vehicles and electric vehicle batteries do not grow on trees. The Thacker Pass FEIS shows that hundreds of thousands of tons of carbon dioxide equivalent emissions will be produced by the mine annually; tens of thousands of gallons of diesel fuel will be used on site daily; and the sulfuric acid LNC requires for its leaching process will likely be purchased from oil refineries.

Manufacturing materials like steel and plastic for any kind of vehicle (including electric ones) are very fossil-fuel intensive. In order for LNC to claim that, on balance, the Thacker Pass mine will benefit the environment, it would have to be true that the net reduction in tailpipe emissions achieved by the electric vehicles Thacker Pass' lithium is used in outweighs the greenhouse gasses emitted during the extraction for, and manufacturing of, electric batteries and new electric vehicles. LNC cannot prove this.

The public has a strong interest in federal agencies following the consultation regulations Congress has obligated them with – especially because those consultation regulations do not give

the public the power to withhold consent from projects that will harm them. Regardless, the Plaintiffs have made a sufficiently strong showing of likelihood of success on the merits and irreparable harm to outweigh any uncertainty about what is truly in the public interest. The public, moreover, has an overarching interest in its government abiding by the laws and regulations governing it. *See, e.g., East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018).

G. No bond is necessary in this case.

"The court has discretion to dispense with the security requirement, or to request a mere nominal security, where keeping security would effectively deny access to judicial review." *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Plan Agency,* 766 F.2d 1319, 1325-26 (9th Cir. 1985). In *Cal. ex rel. Van De Kamp*, the court did not require a bond where the plaintiffs were public interest organizations seeking to protect the environment. *Id.* Courts have consistently waived the bond requirement or imposed a nominal bond where plaintiffs, like the Tribes in this case, seek a restraining order to protect the public interest. *See id.* (requiring no bond); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (requiring only a $1,000 bond).

Plaintiffs, here, are all federally-recognized Tribes who seek to protect their traditional cultural property and ensure that BLM follows all tribal consultation requirements before it allows a corporation to destroy their traditional cultural property. They have no pecuniary interest in the lawsuit, and a requirement of more than a nominal bond would chill the Tribes' right to seek judicial review. Furthermore, Plaintiffs have raised serious questions on the merits, which "tips in favor of a minimal bond or no bond at all." *Van De Kamp*, 766 F.2d at 1326.

Dated Wednesday, March 1, 2023

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

By: /s/ Louis M. Bubala III
Louis M. Bubala III, Bar No. 8974

Local Counsel for Plaintiffs

/s/ Will Falk
Will Falk (Utah Bar No. 16678)
[Pro Hac Petition Submitted and Pending]

Certificate of Service

I hereby certify that on March 1, 2023, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

By: /s/Will Falk
Will Falk (Utah Bar No. 16678)

INDEX OF EXHIBITS

Ex.	Description	Pages
1	Declaration of Will Falk	7
2	BLM's February 23, 2023 Letter to RSIC	3
3	BLM's COVID Consultation Tracking List	5
4	BLM's April 13, 2020 Email	2
5	NV SHPO's October 24, 2019 Email to BLM	2