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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BARTELL RANCH LLC, et al., Plaintiffs, v. ESTER M. MCCULLOUGH, et al., Defendants, and LITHIUM NEVADA CORPORATION, Intervenor-Defendant.	Case No.: 3:21-cv-80-MMD-CLB (LEAD CASE) **ENVIRONMENTAL PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND MEMORANDUM IN SUPPORT**

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs, and RENO SPARKS INDIAN COLONY, et al., Intervenor-Plaintiff, and BURNS PAIUTE TRIBE Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and LITHIUM NEVADA CORPORATION, Intervenor-Defendant.	Case No.: 3:21-cv-103-MMD-CLB (CONSOLIDATED CASE)

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INTRODUCTION

To preserve the *status quo*, Plaintiffs Western Watersheds Project (WWP), Great Basin Resource Watch (GBRW), Basin and Range Watch (BRW), and Wildlands Defense (WD), (collectively, Environmental Plaintiffs or WWP) submit this Emergency Motion under Local Rule 7-4 for an Injunction Pending Appeal pursuant to Federal Rule of Civil Procedure 62(d). According to LNC, the construction of the Thacker Pass Project is imminent, and may begin as soon as February 27.[1]

LNC plans to begin construction even though LNC has not shown, nor has BLM determined, that LNC has any right to dump its waste and tailings on public land – necessary facilities without which the Project could not be legally approved. As the Court's Summary Judgment Order held, the 1872 Mining Law "requires a discovery of valuable mineral deposit for a mining project proponent to have rights under Section 22 before that proponent may permanently occupy any land." Bartell Ranch v. McCullough, 2023 WL 1782343, at *5 (D. Nev. 2023). The Court remanded the Decision back to BLM to determine whether LNC has made the requisite discovery of a valuable mineral deposit on each of the over 60 mining claims proposed to be used for the waste dumps and tailings. Id. at *25. BLM and LNC have not complied with the remand order, or shown that LNC has any rights to these lands.

Nevertheless, BLM and LNC contend that development can begin because this Court denied the Plaintiffs' request to vacate the BLM's ROD. On February 16, 2023, Lithium

[1] Pursuant to Local Rule 7-4(a), Environmental Plaintiffs attempted to forestall the impending ground disturbance and construction, and the need for this Emergency Motion, by conferring with opposing counsel many times over the last 10 days. Plaintiffs' counsel's declaration regarding these unsuccessful efforts is attached (Exh. 1) (hereinafter, "Flynn Declaration"). Counsel for LNC stated that operations could begin as soon as February 27th. Counsel for BLM stated that operations could not start until it approved the reclamation bond for the Project. Counsel for LNC stated that the company would submit the necessary paperwork for the bond as soon as Tuesday, February 21. BLM's approval of the bond could occur at any time after BLM receives the paperwork. Plaintiffs requested that LNC stay operations, or that BLM delay approval of the bond, to allow for expedited briefing on the injunction motions, but BLM refused. Counsel for LNC was unable to provide its position on Plaintiffs' request prior to February 21. *See* Flynn Dec. at 2. Thus, since BLM may approve the bond at any time after LNC submits the paperwork, Plaintiffs have no choice but to seek emergency relief.

Americas, Inc., the parent company of LNC, released a statement from the President and CEO stating that: "'**The beginning of construction at Thacker Pass is imminent** following last week's favorable ruling on the Record of Decision and the closing of GM's initial investment,' said Jonathan Evans, President and CEO of Lithium Americas." Attached to Flynn Decl. (emphasis added).

Due to the imminent onset of full Project construction, WWP filed its Notice of Appeal on February 20, 2023 (ECF No. 282), appealing this Court's Order of February 6, 2023 (ECF No. 279) and Judgment dated February 7, 2023 (ECF No. 280), especially this Court's refusal to grant WWP's request for vacatur of the ROD, as well as the denial of WWP's summary judgment motion on the other claims. WWP requests that this Court enjoin LNC from commencing ground disturbance at the Project site to preserve the *status quo* while Plaintiffs seek review from the Ninth Circuit.

JURISDICTION

Federal Rule of Civil Procedure 62(d), provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modified, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d).

In its Order (ECF No. 279) and Judgment (ECF No. 280), this Court granted in part Environmental Plaintiffs' motion for summary judgment, yet refused to grant the relief Plaintiffs requested in their Complaint and motion, that the Court "[e]njoin Defendants… from proceeding with any aspect of the Thacker Pass Project, pending full compliance with the requirements of federal law" and "set aside and Vacate the ROD, FEIS, and Project approvals." Compl. at 68-69 (Request for Relief)(ECF No. 1). Instead, the Court's Order granted BLM's and LNC's request not to vacate the Project-approving Record of Decision (ROD) or to otherwise enjoin Project operations. Thus, this motion is proper under Rule 62(d). *See* Nat. Res. Def. Council v. Sw. Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001)(recognizing jurisdiction of district court to consider injunction motions under FRCP 62 after appeal is filed).

STANDARD OF REVIEW

The Federal Rules of Appellate Procedure contemplate that parties will first seek an injunction pending appeal from the district court before seeking similar relief from the Court of Appeals. Fed. R. App. P. 8(a)(1)(C). Courts have observed that "[p]rior recourse to the initial decisionmaker would hardly be required as a general matter if [a district court] could properly grant interim relief only on a prediction that it has rendered an erroneous decision." Or. Nat. Res. Council v. Marsh, 1986 WL 13440, at *1 (D. Or. 1986)(quoting Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)). Accordingly, courts will grant Rule 62 relief "when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." Id. *quoting* Wash. Metro, 559 F.2d at 844-45; *see also* Protect Our Water v. Flowers, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004)(same).

In deciding whether to grant an injunction pending appeal, courts are guided by the standard employed when considering a motion for a preliminary injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). Preliminary injunctions generally require plaintiffs to show: (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. Winter v. Nat. Res. Defense Council, Inc., 555 U.S. 7, 20 (2008). The Court's focus is on the harms that will result during the pendency of the case if the injunction is not issued. *See* League of Wilderness Defs. v. Connaughton, 752 F.3d 755, 765-66 (9th Cir. 2014)(initial P.I. context).

"A stay should issue if failing to do so would 'destroy [the plaintiff's] rights to secure meaningful review' on appeal." NCTA – Internet & Tel. Ass'n v. Frey, 2020 WL 2529359, at *2 (D. Me. 2020)(*quoting* Providence Jour. Co. v. Fed. Bur. of Invest., 595 F.2d 889, 890 (1st Cir. 1979)). Assuming that irreparable harm is sufficiently likely and the public interest favors a stay, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

ARGUMENT

WWP satisfies all four parts of this test because (1) this Court has already ruled that BLM violated FLPMA in approving the Project; (2) for the other issues, WWP has raised "serious questions" for the Ninth Circuit to consider on appeal; (3) the ground clearing, blasting, road construction, drilling and other initial operations will result in immediate and irreparable harm to wildlife and to Plaintiffs', and their members', use of these public lands; (4) the balance of hardships tips overwhelmingly towards Plaintiffs; and (5) the public interest will be well served if the Project is enjoined while the Ninth Circuit considers this important case.

I. Plaintiffs Have Already Succeeded on Their Primary Legal Claim on the Merits.

This Court ruled in favor of the Environmental Plaintiffs on their primary legal claim – that BLM violated FLPMA because it approved the Project, and determined provisions of its own Resource Management Plan ("RMP") did not apply, without first determining whether LNC had "valid rights" under the 1872 Mining Law to occupy all of its mining claims. This was because, as held by this Court, the Ninth Circuit's ruling in the "Rosemont" case, Center for Biological Diversity v. U.S. Fish and Wildlife Service, 33 F.4th 1202 (9th Cir. 2022), applied to BLM's approval of mining projects, and thus BLM's assumption that LNC held valid mining claims to lands where no valuable minerals had been discovered was based on an erroneous interpretation of the Mining Law and FLPMA. Bartell Ranch, 2023 WL 1782343, at **3-8. WWP does not appeal the portions of this Court's Order that granted Plaintiffs' summary judgment motion on this FLPMA violation. Rather, WWP has appealed this Court's decision not to vacate BLM's Project approval, as well as the decision to deny WWP's summary judgment motion on its other claims.

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II. There Are Serious Questions for Appeal Regarding the Decision Not to Vacate the Illegal BLM Record of Decision and Project Approval.

The impending onset of vegetation clear-cutting, blasting, road construction, infrastructure and facility construction, and related ground disturbance will result in immediate and irreparable harm to Environmental Plaintiffs, and the environment. Yet, despite finding that the BLM violated its governing statute, FLPMA, and erroneously interpreted the Mining Law contrary to controlling Ninth Circuit precedent, this Court rejected Plaintiffs' request that it vacate or enjoin the illegal agency decision.

The Court's decision not to vacate the illegal decision, in the face of immediate and irreparable environmental harm, is contrary to Ninth Circuit caselaw. WWP is aware that this Court stated that it did not invite further briefing on the vacatur issue. Due to the imminent environmental destruction that will result from keeping BLM's illegal Project approval in force, WWP believes that this issue warrants immediate review by this Court and the Ninth Circuit.

As this Court noted, it "may only order remand without vacatur in limited circumstances, and only when equity demands." Bartell Ranch, 2023 WL 1782343, at *23. In deciding whether to leave a defective agency action in place, the court must "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." Pollinator Stewardship Council v. U.S. E.P.A., 806 F.3d 520, 532 (9th Cir. 2015)(citations omitted). "Examples of where it is appropriate to remand without vacatur include situations where environmental harm will result from vacatur." Bartell Ranch, 2023 WL 1782343, at *23. In addition, the Court may consider whether BLM could "essentially fix the error the Court has identified in its review." Id. at *23, citing Pollinator, 806 F.3d at 532.

Both considerations weigh in favor of vacatur here since the required claim validity review is an error infecting BLM's whole decision, not a mere procedural hurdle to be easily cleared, and ***without*** vacatur, significant, immediate, and irreparable "environmental harm" ***will*** occur at the Project site, likely starting in a week. The agency's errors are serious and preserving the *status quo* while the Ninth Circuit reviews the Court's decision will cause little disruption to a Project LNC has already voluntarily delayed for two years.

A. BLM's Refusal to Evaluate Claim Validity Was Serious Error.

In deciding not to vacate the illegal BLM ROD, this Court determined that BLM could "essentially fix the error" the Court has identified in its review because "it could find on remand that Lithium Nevada possesses valid rights to the waste dump and mine tailings land it intends to use for the Project." Bartell Ranch, 2023 WL 1782343, at *24.

Yet "the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step." Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 985 F.3d 1032, 1052 (D.C. Cir. 2021), *cert. denied sub nom.* Dakota Access, LLC v. Standing Rock Sioux Tribe, 142 S. Ct. 1187 (2022). The question is thus not whether BLM could justify the decision it reached on remand, but rather, whether it could justify its refusal to even consider whether LNC held valid mining claims to the waste dump lands.

WWP respectfully submits that BLM cannot "fix" this error. As the Ninth Circuit held, the agency's interpretation that it could simply assume valid rights under the Mining Law existed was "foreclosed by a century of precedent." Ctr. for Biological Diversity, 33 F.4th at 1219. Determining claim validity is more than a mere procedural hurdle; it is a fundamental prerequisite to LNC possessing any right to occupy the waste and tailings dump lands. The determination requires evidence showing that the purported minerals on each claim exist in sufficient quantities to be sold at a reasonable profit, necessarily analyzing the costs to extract, process, and market the minerals on those claims. Those facts are absent from this Record.

1. BLM Cannot "Fix" Its Decision to Ignore Mining Claim Validity.

As the Ninth Circuit held, and this Court agreed, BLM fundamentally misinterpreted the Mining Law, contrary to a hundred years of precedent, when it determined it could assume LNC held valid existing rights to occupy the waste rock lands regardless of whether those lands contained valuable minerals. *See* Ctr. for Biological Diversity, 33 F.4th at 1219-20 (discussing precedent). BLM thus could not "reach the same result on remand but either offer better reasoning or comply with procedural rules to essentially fix the error the Court has identified in

its review." Bartell, 2023 WL 1782343, at *23, citing Pollinator, 806 F.3d at 532. This Court has now ruled that BLM could not lawfully skip a claim validity review when determining that LNC held valid existing rights to develop the entire Project area.

Where there is an "absence of analysis," rather than a "flawed analysis," by the agency, "the Court cannot determine whether there exists a serious possibility that the [agency would] be able to substantiate its decision on remand" and thus the decision should be vacated. Wildearth Guardians v. Bureau of Land Mgmt., 457 F. Supp. 3d 880, 897 (D. Mont. 2020) (citing Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151)(D.C. Cir. 1993) (internal quotation marks omitted). As this Court noted, its "review is limited to the grounds that the agency invoked when it took the action." Bartell Ranch, 2023 WL 1782343, at *2. BLM never considered whether LNC's mining claims to the waste and tailings dump lands were valid and any new BLM decision on claim validity would have to be based on a new and expanded administrative record, as the current record does not contain any such decision and analysis.

2. *The Required Determination that LNC has Discovered a Valuable Mineral Deposit on Each Mining Claim is a Fundamental Legal and Evidence-based Decision that Affects Whether the Project Can be Approved at All*.

Moreover, determining claim validity is a demanding inquiry, not a mere procedural step. For each of its 60+ mining claims to be occupied by waste rock or tailings waste, LNC must show, and BLM must verify based on detailed analysis of evidence of the mineral content on each claim, including the costs to remove, process, and bring the minerals on those claims to market, that LNC has made the "discovery of a valuable mineral deposit."

Although this Court determined that it is "possible" that valuable minerals exist on each of the 60+ claims, Bartell, 2023 WL 1782343, at * 6, that is not enough to meet the exacting "valuable minerals" test. "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and extraction of the mineral." Chrisman v. Miller, 197 U.S. 313, 322 (1905). To qualify as a valuable mineral deposit, "it must be shown that the mineral can be extracted, removed and marketed at a profit." U.S. v. Coleman, 390 U.S.

599, 602 (1968).

Further, valuable minerals must be discovered on each individual claim. As the Rosemont decision held: "The validity of a claim cannot be established by a discovery of valuable minerals nearby." 33 F.4th at 1210, *citing and quoting* Waskey v. Hammer, 223 U.S. 85, 91 (1912) ("A discovery without the limits of the claim, no matter what its proximity, does not suffice."). Instead, "[e]ach lode [mining] claim must be independently supported by the discovery of a valuable mineral within the location as it is marked on the ground." Lombardo Turquoise Mining & Milling v. Hemanes, 430 F. Supp. 429, 443 (D. Nev. 1977) *aff'd* 605 F.2d 562 (9th Cir. 1979).

Finally, the minerals on each claim must support the objective and reasonable prospect of profitable mining of those claims, which necessarily includes a detailed analysis and computation of all costs. "[T]he finding of some mineral, or even of a vein or lode, is not enough to constitute discovery – their extent and value are also to be considered." Converse v. Udall, 399 F.2d 616, 619 (9th Cir. 1968). "[P]rofit over cost must be realizable from the material itself and it is that profit which must attract the reasonable man." Ideal Basic Indus., Inc. v. Morton, 542 F.2d 1364, 1369 (9th Cir. 1976); United States v. Springer, 491 F.2d 239, 243 (9th Cir. 1974) ("The evidence must show that the minerals taken intrinsically satisfy the prudent man test and the marketability test established by the cases."). As held by a leading Interior Department case, the fact that mining claims contain minerals, even potential substantial deposits, is not enough to meet the strict "discovery" test under the Mining Law, as all costs must be analyzed in detail and factored into the prudent person and marketability tests:

> While [the claimant] has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors—some of which may be beyond the control of [the claimant]—which could stand in the way of a profitable mining operation. After evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

U.S. v. Pittsburg Pacific, Co., 30 IBLA 388, 84 Interior Dec. 282, 1977 WL 16514, at **3 (1977).

LNC cannot demonstrate it meets these strict tests on this Record. "The question is whether valuable minerals have been 'found' on the claims, not whether valuable minerals might

be found." Center for Biological Diversity, 33 F.4th at 1222. LNC's own Technical Report shows that the "known zone of Li [lithium] mineralization" is in the pit and does not extend to the waste dump lands. AR033908 (TPEIS-0234). Even if it were true that the area is generally mineralized, the Record contains no evidence of the level of mineralization of each individual mining claim to be covered in waste and tailings. Nor is there evidence of the costs to extract, process, and develop these minerals showing that they could be extracted and marketed at a reasonable profit.

That makes sense, as LNC made the business decision to bury these lands with permanent waste and tailings piles, and never proposed extracting any minerals from these lands. As was the case in Rosemont, LNC's decision is a significant indication of the lack of valuable minerals on those lands. "As a threshold matter, Rosemont's proposal to bury its 2,447 acres of unpatented mining claims under 1.9 billion tons of its own waste was a powerful indication that there was not a valuable mineral deposit underneath that land." Center for Biological Diversity v. FWS, 409 F. Supp. 3d 738, 748 (D. Ariz. 2019).

In any event, at this point, any argument about whether the claims satisfy the strict discovery test is based on pure speculation. Here, like at Rosemont, the company is free to attempt to prove, via verified evidence, that such a discovery exists on every claim. But until that occurs, neither Plaintiffs, BLM, or the Court can determine whether LNC holds any occupancy rights. That determination will require a new factual record that does not exist yet.

B. BLM Cannot Cure its Error Without Revisiting the Entire Decision.

BLM's assumption that LNC had valid rights to use and occupy all the public lands at the site without verifying, let alone examining, claim validity is a serious error that fundamentally affected its entire decision-making process. That was the situation found by the District Court and Ninth Circuit in Rosemont. *See* Center for Biological Diversity, 33 F.4th at 1212-1213 (discussing Forest Service rationales). As the Rosemont district court held, "the Forest Service accepted, without question, that those unpatented mining claims were valid. **This was a crucial error as it tainted the Forest Service's evaluation of the Rosemont Mine from the start**."

Center for Biological Diversity, 409 F. Supp. 3d at 747 (emph. added).

The same "crucial error" occurred at Thacker Pass. BLM's decision not to apply any of the Sage Grouse RMP standards and requirements, and the binding Visual Resource Management (VRM) standards, as well as its overall review of the Project, was based on its illegal and unsupported assumption that BLM's discretion over the Project was severely limited because LNC held statutory rights to occupy all of public lands at the site. *See* WWP Reply on Summ. J., 14, 22-23 (ECF No. 264). BLM cannot cure that error on remand without revisiting the entire Decision.

The need for a wholesale re-evaluation is underlined because BLM could not lawfully approve a mine Project with no plan for disposing of waste rock and tailings. BLM's Decision approving blasting, ground clearing, facility construction and other operations outside of the 1,300 acres of the waste and tailings dumps is premised on approval of a full and complete mine Plan of Operations (PoO) authorized pursuant to rights under the Mining Law. But that Project essentially no longer exists. Because BLM has no idea if LNC has any right to occupy the 1,300 acres slated for the waste and tailings dumps – as it was required to determine under Rosemont and this Court's Order – its review and approval of the Project based on those rights is no longer valid. In other words, because LNC currently has no rights to dump its waste and tailings, and occupy those lands, BLM's ROD approved what is now essentially half a mine.

If the Court does not vacate the ROD, or enjoin Project development pursuant to this Emergency Motion, LNC will consider itself free to blast and excavate the mine pit, construct the sulfuric acid processing plant, and build other facilities on thousands of acres of public land, to produce waste rock and tailings with nowhere to legally put them. Such an incomplete mine plan could never be approved under BLM mining regulations and FLPMA. *See, e.g.*, 43 C.F.R. §3809.401 (requiring submittal of detailed description of all operations as a condition of approval).

To treat claim validity review as an easily-remedied procedural hurdle gives BLM and LNC "substantial ammunition" to "build first and conduct comprehensive reviews later." Standing Rock Sioux Tribe, 985 F.3d at 1052. Indeed, that is exactly what LNC plans to do. It

plans to begin Project construction without important mitigations and other protections aimed at reducing impacts to sage-grouse and other resources that otherwise would be required by BLM's RMP, imminently. This renders BLM's claim validity determination no more than an afterthought and ensures that the area's unique values will be destroyed even if BLM's review finds no valid existing rights exist.

C. Failing to Vacate the ROD Harms the Environment.

Without vacatur, the mining company will destroy the Project area by stripping away the vegetation and commencing Project development, beginning as soon as February 27. This will cause permanent environmental destruction. The Court recognized as much when it stated, "If … Plaintiffs obtain their desired relief, further construction of the mine will be halted, at least temporarily. No party seriously disputes that this outcome would be more beneficial for the environment immediately surrounding the Project." Order (on standing and evidence) 3 (ECF No. 275).

Thus, this case is unlike the Ninth Circuit cases on remand without vacatur. In both Ninth Circuit cases relied on to support the Court's decision not to vacate the agency's unlawful decision, the Ninth Circuit chose outcomes that would be **better** for the environment. In Pollinator Stewardship Council v. U.S. E.P.A., the Ninth Circuit vacated a limited pesticide registration granted without adequately considering effects to honeybees because "given the precariousness of bee populations, leaving the EPA's registration of sulfoxaflor [a pesticide] in place risks more potential environmental harm than vacating it." 806 F.3d 520, 532 (9th Cir. 2015).

EPA immediately stopped manufacturers from selling or manufacturing sulfoxaflor, but later approved use of the pesticide again after the proponent, Dow, submitted new studies it determined showed no "unreasonable effects" to honeybees. Center for Food Safety v. Regan, 56 F.4th 648, 655-56 (9th Cir. 2022). Plaintiffs sued again. Upon review of the second registration decision, the Ninth Circuit left the challenged pesticide regulation in place because it determined vacatur would result in the use of more environmentally damaging pesticides. Center for Food

Safety, 56 F. 4th at 668.

While the interim consequences of preserving the *status quo* could have temporary implications for LNC's bottom line, the harm to the environmental and other values in the Project area is immediate and irreparable. These are not the "limited circumstances" in which the Ninth Circuit has held an invalid agency decision should be left in place on remand. WWP has shown serious questions about whether the Court properly allowed the Project to proceed because BLM could purportedly "fix" its failure to consider claim validity on remand.

III. Serious Questions Go to the Merits of WWP's Other Issues.

The Court's Order and Judgment denied WWP's other claims regarding the National Environmental Policy Act (NEPA) and FLPMA. WWP respectfully submits that this Court erred in denying summary judgment on those claims and that the importance of these claims warrant review by the Ninth Circuit on an expedited basis. Due to the emergency nature of this Motion, and for brevity's sake, WWP relies on its previously submitted summary judgment briefing on these claims. ECF Nos. 202, 264.

IV. The Project Will Result in Immediate Irreparable Harm.

"[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Vill. Of Gambell, Alaska, 480 U.S. 531, 545 (1987). Environmental damage causes irreparable harm because "once the desert is disturbed, it can never be restored." Save Our Sonoran v. Flowers, 408 F.3d 1113, 1126 (9th Cir. 2005). "Ongoing harm to the environment constitutes irreparable harm warranting an injunction." Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006) (affirming grant of injunction pending appeal).

Irreparable harm to Plaintiffs' interests in use and enjoyment of the Project area and its sagebrush ecosystem—including sage-grouse and other native wildlife Plaintiffs value—is slated to begin as soon as February 27. BLM's approval of the Project authorizes LNC to begin "pre-

production waste rock removal and stripping concurrent with process facility construction." FEIS at B-25 (LNC Mining Plan)(TPEIS-0384, AR 045794). "Stripping," "Pre-stripping" and "waste rock removal" involves bulldozing, blasting, removal of all vegetation, and excavation and dumping of millions of tons of rock at the Project site. Id. at ii. "The site preparation and construction activities are expected to include a combination of scraping, dozing, grading, compacting, and material transfers…. The pre-production waste rock removal operations would include drilling, blasting, waste hauling, and material transfers." FEIS at 4-77, AR 045625. LNC plans to begin these activities imminently. All of this significant and irreparable damage will occur in BLM's designated Priority Habitat Management Area (PHMA) for the Sage Grouse. FEIS Figure 4.5-11 (TPEIS-0384), AR 045738.

Prior to the issuance of the Order and Judgment, LNC had agreed to provide Plaintiff Bartell Ranch with at least 60 days' notice before commencing that sort of ground disturbance. Joint Case Management Plan 8 (ECF No. 32). While that agreement was focused on avoiding the need for a motion for preliminary injunction prior to the ruling on the merits, Plaintiffs had hoped BLM and LNC would agree to hold off on development until this Court, or the Ninth Circuit, could rule on Plaintiffs' request for injunctive relief. Unfortunately, LNC's counsel informed WWP's counsel that the company intends to begin Project construction as early as next Monday, February 27. *See* Flynn Decl. (Exh. 1). According to BLM and LNC, because the ROD was not vacated, the ROD's approval of the Project is in full force and effect.

Harm from the destruction of the Project area will be irreparable, and immediate. The mine will "completely remove the last, large scale, unburned south facing sagebrush ecosystem in the entirety of the Montana Mountains." Crawforth Decl. ¶ 29 (Exh. 2).[2] "Since sagebrush, once destroyed, can take decades to re-establish,…destruction of fragile sagebrush habitats is a virtually permanent effect." Braun Decl. ¶¶ 28, 42 (ECF No. 23-30).[3]

[2] Terry Crawforth, a local resident with extensive knowledge of the area, worked for the Nevada Department of Wildlife (NDOW) for 42 years, including over six as agency Director.

[3] The Declaration of Clait Braun, one of the leading experts on sage grouse in the West, was submitted in support of WWP's initial motion for preliminary injunction.

Because the south facing slope holds less snow, the area provides "critical winter range for a wide array of wildlife," which are presently gathered there and using the area as winter habitat. Crawforth Decl. ¶ 29. Mr. Crawforth has recently seen pronghorn antelope, as well as herds of 50-60 deer using the Project area. Id. ¶ 30. The area is particularly valuable because the shallower snow depth allows browsing animals earlier access to protein-rich "greenup" vegetation that is currently emerging in the Thacker Pass area. Crawforth Decl. ¶¶ 30-31. Those animals will be displaced by the mine development with nowhere to go in the area that provides similar nutrition and "will likely experience increased mortality," which will "exacerbate the already dwindling area populations." Id. ¶¶ 26, 30.

Those effects will exert a brutal toll on the already-struggling sage-grouse. "Adverse effects from the mine will destroy the value of habitat at Thacker Pass for generations of sage-grouse…." Crawforth Decl. ¶ 32. The destruction will displace sage-grouse from the important winter habitats they are presently using for food and shelter. *See* id. ¶ 23; *see also* Braun Decl. ¶ 17 (describing sage-grouse use of winter habitats). In addition, they will lose access to the greenup vegetation, which is especially important since "studies have shown that sage-grouse in the Montana mountains have very low protein levels compared to populations elsewhere and so protein from emergent forbs is essential for those birds." Crawforth Decl. ¶ 31. "It must be assumed significant mortality of [sage-grouse that use the Project area] will occur due to noise pollution, traffic and outright removal of the sagebrush community." Id. ¶ 24.

The effects of disturbance to this key sagebrush habitat threatens population-level effects for sage-grouse. Noise from blasting and other mine activities slated to begin next week will occur at the commencement of sage-grouse breeding season when it will "increase likelihood of lek abandonment and cause decreases in juvenile recruitment (Blickley et al. 2013)." Braun Decl. ¶ 34. Those impacts will be felt at the Montana-10 lek, which "is one of the three largest leks in the Lone Willow PMU and is nearly within eyesight and certainly within ear shot of the Thacker Pass Project." Crawforth Decl. ¶ 24. Impacts to the Montana-10 lek "could have population-level effects to sage-grouse." Braun Decl. ¶ 39. *See also* Crawforth Decl. ¶ 24. "Impacts to sage-grouse in the Montana mountains would be significant enough to place the species on a sure path

to listing under the Endangered Species Act since abundance of grouse in that area is exceptional." Crawforth Decl. ¶ 33. Even though the Court held that BLM unlawfully assumed it did not have to comply with its own RMP's requirements intended to protect sage-grouse from this kind of disturbance, unmitigated development may commence February 27.

The imminent destruction of the aesthetic and scenic values, wildlife, water, and air quality of Thacker Pass and the surrounding community will also irreparably harm Plaintiffs' interests. The Project's unalterable damage to the over 5,600 acres of public land directly impacted is undisputed. As shown in the declarations submitted in support of WWP's summary judgment motion, members of Plaintiffs groups use the Project site for wildlife viewing and appreciation, solitude, recreation, cultural, and aesthetic enjoyment – which will be permanently eliminated by the Project. *See* Decls. Of Hadder/GBRW (ECF No. 202-1), Fuller/WWP (ECF No. 202-2), Emmerich/BRW (ECF No. 202-4), and Fite/WD (ECF No. 202-3).

Moreover, once this development has begun, BLM will have a powerful incentive to supply a rationale for its approval of the Project, rather than conduct a thorough and searching claim validity review. Indeed, allowing LNC to strip vegetation, blast, and construct various facilities on the other lands at the site for a mining project that is not viable without rights to occupy the lands where it intends to dump its waste and tailings essentially presupposes that BLM and LNC will later meet the strict test for claim validity under the Mining Law.

Courts must guard against such a "bureaucratic steam roller" that often develops within an agency when it is called upon to revisit already-approved actions. Western Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1240 (D. Idaho 2018) ("Federal courts elsewhere have held . . . that 'bureaucratic momentum' can support an argument of irreparable harm."). *See also* id. at 1240–41 (discussing and citing other cases re: bureaucratic momentum). "[T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started, still seems to us, . . . a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction." Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (Breyer, J.).

As one recent decision held: "Only a remedy that prevents new mining in the expansion area will avoid subjecting conservation groups' valid objections to the 'bureaucratic steamroller.'" Wildearth Guardians v. Bernhardt, 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019) (citations omitted). "Because remand without vacatur or injunction would incentivize agencies to rubber stamp a new approval, rather than take a true and informed hard look, I must enjoin further action until the agency review is completed." Id. The fact that these rulings vacating illegal agency decisions were based on the procedural violations of NEPA, as opposed to BLM's substantive legal decision under FLPMA and the Mining Law, to assume claim validity in this case without any evidence, only reinforces the need to vacate the agency's illegal decision here.

V. The Balance of Hardships Tips Decidedly in Plaintiffs' Favor.

The harm to Plaintiffs from the permanent destruction of the fragile Thacker Pass ecosystem and the vital wildlife habitat it provides outweighs any harm to BLM or LNC from temporary delay of the Project activities while the Ninth Circuit resolves Plaintiffs' appeal. BLM has no real stake in the Project and any harm to the agency will be negligible. As to LNC, the Ninth Circuit has repeatedly held:

> Because the jobs and revenue will be realized if the project is approved, the marginal harm to the intervenors of the preliminary injunction is the value of moving those jobs and tax dollars to a future year, rather than the present. The LOWD plaintiffs' irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project.

Connaughton, 752 F.3d at 765-66. *See also* Southeast Alaska Conservation Council, 472 F.3d at 1101 (balance of hardships tipped in environmental plaintiffs' favor).

Plaintiffs' environmental injury outweighs harm from any temporary delay to LNC. Although LNC will undoubtedly continue to assert that the nation's need for lithium outweighs all other factors, that there may be some future benefit from using lithium does not override the Ninth Circuit's recognition that "the public's interest in preserving precious, unreplenishable resources must be taken into account in balancing the hardships." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1125 (9th Cir. 2002), abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

Moreover, to the extent lithium production could eventually provide some general global environmental benefit, that would not occur for at least 3 years after the initial start of operations: "Beginning year three, LNC would begin Lithium Carbonate production at a maximum capacity rate of 33,000 tons per year." FEIS at 4-86, AR 045634 (TPEIS-0384). In the meantime "two years of facility construction and pre-production waste rock removal" involving wholesale destruction of the Project area would commence. FEIS at 4-77, AR 045625.

Also, based on this Court's Order, LNC has no rights to the waste dump lands that are necessary for the project to be viable. As discussed above, any assertion that it is "possible" that valuable mineral deposits exist on each of these claims is pure speculation at this point, as BLM has yet to conduct the rigorous claim validity determinations required under the Mining Law. Until that happens, there is no assurance that any lithium could be produced, because without waste rock and tailings facilities, the mine could not begin excavation and then processing.

To the extent LNC may argue it will suffer lost profits, "[i]t is well established, however, that such monetary injury is not normally considered irreparable." Los Angeles Mem. Col. Comm. v. NFL, 634 F.2d 1197, 1202 (9th Cir. 1980). *See* S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior, 588 F.3d 718, 728 (9th Cir. 2009) (finding economic injuries to mining company temporary). Similar to Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, "there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation." 472 F.3d at 1101; *see also* Cottrell, 632 F.3d at 1138.

Indeed, LNC voluntarily delayed Project operations for two years to give this Court time to rule on the merits and avoid the need for Plaintiffs to seek any further emergency relief. A brief further delay while the Ninth Circuit evaluates Plaintiffs' claims will not result in any significant hardship to LNC or BLM.

VI. The Public Interest Favors a Temporary Stay of Operations While the Ninth Circuit Reviews the Critical Issues in this Case.

To allow the Project to move forward while Plaintiffs' appeal is pending does not serve the public interest. "The public interest strongly favors preventing environmental harm."

Southeast Alaska Conservation Council, 472 F.3d at 1101. 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,'" whether that consideration is under NEPA or another statute. Cottrell, 632 F.3d at 1138 (quoting S. Fork Band, 588 F.3d at 728).

Here, if the Court does not issue an injunction to preserve the status quo, LNC will immediately begin environmentally destructive development that the Court has held BLM unlawfully approved. Although the Court declined to vacate the ROD because it believed BLM might find LNC's claims were valid following future claim validity examinations, those exams have not occurred yet, and as detailed above, require extensive analysis based on the facts of each mining claim. Nevertheless, unmitigated development approved under the presumption that LNC held a valid existing right to develop the *entire* Project area, including the waste and tailings dump lands—and that vital environmental protections in the RMPs therefore did not apply—will now move forward. Allowing that development before BLM has complied with the Court's remand order, and has determined whether LNC even has the right to use and occupy the waste and tailings dump lands, and before the Ninth Circuit is able to assess the vacatur issue and Plaintiffs' other claims, will cause irreparable harm to the environment and does not serve the public interest.

Lastly, LNC and BLM may assert that at most, this Court should limit its injunction to operations on the 1,300 acres to be covered by the waste and tailings dumps. Yet, this would mean that the remaining over 4,000 acres would be irreparably damaged and largely destroyed based on a mine that has no rights to dump the waste – at least not until BLM determines whether each of the 60+ mining claims in that area are valid under the Mining Law. It is certainly not in the public interest to allow the obliteration of vital wildlife habitats and the other critical environmental and cultural resource values at the site when there is no guarantee that the mine is even viable, and could be denied, depending on whether LNC and BLM can prove the existence of a valuable mineral deposit on each claim.

VII. No More Than a Nominal Bond Is Appropriate in this Case.

Under Federal Rules of Civil Procedure 65(c) and 62(d), in order to obtain a preliminary injunction, a plaintiff may be required to post a bond as the court deems proper. However, the "court has discretion to dispense with the security requirement, or to request a mere nominal security, where requiring 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) (no bond where plaintiffs were public interest organizations seeking to protect the environment); *see also* Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975)($1,000 bond). The imposition of more than a nominal bond would pose a real financial hardship and prevent Plaintiffs from vindicating their rights and frustrate judicial review. *See* Plaintiffs' Declarations submitted in support of WWP's motion for preliminary injunction in 2021. Hadder Decl. ¶¶ 22-23 (ECF No. 23-26), Molvar Decl. ¶¶ 4-8 (ECF No. 23-31), Emmerich Decl. ¶¶ 22-24 (ECF No. 23-28), and Fite Decl. ¶¶ 35-36 (ECF No. 23-29).

Respectfully submitted this 21st day of February, 2023.

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Certificate of Service

I, Talasi Brooks, hereby attest that I served the foregoing and all attachments on all parties via this Court's ECF system, this 21st day of February, 2023.

/s/ Talasi Brooks