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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WESTERN WATERSHEDS PROJECT, *et al.*,  
  
Plaintiffs,  
  
v.  
  
BUREAU OF LAND MANAGEMENT OF  
THE U.S. DEPARTMENT OF THE  
INTERIOR, *et al.*,  
  
Defendants.

Case No. 3:21-cv-00103-MMD-CLB  
  
ORDER

**I. SUMMARY**

Plaintiffs<sup>1</sup> sued Defendants<sup>2</sup> over their approval of the Thacker Pass Lithium Mine Project (the “Project”), seeking to halt construction of the mine. (ECF No. 1.) The Court previously granted Defendant-Intervenor Lithium Nevada Corporation (“Lithium Nevada”), the proponent of the Project, leave to intervene. (ECF No. 18.) Before the Court is proposed Plaintiff-Intervenors Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain’s (collectively, the “Tribes”) motion to intervene.<sup>3</sup> (ECF No. 43 (“Intervention Motion”).) While neither Plaintiffs (ECF No. 52) nor Defendants (ECF No. 50) oppose the Intervention Motion, Lithium Nevada does (ECF No. 51).<sup>4</sup> Because the

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<sup>1</sup>Plaintiffs are Western Watersheds Project, Great Basin Resource Watch, Basin and Range Watch, and Wildlands Defense. (ECF No. 1 at 1.)

<sup>2</sup>Defendants are Bureau of Land Management of the U.S. Department of the Interior (“BLM”), the Department of the Interior, and Ester M. McCullough (collectively, “Federal Defendants”). (ECF No. 1 at 1.)

<sup>3</sup>The Court previously granted the Tribes’ motion to expedite and set an expedited briefing schedule on the motion to intervene. (ECF No. 47.)

<sup>4</sup>The Tribes filed a reply. (ECF No. 54.)

1 Court finds the Tribes' intervention timely, otherwise finds that the Tribes satisfy the factors  
2 governing intervention as of right, and as further explained below, the Court will grant the  
3 Intervention Motion.

## 4 **II. BACKGROUND**

5 The Court incorporates by reference the background of this case as described in  
6 its recent order denying Plaintiffs' motion for a preliminary injunction and does not recite  
7 that background here. (ECF No. 48 at 2-4.)

## 8 **III. DISCUSSION**

9 The Tribes seek intervention as of right under Fed. R. Civ. P. 24(a), or in the  
10 alternative, permissive intervention under Fed. R. Civ. P. 24(b). (ECF No. 43 at 2.) The  
11 Court finds that the Tribes have demonstrated entitlement to intervene as of right.

12 Rule 24(a)(2) permits anyone to intervene who "claims an interest relating to the  
13 property or transaction that is the subject of the action, and is so situated that disposing  
14 of the action may as a practical matter impair or impede the movant's ability to protect its  
15 interest, unless existing parties adequately represent that interest." When evaluating  
16 motions to intervene as a matter of right, courts construe Rule 24 liberally in favor of  
17 potential intervenors, focusing on practical considerations rather than technical  
18 distinctions. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001).

19 A party seeking to intervene as of right must meet four requirements:

20 (1) the applicant must timely move to intervene; (2) the applicant must have  
21 a significantly protectable interest relating to the property or transaction that  
22 is the subject of the action; (3) the applicant must be situated such that the  
23 disposition of the action may impair or impede the party's ability to protect  
24 that interest; and (4) the applicant's interest must not be adequately  
25 represented by existing parties.

24 *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted). An applicant  
25 for intervention bears the burden of showing that all four requirements are met. *See United*  
26 *States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). The Tribes have satisfied  
27 these four factors.

1                   **1. Factor 1: Timeliness**

2                   “Timeliness is ‘the threshold requirement’ for intervention as of right.” *League of*  
3 *United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997) (quoting *United*  
4 *States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990)). “Timeliness is determined by the  
5 totality of the circumstances facing would-be intervenors, with a focus on three primary  
6 factors: ‘(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the  
7 prejudice to other parties; and (3) the reason for and length of the delay.’” *Smith v. Los*  
8 *Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). The Court addresses below  
9 the parties’ arguments as to each of the three timeliness prongs.

10                   **a. Stage of the Proceedings**

11                   The Tribes argue they filed their Intervention Motion at an early stage in the  
12 proceedings because they filed the motion just before the Court held a hearing on  
13 Plaintiffs’ motion for a preliminary injunction, which the Court later denied. (ECF No. 43  
14 at 7.) Lithium Nevada counters that the Tribes filed their Intervention Motion at a late  
15 stage in the proceedings because the Intervention Motion did not become fully briefed,  
16 even on an expedited schedule, until after the Court held the hearing on, and denied, the  
17 motion for preliminary injunction. (ECF No. 51 at 6.) Moreover, Lithium Nevada argues,  
18 the existing parties to this case have already negotiated and agreed to a briefing schedule  
19 for dispositive motions in this case. (*Id.*) The Court agrees with the Tribes on this prong.

20                   This case is still in its early stages. Per the briefing schedule the parties agreed  
21 to—and the Court approved—Federal Defendants will not even file the administrative  
22 record until the end of this week. (ECF No. 28 at 5.) Dispositive, merits briefing will not  
23 happen until later this year. (*Id.* at 5-6.) And the Court has not yet issued a preliminary  
24 injunction, despite Plaintiffs’ request. (ECF No. 48.) The Court accordingly views this case  
25 as still in its early stages. Moreover, the Tribes are correct that the fact they filed their  
26 Intervention Motion before (albeit right before) the Court held a hearing on Plaintiffs’  
27 preliminary injunction motion tends to weigh in favor of finding the Intervention Motion  
28 timely filed. *See Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995)

1 (affirming decision to allow proposed intervenors to intervene as of right and finding their  
2 motion to intervene was timely where they “moved to intervene prior to the hearing on the  
3 preliminary injunction motion”). This prong weighs in favor of finding the Intervention  
4 Motion timely.

5 **b. Prejudice**

6 The Tribes argue that no existing parties will be prejudiced if the Court allows them  
7 to intervene because the Court had not ruled on any substantive issues at the time they  
8 filed the Intervention Motion, no relief from long-standing inequities will be delayed, and  
9 the soonest the Court could grant any party final relief is more than five months away in  
10 any event. (ECF No. 43 at 7-8.) Lithium Nevada counters that it will be prejudiced if the  
11 Tribes are allowed to intervene because the Tribes knew or should have known that their  
12 interests were not being adequately represented months before they filed the Intervention  
13 Motion, the existing parties already spent substantial time briefing and arguing Plaintiffs’  
14 motion for preliminary injunction, and allowing intervention will force the parties to  
15 participate in additional rounds of briefing “when this case needs to move forward to  
16 dispositive motions.”<sup>5</sup> (ECF No. 51 at 8.) The Court again agrees with the Tribes.

17 While it is true that Lithium Nevada and the other parties will have to participate in  
18 briefing at least some additional issues if the Court allows the Tribes to intervene, the  
19 Court will mitigate this potential prejudice by requiring the Tribes to adhere to the same  
20 case schedule the parties have already agreed to. Moreover, the Court already outlined  
21 a potential briefing schedule on the Tribes’ potential motion for preliminary injunction that  
22 will not drastically disrupt the case schedule. (ECF No. 47.) And in their reply in support  
23 of their Intervention Motion, the Tribes state they agree to be bound by the existing case  
24 schedule. (ECF No. 54 at 3.) It is also notable that only Lithium Nevada argues prejudice,  
25 whereas the other parties who have participated in the same briefing and agreed to the  
26 same case schedule do not oppose intervention. Moreover, as described above with

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28 <sup>5</sup>This quoted statement appears to reflect nothing more than an understandable preference on Lithium Nevada’s part.

1 respect to the stage of the proceedings, this case remains in its early stages. When the  
2 Court considers all of this in light of the Ninth Circuit Court of Appeals' 'repeated  
3 instruction' that "the requirements for intervention are [to be] broadly interpreted in favor  
4 of intervention" *Smith*, 830 F.3d at 853 (citation omitted), the Court also finds that this  
5 prong weighs in favor of finding the Intervention Motion timely.

6 **c. Reason for and Length of the Delay**

7 The Tribes argue the delay between this case being filed and the Intervention  
8 Motion is attributable to the Tribes not learning about the Project until February 2021, not  
9 learning about the plan for physical disturbance of the site as part of the Historic Property  
10 Treatment Plan ("HPTP") until April 2021, and not learning about the imminence of the  
11 HPTP until May 2021. (ECF No. 43 at 8-11.) The Tribes also argue they were trying to  
12 get information and obtain assurances from Federal Defendants for some time that further  
13 contributed to their delay in filing the Intervention Motion. (*Id.* at 9-11.) The Tribes further  
14 argue that the consultation period on the Project occurred while the COVID-19 pandemic  
15 was raging, primarily online though many Tribe members lack internet access, and  
16 required documents filed by Federal Defendants in approving the Project contradict each  
17 other, so it has been difficult for the Tribes to gather information sufficient to allow them  
18 to file their Intervention Motion until now. (*Id.*) Lithium Nevada counters that the Tribes  
19 should have been aware that their interests were not adequately protected months ago  
20 and offer no justifiable reason for their delay. (ECF No. 51 at 9-10.) While the Tribes have  
21 delayed, the Court nonetheless finds their arguments more persuasive on this prong as  
22 well.

23 "Although delay can strongly weigh against intervention, the mere lapse of time,  
24 without more, is not necessarily a bar to intervention." *Bank of New York Mellon v.*  
25 *Foreclosure Sales Servs., LLC*, Case No. 2:15-cv-02087-APG-GWF, 2017 WL 626360,  
26 at \*4 (D. Nev. Feb. 15, 2017) (quoting *Alisal*, 370 F.3d at 921) (granting motion to  
27 intervene despite delay). The Court credits the Tribes' explanation that it was difficult for  
28 their members to gather information about the Project given the COVID-19 pandemic and

1 their members' lack of internet access, and the potentially contradictory statements  
2 Federal Defendants made in public documents regarding the Project. The Court finds less  
3 persuasive the Tribes' argument that they were attempting to correspond with Federal  
4 Defendants, because Ms. Rehberg's letter is dated July 12, and gives the Tribes an  
5 opportunity to engage in some consultation that the Tribes apparently did not take her up  
6 on. (ECF No. 43-6 at 2.) But the Tribes still filed their motion within two weeks of receiving  
7 that letter. (ECF No. 43.) And the Court again finds the Tribes' delay understandable given  
8 the COVID-19 pandemic and their members' lack of internet access. This prong is  
9 therefore either neutral, or slightly favors finding the Intervention Motion timely.

10 On balance, all three prongs of the timeliness analysis weigh at least slightly in  
11 favor of finding the Intervention Motion timely filed. The Court accordingly finds the  
12 Intervention Motion timely and moves on to the remaining intervention as of right factors.

## 13 **2. Factors 2 and 3: Significant Protectable Interest and Impairment** 14 **of That Interest**

15 "An applicant has a 'significant protectable interest' in an action if (1) it asserts an  
16 interest that is protected under some law, and (2) there is a 'relationship' between its  
17 legally protected interest and the plaintiff's claims." *Cal. ex rel. Lockyer v. United States*,  
18 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th  
19 Cir. 1998)). "The 'interest' test is not a bright-line rule." *Alisal*, 370 F.3d at 919 (citations  
20 omitted). It is instead "primarily a practical guide to disposing of lawsuits by involving as  
21 many apparently concerned persons as is compatible with efficiency and due process[.]"  
22 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citation  
23 omitted).

24 Lithium Nevada recognizes the importance of proper tribal consultation, and  
25 instead essentially incorporates by reference its timeliness arguments to argue the Tribes  
26 have not satisfied these factors. (ECF No. 51 at 10-11.) Lithium Nevada then moves on to  
27 merits arguments as to why Federal Defendants did not violate the National Historic  
28 Preservation Act ("NHPA") as the Tribes claim the Federal Defendants did in the proposed

1 complaint they attached to their Intervention Motion. (*Id.* at 11-17; *see also* ECF No. 43-  
2 1.) Lithium Nevada finally argues that the Tribes' interest will not be impaired if they are  
3 not allowed to intervene because Federal Defendants have offered to let the Tribes  
4 participate in consultation regarding another permit required before the HPTP may move  
5 forward. (*Id.* at 17-18.)

6 The Court finds it premature to address Lithium Nevada's arguments about the  
7 merits of the Tribes' proposed claims. And when the Court disregards Lithium Nevada's  
8 merits arguments, Lithium Nevada offers little argument to suggest the Tribes have not  
9 shown a significantly protectable interest that would be impaired were they not permitted  
10 to intervene in this case. For their part, the Tribes argue that they have significantly  
11 protectable interests under the NHPA that are related to the claims in this case because  
12 this case too seeks to block construction of the Project at least until Federal Defendants  
13 comply with their statutory consultation obligations, and the Tribes' interests would be  
14 harmed if Defendants are permitted to proceed with the HPTP. (ECF No. 43 at 11-14.)  
15 Indeed, the Tribes argue, the HPTP contemplates digging up sacred sites containing the  
16 remains of the Tribes' members' ancestors. (*Id.*)

17 The Court agrees with the Tribes that they have shown a significantly protectable  
18 interest that would be impaired were they not allowed to intervene. If the Tribes are right,  
19 and Federal Defendants did not properly consult them under the NHPA, they have a  
20 significantly protectable interest in ensuring they are properly consulted before any of their  
21 sacred sites are dug up and a lithium mine is built on land they consider sacred. Moreover,  
22 if the Court does not allow the Tribes to intervene, Defendants may imminently proceed  
23 with the HPTP, which could certainly impair the Tribes' protectable interests in not having  
24 their sacred sites dug up before being properly consulted. The Court also finds persuasive  
25 the Tribes' argument that the alternative consultation offered by Federal Defendants under  
26 the 'ARPA' process is not a perfect substitute for the consultation rights they are entitled  
27 to under the NHPA.

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1           Moreover, the Court effectively permitted the parties to move forward towards  
2 completing digging incident to the HPTP when it denied Plaintiffs' motion for preliminary  
3 injunction. (ECF No. 48.) The Tribes persuasively argue that the digging incident to this  
4 plan will cause them irreparable harm. (ECF Nos. 43, 43-1, 44-1.) And "[i]f an absentee  
5 would be substantially affected in a practical sense by the determination made in an action,  
6 he should, as a general rule, be entitled to intervene." *Berg*, 268 F.3d at 822 (quoting the  
7 Fed. R. Civ. P. 24 advisory committee's notes) (reversing the district court's decision  
8 denying motion for leave to intervene as of right and finding in pertinent part that the  
9 proposed intervenor's interests would be impaired if not permitted to intervene). In sum,  
10 these two factors favor permitting the Tribes to intervene as of right in this case.

### 11                           **3.       Factor 4: Adequate Representation**

12           Courts consider three factors when assessing whether a present party will  
13 adequately represent the interests of an applicant for intervention:

14                   (1) whether the interest of a present party is such that it will undoubtedly  
15                   make all of a proposed intervenor's arguments; (2) whether the present party  
16                   is capable and willing to make such arguments; and (3) whether a proposed  
                  intervenor would offer any necessary elements to the proceeding that other  
                  parties would neglect.

17           *Arakaki*, 324 F.3d at 1086. Moreover, "the requirement of inadequacy of representation is  
18 satisfied if the applicant shows that representation of its interests 'may be' inadequate and  
19 that the burden of making this showing is minimal." *Sagebrush Rebellion, Inc. v. Watt*, 713  
20 F.2d 525, 528 (9th Cir. 1983).

21           There is basically agreement on this factor. The Tribes argue that their interests  
22 are inadequately represented because Plaintiffs do not bring a claim under the NHPA, nor  
23 do they claim to represent the Tribes' interests. (ECF No. 43 at 14-16.) Indeed, Plaintiffs  
24 themselves argue that they do not adequately represent the Tribes' interests. (ECF No.  
25 52 at 2.) And neither Federal Defendants, who do not oppose the Intervention Motion, nor  
26 Lithium Nevada, who does, address this factor in their responses to the Intervention  
27 Motion. The parties accordingly appear to agree that the Tribes' interests are not  
28



1 adequately represented by the existing parties to this case. This factor thus also favors  
2 allowing intervention as of right.

3 In sum, all four factors weigh in favor of permitting the Tribes to intervene as of  
4 right. The Court will grant the Intervention Motion.

5 **IV. CONCLUSION**

6 The Court notes that the parties made several arguments and cited to several cases  
7 not discussed above. The Court has reviewed these arguments and cases and determines  
8 that they do not warrant discussion as they do not affect the outcome of the Intervention  
9 Motion before the Court.

10 It is therefore ordered that proposed Plaintiff-Intervenors' motion to intervene (ECF  
11 No. 43) is granted.

12 It is further ordered that proposed Plaintiff-Intervenors are admitted into this case  
13 as Plaintiff-Intervenors, with full rights of participation limited to the claims asserted in their  
14 proposed complaint (ECF No. 43-1).

15 It is further ordered that Plaintiff-Intervenors are bound by the existing case  
16 schedule that the Court approved and discussed at the recent hearing. (See ECF No. 47.)

17 DATED THIS 28<sup>th</sup> Day of July 2021.

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MIRANDA M. DU  
22 CHIEF UNITED STATES DISTRICT JUDGE  
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