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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Hualapai Indian Tribe,
10 Plaintiff,

11 v.

12 Debra Haaland, et al.,
13 Defendants.
14

No. CV-24-08154-PCT-DJH

ORDER

15 Before the Court is the Hualapai Indian Tribe’s (“Plaintiff” or “the Tribe”) challenge
16 to the U.S. Bureau of Land Management’s (“BLM”) decision to approve Phase 3 of the
17 Sandy Valley Exploration Project (“the Project”). Phase 3 of the Project would allow
18 Intervenor, Defendant Arizona Lithium Limited (“AZL”) to conduct exploratory drilling
19 for lithium on BLM lands adjacent to Cofer Hot Springs, or Ha’Kamwe’, an area the Tribe
20 holds sacred and uses for culturally significant activities. The Tribe specifically seeks to
21 enjoin Phase 3. It alleges that the BLM violated (1) the National Historic Preservation Act,
22 16 U.S.C. § 479, *et seq.* (“NHPA”) when it found that no historic properties were affected
23 by the Project; (2) the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, *et*
24 *seq.* (“NEPA”) by failing to consider a reasonable range of alternatives to the proposed
25 project and by failing to take a “hard look” at the impacts on water resources; and (3) the
26 Administrative Procedures Act, 5 U.S.C. § 706(2)(a) (“APA”), by engaging in actions that
27 are not in accordance with law. (*See generally* Doc. 1).

28 On August 22, 2024, the Court issued a Temporary Restraining Order (“TRO”)

1 (Doc. 32). The Court found that Plaintiff raised credible concerns that the Phase 3 drilling
2 was likely to imminently threaten the aquifer feeding Ha’Kamwe’s waters, causing
3 irreparable harm; raised sufficiently serious questions regarding the BLM’s NPHA
4 compliance; and that the balance of equities and public interest tipped in Plaintiff’s favor.
5 (*Id.* at 6, 9). Defendants¹ were thus temporarily enjoined from authorizing or allowing any
6 ground disturbance, construction, operation, or other activity approved by the BLM related
7 to Phase 3 of the Project. (Doc. 32 at 11). On September 17, 2024, the Court held an
8 evidentiary hearing (the “Hearing”) to determine whether the TRO should convert to a
9 Preliminary Injunction (“PI”) (Doc. 54).

10 The Court has considered the parties’ briefing (Docs. 11, 15, 28, 35, 36, 37), the
11 evidence and testimony they presented at the Hearing, their written closing summations
12 (Docs. 70, 72, 74), and the applicable law. It now makes the following findings and
13 conclusions.

14 **I. Background**

15 **A. Ha’Kamwe’**

16 Ha’Kamwe’ is located at Cholla Canyon Ranch and is surrounded by the Big Sandy
17 River Valley near Wikiup, Arizona. (*See* Tribe’s June 10, 2021, letter to BLM (Doc. 11-7
18 at 13)). The land Ha’Kamwe’ is located on were taken into trust by the Department of the
19 Interior (“DOI”) for the benefit of Plaintiff, the Hualapai Tribe. (Doc. 11 at 7–8); *see also*
20 Hualapai Tribe Water Rights Settlement Act of 2022, Pub. L. No. 117-349, § 12); 136 Stat.
21 6225, 6252 (2023)). The proposed drilling in Phase 3 of the Project is set to occur on three
22 sides of Cholla Canyon Ranch. (Doc. 15-2).

23
24 ¹ In addition to the BLM, Defendants are Debra Haaland in her official capacity as the
25 United States Secretary of the Interior; Ray Suazo in his official capacity as State Director
26 of the BLM; and Amanda Dodson in her official capacity as Field Office Manager of the
27 BLM Kingman Field Office (“the Federal Defendants”). Before the hearing, AZL moved
28 to intervene and appear at the hearing (Docs. 18 & 19) and the Court granted AZL’s
requests. (Doc. 20). AZL is a lithium exploration and development company
headquartered in Perth, Australia. (Doc. 18 at 3). It operates the Project to explore for
high-grade lithium around Wikieup, Arizona, on existing mining claims on public lands
managed by the BLM, including those in proximity to Cholla Canyon Ranch (Doc. 18-4 at
2; Doc. 15-15 at 3).

1 Ha’Kamwe’ is deemed a Traditional Cultural Property (“TCP”) eligible for listing
2 on the National Register of Historic Places. (Doc. 11 at 7–8). Tribal members testified
3 that the natural characteristics surrounding Ha’Kamwe, including its water, and its flow
4 and temperature, are important attributes for its traditional uses. (*See e.g.*, testimony of
5 Ms. Ka-Voka Jackson, Doc. 71 at 29 (“Ms. Jackson’s testimony”). Ha’Kamwe’ means
6 “warm water” in the Hualapai language and is referred to in traditional stories and songs.
7 (*Id.* at 19). Tribal members use Ha’Kamwe’ and its surrounding area for a variety of
8 traditional and cultural purposes, including gathering native plants, clay and other
9 materials, observing wildlife, and holding ceremonies that are central to their cultural life
10 and traditions. (*See e.g.*, Decl. of Chairman Duane Clarke at Doc. 11-3, ¶ 4 (“Clarke
11 Decl.”)).

12 **B. Previous Studies for Resource Extraction near Ha’Kamwe’**

13 Prior to the current drilling project, the area around Ha’Kamwe’ has been studied
14 for a variety of reasons. During the 1970s, the Department of Energy (“DOE”) collected
15 streambed sediment samples and water samples for geochemical analyses as part of the
16 National Uranium Resource Evaluation. (Preliminary Assessment of the Hydrology and
17 Geochemistry of Ha’Kamwe’ (Cofer Hot Spring), Mohave County, Arizona, 2023, by Mr.
18 Winfield Wright at Doc. 11-7 at 63 (“the Wright Report”). In 1973, the Arizona Water
19 Commission, in cooperation with the United States Geological Survey (“USGS”), issued a
20 report showing that Ha’Kamwe’ may be located on a small fault line. (*Id.*) Subsequently,
21 in 1983, the USGS published maps of groundwater levels, locations of springs, and spring
22 water temperatures, including those in the Big Sandy area and Ha’Kamwe’. (*Id.* at 65).

23 In the 1990s the DOE also initiated an effort to construct a power plant near
24 Sycamore Creek south of Wikieup, within 2.5 miles of Ha’Kamwe’. (Doc. 11-7 at 63). As
25 part of that effort, Mr. Paul Manera and Caithness Big Sandy, LLC, studied the water
26 resources in the Big Sandy Valley and issued a report in October of 2000. (Water
27 Resources of the Southern Portion of the Big Sandy Valley, Doc. 15-16 at 2 (“the 2000
28

1 Manera Report”). The 2000 Manera Report found, in pertinent part, that there are three
2 separate aquifers in the Big Sandy Basin south of Wikieup:

3 The Upper Aquifer: composed of the Recent Stream and Flood-Plain
4 Alluvium and the underlying Upper Basin fill. In the southern portion of the
5 basin, this aquifer is partially saturated in the entrenched riverbed and flood
6 plain of the Big Sandy River.

6 The Middle Aquifer: composed of the Older Basin fill. The Middle Aquifer
7 is saturated in most of the southern portion of the Big Sandy basin; [and]

8 The Lower Aquifer: composed of the Volcanic Rocks of Sycamore Creek.
9 Four hundred and fifty (450) feet of these volcanics were penetrated by the
10 drill. However, only 300 feet or 66 percent of the volcanic penetrated was
11 considered aquifer as a conservative consideration. The confined aquifer is
12 fully saturated with a piezometric surface elevation of 2,079 feet.

12 (*Id.* at 17). After the 2000 Manera Report was issued, the project was abandoned by the
13 DOE out of concern that groundwater development for the project would diminish or dry
14 up Ha’Kamwe’. (Doc. 11-7 at 63). Then, in 2012 and 2013, AZGS investigated the
15 geochemical makeup of groundwater from selected thermal springs and wells throughout
16 Arizona. (Doc. 11-7 at 65). This report concluded that water from Ha’Kamwe’ is a mixture
17 of different sources of shallow and deep water. (*Id.*)

18 The Tribe retained Mr. Wright in 2021 to educate tribal council and the tribal
19 members on Phase 3 of the Project and its potential impacts. (Doc. 71 at 60). Mr. Wright
20 holds a Master of Science in Civil Engineering Hydrosystems from Virginia Polytechnic
21 Institute. (*Id.* at 57). He stated that he specializes in surface water hydrology, groundwater
22 hydrology, water quality, and geochemistry and has authored sixty peer reviewed
23 publications. (*Id.* at 58). At the preliminary injunction hearing, Mr. Wright was qualified
24 as an expert in the fields of surface and groundwater hydrology, geochemistry and water
25 quality. (*Id.* at 59). As part of his analysis, Mr. Wright tested the water quality of
26 Ha’Kamwe’ and concluded its source “derives from a mixture of deep and shallow water,
27 which is produced by rising deep circulation water, mixed with shallow meteoric water,
28

1 geochemically reacting with limestone, basin-fill, and evaporite deposits.” (Doc. 11-
2 7 at 81).

3 **C. Phase 1 and 2 of the Project**

4 In 2019, AZL conducted two phases of exploratory drilling looking for lithium
5 resources within the Project site. (Final Environmental Assessment, June 2024, Doc. 15-1
6 at 5 (“the final EA”). BLM states that demand for lithium is expected to “explode”
7 because of its use in technology and that the Project at issue here is one part of the United
8 States’ larger effort to transition to renewable sources of energy. (Doc. 15 at 24–25). Phase
9 1 of the Project consisted of drilling 16 holes, twelve of which were accessed, drilled, and
10 reclaimed. (Doc. 15-1 at 5). Phase 2 of the Project consisted of drilling 37 holes, all of
11 which were accessed, drilled, and reclaimed. (*Id.*) Neither phase encountered any
12 groundwater. (*Id.* at 26). Defendant represents that approximately 39 of the exploratory
13 holes drilled in Phases 1 and 2 were located between 700 and 3,200 feet from Ha’Kamwe’.
14 (Federal Defendant’s Proposed Findings of Fact and Conclusions of Law, Doc. 47-1 at ¶
15 14 (“Federal Defendants FOFs”). Plaintiff does not dispute this.

16 **D. Phase 3 of the Project**

17 In Phase 3, AZL will drill 131 boreholes and three “auger holes” to explore for
18 lithium in the Big Sandy River Basin. (*See* Final EA, Doc. 15-1 at 5; Decl. of Paul Lloyd
19 at Doc. 18-4 at 2 (“Lloyd Decl.”)). The 613-acre exploration area for Phase 3 drilling is
20 split between a northern and southern area. (Final EA, Doc. 15-1 at 5). Defendant
21 represents that, in the northern area, Phase 3 involves drilling 100 exploratory core holes.
22 (Federal Defendant’s FOFs, Doc. 47-1 at ¶ 23). Those drill sites are located between
23 approximately 1,200 and 4,000 feet from Ha’Kamwe. (*Id.*) The northern area of drilling
24 is further split between 61 core holes to the north of Ha’Kamwe’ and 39 core holes to the
25 south, southeast, and east of Ha’Kamwe’. (*Id.*) In the southern area, Phase 3 involves
26 drilling 31 exploratory core holes located approximately 3.8 miles south of Ha’Kamwe’.
27 (*Id.* at ¶ 24). Plaintiff does not dispute these factual assertions either.

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1 **E. The NHPA and NEPA Processes**

2 **1. The NHPA Process**

3 The NHPA created the Advisory Council on Historic Preservation (“ACHP”) and
4 charges it with the responsibility to “advise the President and the Congress on matters
5 relating to historic preservation,” and to “review the policies and programs of Federal
6 agencies and recommend” methods for harmonizing those policies and programs with the
7 NHPA. 16 U.S.C. § 470j(a)(1), (6). The NHPA established a national preservation
8 program to protect historic properties as a cooperative effort between the federal
9 government and states, local governments, Tribes, Native Hawaiian organizations, and
10 private organizations. 54 U.S.C. § 300101. Section 106 of NHPA requires federal agencies
11 to consider the impact of their actions on historic properties. 54 U.S.C. § 306108. In that
12 process, the agency must determine the area of potential effects (“APE”), which is the
13 geographic area or areas within which an undertaking may directly or indirectly cause
14 alterations in the character or use of historic properties. 36 C.F.R. § 800.16(d). The agency
15 must then determine whether the project will affect any historic properties within the area
16 of potential effects. *Id.* § 800.4. An “effect” is defined as an alteration to the characteristics
17 of a historic property qualifying it for inclusion in the National Register. *Id.* § 800.16(i).

18 If the agency concludes that a historic property will be affected, it must then
19 determine whether the effects are adverse. *Id.* § 800.5. Effects are adverse if the proposal
20 “may alter, directly or indirectly, any of the characteristics of a historic property that qualify
21 the property for inclusion in the National Register in a manner that would diminish the
22 integrity of the property’s location, design, setting, materials, workmanship, feeling, or
23 association.” *Id.* § 800.5(a)(1). If adverse effects are found, then the agency must explore
24 measures to avoid, minimize, or mitigate adverse effects on historic properties and reach a
25 written agreement with the State Historic Preservation Officer (“SHPO”) or Tribal Historic
26 Preservation Officer (“THPO”) on measures to resolve them.² *Id.* § 800.6.

27 ² A State Historic Preservation Officer, or SHPO, “means the official appointed or
28 designated pursuant to section 101(b)(1) of the act to administer the State historic
preservation program or a representative designated to act for the State historic
preservation officer.” 36 C.F.R. §800.16(v). A Tribal Historic Preservation Officer, or

1 Federal agencies “shall” consult with any Tribe that “attaches religious and cultural
2 significance” to a historic property affected by an undertaking. 54 U.S.C. § 302706(b); 36
3 C.F.R. § 800.2(c)(2)(ii). This consultation must recognize the government-to-government
4 relationship between the Federal Government and Tribes and give the Tribe the opportunity
5 to “advise on the identification and evaluation of historic properties, including those of
6 traditional religious and cultural importance” and “participate in the resolution of adverse
7 effects.” 36 C.F.R. § 800.2(c)(2)(ii).

8 2. The NEPA Process

9 Federal agencies must ensure “that environmental information is available to public
10 officials and citizens before decisions are made and before actions are taken. The
11 information must be of high quality. Accurate scientific analysis, expert agency comments,
12 and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). NEPA
13 requires federal agencies, like the BLM, to assess the environmental impact of proposed
14 actions that “significantly affect[] the quality of the human environment.” 42 U.S.C. §
15 4332(C). NEPA mandates the preparation of an Environmental Impact Statement (“EIS”)
16 for “major Federal actions significantly affecting the quality of the human environment.”
17 *Id.* at 4332(2)(C).

18 A threshold question in a NEPA case is “whether a proposed project will
19 ‘significantly affect’ the environment, thereby triggering the requirement for an EIS.” *Blue*
20 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)
21 (quoting 42 U.S.C. § 4332(2)(C)). “Before deciding whether to complete an EIS,
22 government agencies may prepare a less formal EA which ‘briefly provides sufficient
23 evidence and analysis for determining whether to prepare an environmental impact
24 statement or a finding of no significant impact.’ ” *Anderson v. Evans*, 371 F.3d 475, 488
25 (9th Cir. 2004) (quoting *Tillamook County v. U.S. Army Corps of Eng’rs*, 288 F.3d 1140,
26 1144 (9th Cir. 2002)). “If an agency decides not to prepare an EIS, it must supply a

27 _____
28 THPO, “means the tribal official appointed by the tribe’s chief governing authority or
designated by a tribal ordinance or preservation program who has assumed the
responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in
accordance with section 101(d)(2) of the act.” 36 C.F.R. § 800.16(w).

1 ‘convincing statement of reasons’ to explain why a project’s impacts are insignificant.”
2 *Cascadia Wildlands v. Bureau of Indian Affs.*, 801 F.3d 1105, 1111 (9th Cir. 2015) (citation
3 omitted).

4 **3. The BLM’s NHPA and NEPA Processes**

5 AZL applied to conduct Phase 3 of the Project with BLM on September 20, 2019.
6 (See AZL’s April 15, 2024, Revised Plan of Operations for Mineral Exploration, Doc. 18-
7 4 at 13 (“AZL’s Plan”).) On June 6, 2020, BLM initiated consultation with the Tribe on
8 Phase 3 of the Project, as required by Section 106 of the NHPA. (See June 6, 2020, Letter
9 to Chairman Clarke, Doc. 15-3). The letter invited the Tribe “to initiate consultation and
10 comment on this proposed undertaking in accordance with the [NHPA and implementing
11 regulations] to ensure that any concerns your tribe may have about the project are fully
12 considered.” (*Id.* at 6). The BLM also requested the Tribe’s “assistance in identifying any
13 cultural properties or other areas of tribal concern that may be affected by” the Project.
14 (*Id.*) The Tribe thereafter requested and was provided “the shape files for the project APE.
15 . . . and the footprint for the completed drill holes from previous exploration, the proposed
16 drill holes for this exploration, the proposed access routes, and proposed bulk sample sites,
17 and the proposed staging areas.” (June 22, 2020, email from BLM Archaeologist Thomas
18 Thompson to Director/THPO of Hualapai Dept. of Cultural Resources Peter Bungart, Doc.
19 15-4 (“BLM’s June 22, 2020, email”).

20 Chairman Clarke represents that, on June 29, 2020, the Tribe sent a letter accepting
21 the invitation for consultation. (Clarke Decl., Doc. 11-3 at ¶ 7). He also represents that
22 the Tribe informed BLM of Ha’Kamwe’s existence and status as a Traditional Cultural
23 Property, expressed concern over the Project’s effects on the spring, and requested
24 Cooperating Agency status under NEPA in this letter. (*Id.*) Chairman Clarke states that
25 BLM failed to respond to this letter, so, the Tribe sent another letter on November 2, 2020,
26 again raising these concerns. (*Id.*) Clarke avers that BLM responded on November 10th
27 and told the Tribe that it would coordinate with the tribe but denied its request to participate
28 as a cooperating agency. (*Id.* at 8). Clarke also notes that that BLM explained that it had

1 determined one historic property existed within the APE but would ensure that the Project's
2 operations would avoid the site, so, it made a finding that no historic properties would be
3 affected. (*Id.*)³

4 The record shows that the next interaction with the Tribe was a site visit the BLM
5 conducted with the THPO Peter Bungart and other tribal representatives on March 19,
6 2021. (Site Visit Report, Doc. 15-6). It is unclear why this visit happened and Plaintiff
7 makes no mention of the visit in its briefing. (*See e.g.*, Doc. 11). Next, on April 12, 2021,
8 BLM sent Plaintiff a letter wishing to "continue consultation on the proposed Sandy Valley
9 Exploration Project (Project) located near Wikieup, Arizona." The letter stated:

10 Cultural resource investigations for the Project included a Class I inventory
11 of existing information to identify previous investigations and cultural
12 resources within a one-mile buffer of the Project Area of Potential Effect
13 (APE). A 100% Class III archaeological survey of the entire Project APE
14 totaling 613 acres within three discontinuous parcels was also conducted.
15 The results of the Class I and Class III investigations resulted in the
16 identification of four cultural resource sites. *The BLM has determined one of*
17 *these sites eligible for inclusion in the National Register of Historic Places*
18 *(NRHP) under Criterion D, and three as not eligible for inclusion in the*
19 *NRHP under any criteria.* The BLM would ensure that Project operations
20 avoid the NRHP eligible site for a finding of no historic properties affected.

21 The BLM invited Plaintiff to further comment on the proposed action. (BLM's April 12,
22 2021, letter, Doc. 11-7 at 9). This letter also informed the Tribe of a Preliminary
23 Environmental Assessment ("the preliminary EA") which was available for review. (*Id.*)

24 On May 6, 2021, the ACHP and SHPO suggested that BLM meet with the
25 consulting parties. (Doc. 15-7). The acting Arizona SHPO, Mary-Ellen Walsh, noted in
26 her request to meet that the "AZ SHPO has not heard anything about this undertaking since
27 November 2019, at which time we requested additional consultation." (May 6, 2021, email
28 thread, Doc. 15-7 at 3). On May 7, 2024, Mr. Thompson of the BLM responded to the

³ The Court notes that these letters are not available in the record and are only referenced in Chairman Clarke's declaration. (Doc. 11-3). The record in this matter has some gaps, especially as it pertains to the events which occurred from 2019 through 2021. So, the Court will rely on Chairman Clarke's declaration to fill in these gaps as Defendants do not dispute the above facts. (*Id.*)

1 requests for additional consultation. (*Id.* at 2). In an email addressed specifically to Ms.
2 Walsh, he wrote:

3 I am writing this to follow-up on our phone conversation on the afternoon of
4 May 6th concerning the Sandy Valley Mineral Exploration Project and to
5 clarify the specific scope of this project. I am including Peter Bungart, Linda
6 Otero and Bill Marzella on this update as you requested. You had contacted
7 me in an email dated May 5th after being contacted by Hualapai THPO Peter
8 Bungart enquiring whether the BLM Kingman field office had invited AZ
9 SHPO for formal Section 106 consultation on this project. During our
10 conversation, I clarified that this project only included operations related to
11 mineral exploration and not future mineral extraction mining operations, that
12 this project was contained within BLM jurisdiction lands, and that this
13 project would result in No Historic Properties Affected. After this
14 clarification, you agreed that this project could be processed under the
15 guidelines of the State Protocol Agreement instead of formal Section 106
16 consultation with AZ SHPO.

17 (*Id.*)

18 Pursuant to the requests, on May 28, 2021, BLM held a teleconference with
19 Hualapai, Fort Mojave, Arizona SHPO, and ACHP to “discuss the BLM’s definition of the
20 undertaking, the [APE], the BLM’s efforts to identify historic properties, and the BLM’s
21 finding of No Historic Properties Affected.” (June 17, 2021, Letter from BLM Field
22 Manager Amanda Dodson to SHPS Kathryn Leonard at Doc. 15-8 (summarizing the
23 “Section 106 findings and determinations for [the Project], as discussed in a teleconference
24 on May 28, 2021”)). At that meeting, the BLM stated that “because the exploration plan
25 is temporary in nature and does not propose any permanent infrastructure, . . . this
26 undertaking would not cause visual, audible, atmospheric, or cumulative impacts to a
27 historic property.” (*Id.* at 3). It further conveyed that because “the APE for the undertaking
28 was appropriate for the scope and magnitude of the project, the BLM met the good faith
identification standard required by the regulations found at 36 C.F.R. 800.4(b)(1), and that
the BLM finding of No Historic Properties Affected is appropriate.” (*Id.*)

On June 10, 2021, Plaintiff sent a letter to the BLM stating that it had not properly
identified all cultural resources that would be affected by the Plan either through proper
NHPA Section 106 review or standalone cultural resource identification under NEPA.

1 (Plaintiff’s June 10, 2021, letter, Doc. 11-7 at 18). Specifically, Plaintiff asserted that the
2 BLM was aware of Ha’Kamwe’s TCP status but completely omitted any documented
3 analysis of it in the preliminary EA. (*Id.* at 19). Plaintiff asked BLM to halt any further
4 consideration or review of the “legally inadequate EA and instead conduct NEPA review
5 that properly considers impacts on [Plaintiff’s] interests, rights, and resources-including
6 cultural resources.” (*Id.* at 30).

7 On June 17th, BLM sent the Arizona SHPO a letter summarizing the meeting and
8 noting that BLM archeologist Thompson had spoken with the Arizona SHPO on May 6,
9 2021, to “agree” that the undertaking could “proceed under the 2014 ‘Arizona Protocol
10 Agreement.’ ” (BLM’s June 17, 2021, letter to SHPO, Doc. 15-8 at 2). This letter also
11 stated that BLM had “conducted an intensive [] survey of the entire 613-acre project area
12 to account for not only the exploratory drill holes, associated drill pads, staging areas, and
13 the bulk sample site, but to also account for overland travel of vehicles.” (Doc. 15-8 at 3).

14 BLM represents that the Arizona Protocol Agreement modifies the standard process
15 for complying with Section 106 of the NHPA “by developing a set of understandings and
16 standard operating procedures that eliminate the need for SHPO consultation prior to
17 project authorization for those projects that will not cause adverse effects to historic
18 properties.” (Doc. 47-1 at ¶ 45 (citing Doc. 15-9 at 4)). The Protocol Agreement provides
19 that BLM “may act without consulting the SHPO on BLM administered lands on those
20 undertakings that culminate in No Historic Properties Affected or No Adverse Effect
21 findings.” (Doc. 15-9 at 6). The Arizona Protocol Agreement was entered into in 2014 by
22 the BLM and the Arizona SHPO and automatically terminates in 10 years if not extended.
23 (*Id.* at 21-22). The Tribe is not a signatory to this agreement. (*See id.*)

24 Plaintiff submitted a supplement to its June 10th comments on July 9, 2021, arguing
25 that it is entitled to be a cooperating agency and that tribal consultation had not properly
26 been carried out. (Doc. 11-7 at 34–35). It does not appear that BLM ever responded to the
27 Plaintiff’s 2021 comments. (*See* Doc. 15 at 9).

28

1 On January 11, 2023, the ACHP sent BLM a letter advising it to “reinitiate
2 consultation with the Hualapai Tribe to consider whether its determination is adequately
3 supported, and to reexamine its identification and evaluation measures as necessary.”
4 (Doc. 11-7 at 48). Over a year later, on February 9, 2024, BLM and Plaintiff entered into
5 the MOU making the Tribe a cooperating agency under NEPA. (Doc. 15-11). Under the
6 MOU, BLM agreed to provide Plaintiff with a draft of the final EA so that Plaintiff could
7 provide comments to it. (*Id.* at 2). That same month, BLM provided the draft EA to
8 Plaintiff and Plaintiff provided comments to BLM on March 13, 2024. (Doc. 15-12).
9 Plaintiff’s comments included the Wright Report. (Doc. 15-13).

10 Mr. Wright’s Report discusses his “mixture” theory that all three aquifers are
11 interconnected and feed into Ha’Kamwe’. (Doc. 11-7 at 81). Therein, he concludes that
12 Phase 3 could harm Ha’Kamwe’s flow, temperature and chemistry. (Wright Report, Doc.
13 15-13 at 13). The Report details that the Big Sandy River Valley contains various fractures
14 and lineaments. (*Id.* at 19). He states that fractures are present as “joints, faults, and
15 bedding-plane separations. Fractures in the rocks create features on the land surface, and
16 the fractures may extend into the subsurface. These features are referred to as lineaments.
17 Lineaments are indicated by aligned valleys, wind and water gaps, upland sags and
18 depressions, soil-tonal features, springs, sinkholes, and caves.” (*Id.*) The Wright Report
19 further states that “[l]ineaments in the Ha’Kamwe’ area are mapped by automation using
20 different bands of Landsat Thematic Mapper 8 (TM-8) images. Because small scale
21 fractures and joints reflect vertical fractures, lineaments represent possible conduits and
22 planes for movement of groundwater.” (*Id.*) The Wright Report includes a map showing
23 these faults, lineaments, and the Project’s boreholes which it has drilled already and have
24 proposed to drill:

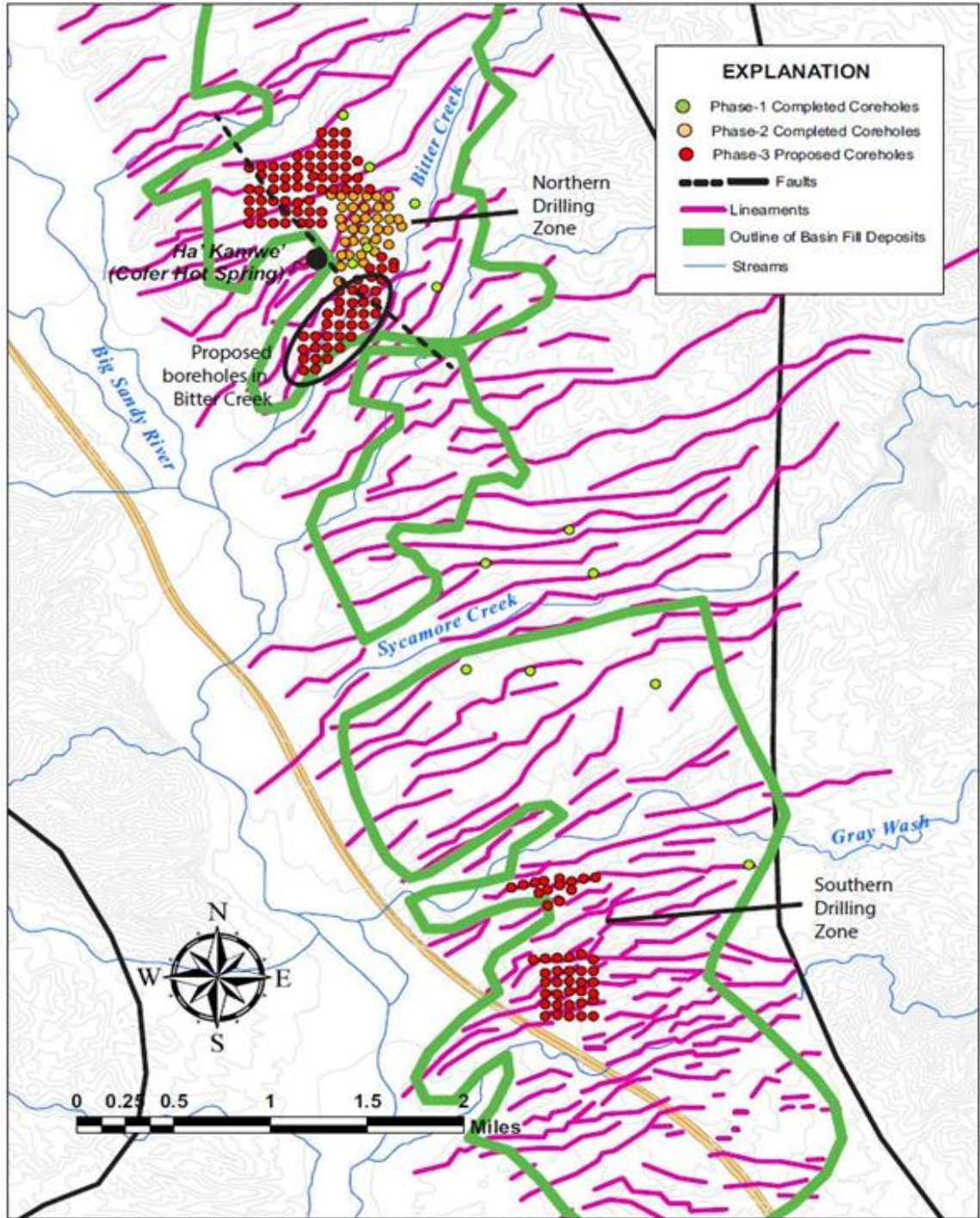
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(Doc. 15-13 at 5).

The Wright Report detailed that based on a mixing of elements found in each aquifer, Ha' Kamwe' is fed by all three aquifers, not just the lower aquifer. (Doc. 71 at 69). BLM responded by updating the EA to require more rigorous procedures to plug boreholes if water is encountered during drilling, but does not directly address the report or opinions

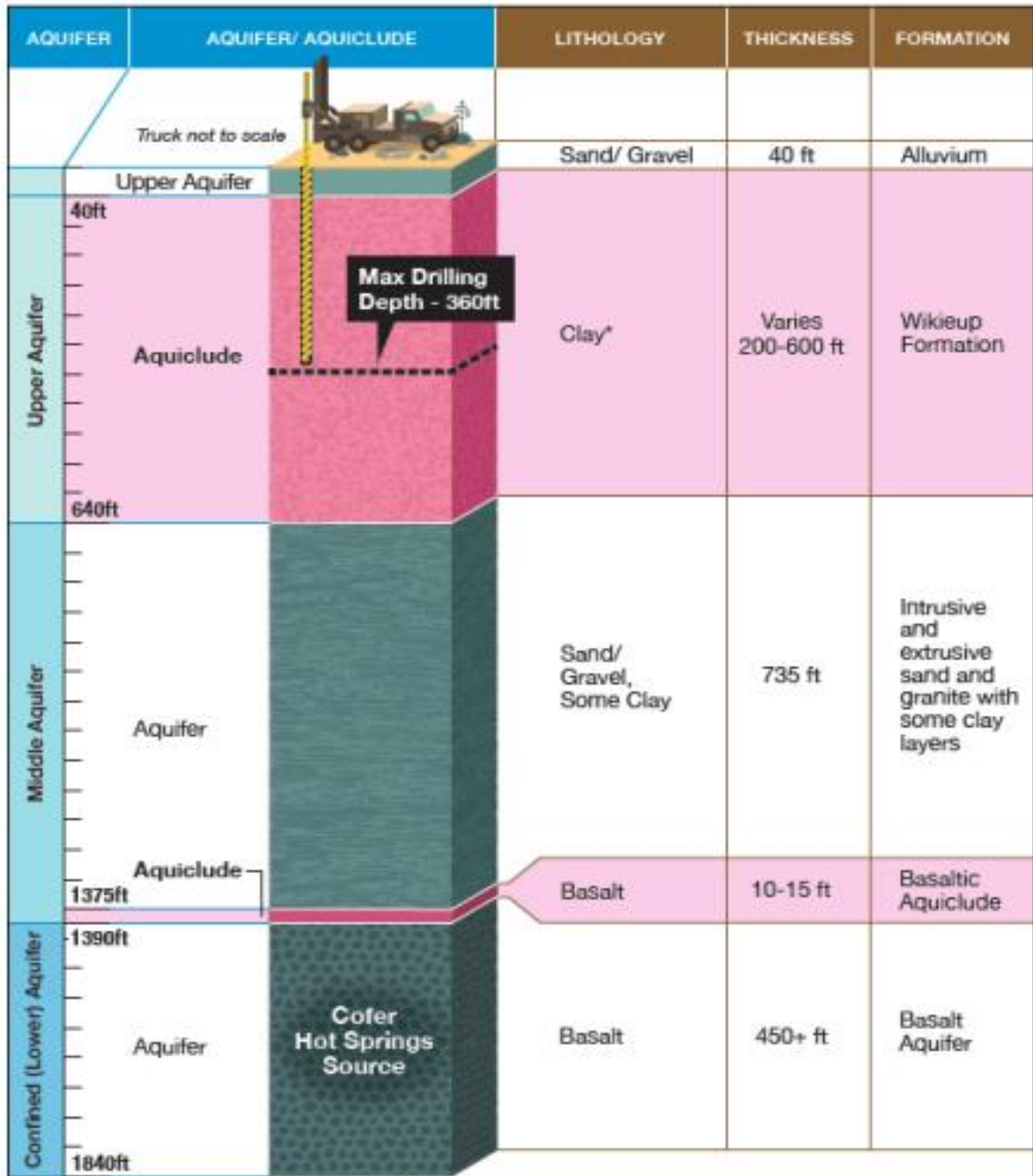
1 which challenge the basis of the final EA. (Doc. 15-14 at 2; Doc. 15 at 9).

2 **i. The Final Environmental Assessment**

3 BLM issued the Final EA and a Finding of No Significant Impact (“FONSI”) on
4 June 5, 2024. (Final EA, Doc. 15-1; Finding of No Significant Impact, Doc. 15-15
5 (“FONSI”). The Final EA relies on the 2000 Manera Report’s conclusion that there are
6 three separate confined aquifers in the area around Ha’Kamwe’: the upper aquifer,
7 composed of “recent stream and floodplain alluvium;” the middle aquifer, composed of
8 “older basin fill;” and the lower aquifer, composed of “volcanic rocks of Sycamore Creek.”
9 (Final EA, Doc. 15-1 at 20). The Final EA notes that the upper aquifer is “isolated from
10 the Middle Aquifer by the Wikieup formation, a lacustrine clay that has a very low
11 permeability rate and varies in thickness from 200 feet to more than 600 feet.” (*Id.* at 21).

12 The Final EA states that “[t]he Wikieup formation clay hosts the lithium
13 mineralization that is the target of the Proposed Action. The depth of drilling of the
14 proposed Project is 360 feet below ground surface, which would not advance below this
15 confining layer into the Middle Aquifer.” (*Id.*) As for the other aquifers, the lower aquifer
16 “receives groundwater recharge from areas where the volcanic rocks of Sycamore Creek
17 are exposed outside of the Project area.” (*Id.*) The Final EA also notes, relying on the
18 Manera Report, that the “aquifer that supplies the Cofer Hot Spring (Ha’Kamwe’) is a
19 deeper confined aquifer (Lower Aquifer) that is geologically isolated from the overlying
20 aquifers (Upper and Middle Aquifers) by an aquitard.” (*Id.*) It also details that the lower
21 aquifer is located approximately 1,100 feet below the surface. (*Id.*) Because of this, the
22 Final EA concludes that the drilling to be done in Phase 3 is not anticipated to reach the
23 lower aquifer supplying Ha’Kamwe’. (*Id.* at 25). The Final EA also states, however, that
24 it is unclear whether there is any contribution of water to Ha’Kamwe’ from the upper
25 aquifer. (*Id.*) The Final EA uses the following diagram (“Figure 4”) to show the
26 “generalized cross-section of the Project area hydrography, including the three aquifers,
27
28

the depth of drilling, and the aquifer source for” Ha’Kamwe’:



(Doc. 15-2 at 9).⁴

Chapter 3 of the Final EA addresses the affected environment and environmental

⁴ Mr. Wright stated at the hearing that Figure 4 is an oversimplification of the subsurface geology and that it is not an accurate diagram because it does not show the interbedded nature of the drill site. (Doc. 71 at 66).

1 consequences. (Final EA, Doc. 15-1 at 14). It finds that there are no “Areas of Critical
2 Environmental Concern” within the Project area. (*Id.*) Due to Plaintiff’s concerns over
3 the groundwater supply near Wikiup, the Final EA notes that AZL has agreed to purchase
4 water from the municipal supply of Wikieup and remove the potential use of the well in
5 the Exploration Plan. (*Id.* at 7). The EA details that “protection of water resources would
6 be provided by promptly plugging and abandoning all core holes, especially those that
7 intersect water in accordance with Arizona Administrative Code R12-15-816.” (*Id.* at 25).
8 However, the Final EA did not address the conclusions in the Wright Report; specifically,
9 that Phase 3 could harm Ha’Kamwe’s flow, temperature and chemistry. (*Compare* final
10 EA, Doc. 15-1 *with* the Wright Report, Doc. 15-13).

11 BLM also notes that Plaintiff had concerns about the impacts to the visual setting
12 and auditory impacts to Tribal uses near Ha’Kamwe’ and surrounding areas. (Final EA,
13 Doc. 15-1 at 14). To reduce these impacts, AZL agreed to relocate a Project staging area
14 that was originally proposed at the existing airstrip near Ha’Kamwe’. (*Id.*) The new
15 location consolidates two originally proposed staging areas into one and is “approximately
16 0.45 miles east” of Ha’Kamwe’. (*Id.*) Finally, it notes that because of concerns about the
17 footprint of the Project, AZL has refined access roads to drill sites by removing redundant
18 routes to reduce overland travel disturbance and to keep all proposed drilling and access
19 for the project on public lands. (*Id.*)

20 The FONSI, which relies on the Final EA, finds that the Project will result in the
21 disturbance of approximately 21 acres of land with exploration activities expected to occur
22 over an 18-month period. (FONSI, Doc. 15-15 at 5). It details the following short- and
23 long-term effects of the Project:

- 24 • Temporary visual effects from drilling equipment and surface
disturbance.
- 25 • Temporary noise and vibration from drilling activities and vehicular
26 travel through the area.
- 27 • Temporary disruption to cultural practices at and/or near Ha’Kamwe’.
- Impacts to native wildlife and vegetation (removal of vegetation, noise,
28 human presence) on up to 21 acres.
- Fugitive dust and vehicle emissions from vehicles and drill rigs during

1 exploration activities.

- 2 • There may be minor local dispersion of recreation away from active
3 drilling and construction areas. However, access in the area would not be
4 restricted to any recreation sites and there are other routes for travel in the
5 area.
6 • New access roads would be constructed which would remove and/or
7 crush vegetation, disturb soil structures, increase the potential for
8 invasives, nonnatives, and noxious weeds to spread and increase potential
9 for soil erosion from stormwater runoff.
10 • The Proposed Action would result in minor contributions to local
11 communities and the local tax base due to the presence of up to 4
12 personnel working over the life of the project (18 months).
13 • The Proposed Action would result in the loss or disturbance of up to 21
14 acres of potential habitat and forage for wildlife, migratory birds, and
15 special-status species. Exploration drilling noise, human presence, and
16 vibrations would have some potential to cause wildlife to vacate from or
17 temporarily avoid the project vicinity during the 18-month duration of the
18 Proposed Action.
19 • There would be a collection and removal of core and rock chip samples
20 from the exploration drilling.

21 (*Id.*) BLM also issued a Decision Record (“DR”) for the Project concurrent with the
22 FONSI detailing its approval of the proposed action. (DR, Doc. 15-15 at 8). The DR lays
23 out the following pertinent environmental protection measures and best management
24 practices:

- 25 • The ability for tribal members to monitor ground disturbing activities during
26 Phase 3;
27 • Relocation of drill pads;
28 • The exclusive use of BLM-approved, certified weed-free seed for reseeding;
• The reduction of speed on access roads to twenty-five miles-per-hour;
• The plugging of boreholes in accordance with Arizona law.

29 (*Id.* at 13–17).

30 Based on the Final EA, BLM determined that the Project “is not a major federal
31 action and will not significantly impact the quality of the human environment.” (*Id.* at 7).
32 The FONSI also states that an EIS is not needed. (*Id.*) On July 9, 2024, based on the DR,
33 FONSI, and Final EA, BLM approved the AZL’s Plan of Operations, authorizing it to begin
34 Phase 3 of the Project. (*Id.* at 11).

1 **II. Legal Standard**

2 Preliminary injunctive relief is an “extraordinary remedy never awarded as of
3 right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a
4 preliminary injunction, a plaintiff must show: (1) a likelihood of success on the merits, (2)
5 a likelihood of irreparable harm if injunctive relief were denied, (3) that the equities weigh
6 in the Plaintiff’s favor, and (4) that the public interest favors injunctive relief. *Id.* at 20.
7 The movant carries the burden of proof on each element of the test. *See Los Angeles*
8 *Memorial Coliseum Comm’n v. National Football League*, 634 F.2d 1197, 1203 (9th Cir.
9 1980). The last two factors merge when, as here, the government is a party. *Drakes Bay*
10 *Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

11 A “sliding scale” approach is used for preliminary injunctions, under which “the
12 elements of the preliminary injunction test are balanced, so that a stronger showing of one
13 element may offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*,
14 632 F.3d 1127, 1131 (9th Cir. 2011). “The moving party may meet [its] burden by showing
15 either: (1) a combination of probable success on the merits and a possibility of irreparable
16 injury, or (2) the existence of serious questions going to the merits and that the balance of
17 hardships tips sharply in its favor.” *Nouveau Riche Corp. v. Tree*, 2008 WL 55381513, at
18 *4 (D. Ariz. Dec. 23, 2008) (citing *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291,
19 1298 (9th Cir. 2003)). “[C]ourts ‘must balance the competing claims of injury and must
20 consider the effect on each party of the granting or withholding of the requested relief,’”
21 and should be particularly mindful, in exercising their sound discretion, of the “public
22 consequences in employing the extraordinary remedy of injunction.” *Id.* at 24 (citations
23 omitted). Injunctive relief is an equitable remedy, and “[t]he essence of equity jurisdiction
24 is the power of the court to fashion a remedy depending upon the necessities of the
25 particular case.” *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009) (citing
26 *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987)).

27 Neither NEPA nor the NHPA contain a private right of action, so Plaintiff’s claims
28 under both statutes are reviewed under the Administrative Procedures Act (“APA”), 5

1 U.S.C. §§ 701–706. *See WildEarth Guardians v. Provencio*, 923 F.3d 655, 664 (9th Cir.
2 2019). To prevail in an APA challenge, a plaintiff must show that an agency’s decision
3 was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”
4 5 U.S.C. § 706(2)(A). Review is “deferential and narrow, and the court is not to substitute
5 its judgment for the agency’s judgment.” *Friends of Animals v. Haaland*, 997 F.3d 1010,
6 1015 (9th Cir. 2021). This standard also applies to how an agency considers and responds
7 to “significant comments” that raise points that could change a decision. *Altera Corp. &*
8 *Subsidiaries v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1080 (9th Cir. 2019) (quoting
9 *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (internal quotation
10 omitted)).

11 **III. Discussion**

12 Plaintiff argues that it can show a likelihood of success on the merits that the BLM
13 violated the APA because: (1) BLM erroneously found no historic properties were affected
14 by the Project under NHPA; (2) BLM failed to consider reasonable alternatives under
15 NEPA; and (3) BLM failed to take a hard look at impacts on water resources under NEPA.
16 (Doc. 1 at ¶¶ 35–37; Doc. 11 at 5, 9 and 11). The Tribe also argues that it can show it will
17 suffer irreparable harm because the Phase 3 drilling will cause degradation of Ha’Kamwe’s
18 character and surrounding environment—specifically, changes to its chemistry, flow and
19 temperature. (*Id.* at 14). It further argues that the balance of harms tips toward it and a
20 preliminary injunction will advance the public interest because the Project will cause
21 permanent harm to the Tribe’s sacred property. (*Id.* at 15–16). It finally argues that the
22 Court should not require the Tribe to post a bond, or alternatively, only require a nominal
23 one. (*Id.* at 16).

24 The Federal Defendants argue that Plaintiff has not established that harm to
25 Ha’Kamwe’s flow and temperature is likely. (Doc. 40 at 3). They argue that any alleged
26 harm to Ha’Kamwe’ is speculative, especially since Plaintiff has not shown that the upper
27 aquifer meaningfully contributes to it. (*Id.*) Additionally, the Federal Defendants argue
28 that Plaintiff’s asserted harm to cultural activities is also speculative as these “vague

1 assertions do not suffice to support an injunction.” (*Id.* at 7 (citing *Bartell Ranch LLC v.*
2 *McCullough*, 570 F. Supp. 3d 945, 953 (D. Nev. 2021) (rejecting “insufficiently specific
3 evidence of irreparable harm”)).

4 AZL similarly argues that its Phase 3 drilling project will not harm Ha’Kamwe’ as
5 it will not affect the lower aquifer which feeds it. (Doc. 42 at 2). It specifically argues that
6 the lower aquifer “starts at 1,390” feet below surface and that it only plans on drilling 360
7 feet in depth, leaving a 1,000-foot buffer between its exploration and the lower aquifer.
8 (*Id.* at 2–3). It also argues that, on the off-chance they encounter groundwater, the EA has
9 planned for this and requires it to immediately plug the bore holes—so there is little risk
10 of any irreparable harm. (*Id.* at 3).

11 The Court will now address the *Winter* factors.

12 **A. Likelihood of Success on the Merits**

13 A reasonable probability of success is all that need be shown for preliminary
14 injunctive relief—an overwhelming likelihood is not necessary. *Candrian v. RS Indus.,*
15 *Inc.*, 2013 WL 2244601, at *3 (D. Ariz. May 21, 2013) (citing *Gilder v. PGA Tour, Inc.*,
16 936 F.2d 417, 422 (9th Cir. 1991)). “Serious questions are ‘substantial, difficult and
17 doubtful, as to make them a fair ground for litigation and thus for more deliberative
18 investigation.’ ” *Gilder*, 936 F.2d at 422 (quoting *Hamilton Watch Co. v. Benrus Watch*
19 *Co.*, 206 F.2d 738, 740 (2nd Cir. 1953)). “Serious questions need not promise a certainty
20 of success, nor even present a probability of success, but must involve a ‘fair chance of
21 success on the merits.’ ” *Id.* (quoting *National Wildlife Fed’n v. Coston*, 773 F.2d 1513,
22 1517 (9th Cir. 1985)).

23 **1. The NHPA**

24 Plaintiff first argues that BLM violated the NHPA by excluding Ha’Kamwe’ from
25 the APE and then concluding that no historic properties—and specifically Ha’Kamwe’—
26 would be affected by the Project. (Doc. 11 at 11). Plaintiff asserts that “BLM attempted
27 to avoid a finding of adverse effects by labeling the identified impacts as temporary,” which
28 is arbitrary and capricious. (Doc. 1 at 4). In response, Defendants argue that BLM

1 complied with the Section 106 consultation process required by the NHPA. (Doc. 15 at
2 18; Doc. 28 at 6). The BLM asserts that it was not arbitrary in determining that “limited,
3 temporary noise and visual effects . . . would not adversely affect the characteristics that
4 qualify Ha’Kamwe’ for inclusion in the National Register.” (*Id.* at 19).

5 The NHPA requires federal agencies to “make a reasonable and good faith effort to
6 identify historic properties; determine whether identified properties are eligible for listing
7 on the National Register . . . [and] assess the effects of the undertaking on any eligible
8 historic properties found.” *WildEarth Guardians v. Provencio*, 923 F.3d 655, 676 (9th Cir.
9 2019). The NHPA involves “a series of measures designed to encourage preservation of
10 sites and structures of historic, architectural, or cultural significance.” *San Carlos Apache*
11 *Tribe v. United States*, 417 F.3d 1091, 1093–94 (9th Cir. 2005) (quoting *Penn Cent.*
12 *Transp. Co. v. City of New York*, 438 U.S. 104, 108 n. 1 (1978)).

13 Section 106 “requires that federal agencies take into account the effect of their
14 undertakings on any district, site, building, structure, or object that is included in or eligible
15 for inclusion in the National Register.” *Id.*; 54 U.S.C. § 306108. This requirement is
16 governed by numerous federal regulations which establish a procedure generally referred
17 to as the Section 106 process. *See* 54 U.S.C. § 306108; 36 C.F.R. § 800 *et seq.*

18 The section 106 process seeks to accommodate historic preservation
19 concerns with the needs of Federal undertakings through consultation among
20 the agency official and other parties with an interest in the effects of the
21 undertaking on historic properties, commencing at the early stages of project
22 planning. The goal of consultation is to identify historic properties potentially
23 affected by the undertaking, assess its effects and seek ways to avoid,
24 minimize or mitigate any adverse effects on historic properties.

25 36 C.F.R. § 800.1.

26 Where an agency determines that an “undertaking” has the potential to cause effects
27 on “historic properties,” the regulations provide for a four-step process: (1) initiate the
28 Section 106 process; (2) identify, through reasonable and good faith efforts, historic
properties within the APE; (3) assess whether effects of the undertaking on any eligible
historic property is adverse; and (4) seek to resolve any adverse effects. 36 C.F.R. § 800.3–

1 800.6. The APE is defined as “the geographic area or areas within which an undertaking
2 may directly or indirectly cause alterations in the character or use of historic properties, if
3 any such properties exist.” 36 C.F.R. § 800.16(d). The APE is “influenced by the scale
4 and nature of an undertaking and may be different for different kinds of effects caused by
5 the undertaking.” *Id.*

6 These steps are accomplished through consultation with interested parties. *Id.* at
7 §§ 800.1(a), 800.2. Specifically, an agency “shall” consult with any Native American
8 Tribe “that attaches religious and cultural significance to [the affected] property” and
9 provide the Tribe “a reasonable opportunity to identify its concerns about historic
10 properties, advise on the identification and evaluation of historic properties, including those
11 of traditional religious and cultural importance, . . . and participate in the resolution of
12 adverse effects.” *Id.* at § 800.2(c)(2)(ii). “If the agency official finds. . . there are historic
13 properties present but the undertaking will have no effect upon them as defined in
14 § 800.16(i), the agency official shall provide documentation of this finding, as set forth in
15 § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties,
16 including Indian tribes and Native Hawaiian organizations, and make the documentation
17 available for public inspection prior to approving the undertaking.” *Id.* at § 800.4(d)(1).
18 BLM must “engage in consultation with the [SHPO] to [d]etermine and document the area
19 of potential effects, [g]ather information, and develop and evaluate alternatives or
20 modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on
21 historic properties.” *WildEarth Guardians*, 923 F.3d at 676.

22 “[F]ederal agencies must comply with these regulations.” *See Pit River Tribe v.*
23 *U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006). “Early consultation with tribes is
24 encouraged by the [NHPA] regulations.” *Te-Moak Tribe of W. Shoshone of Nevada v. U.S.*
25 *Dep’t of Interior*, 608 F.3d 592, 609 (9th Cir. 2010) (citations omitted). The consultation
26 requirement “is not an empty formality; rather, it ‘must recognize the government-to-
27 government relationship between the Federal Government and Indian tribes’ and is to be
28 ‘conducted in a manner sensitive to the concerns and needs of the Indian tribe.’ ” *Quechan*

1 *Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108 (S.D.
2 Cal. 2010) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)). A tribe may, if it wishes, designate
3 representatives for the consultation. *Id.* The Tribe must show that it would have provided
4 new information had it been consulted earlier in the Phase three's approval process to
5 prevail on a claim that BLM violated its obligation to consult with the Tribe, thus violating
6 NHPA. *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592,
7 610 (9th Cir. 2010) (citing 36 C.F.R. § 800.1).

8 **i. BLM's Failure to Consult with the Tribe**

9 Sometime prior to November 10, 2020, the BLM concluded that the Project would
10 have no effect upon historic properties (including Ha'Kamwe') under § 800.4(d)(1). (*See*
11 Clarke Decl., Doc. 11-3 at ¶ 7; *see also* June 17, 2021, Letter from BLM to SHPO at
12 Doc. 15-8 at 2 (writing with the intent "to summarize the. . . Section 106 findings and
13 determinations for [the Project]"). Though recognized as a TCP, Ha'Kamwe' was not
14 included in the Project's APE. (BLMs' April 12, 2021, letter to Plaintiff, Doc. 11-7 at 9–
15 10). As a result of this finding, the BLM did not consult with the Tribe regarding its cultural
16 reliance on Ha'Kamwe' as would have otherwise been required under Section 106.
17 Plaintiff contends that "BLM's failure to include Ha'Kamwe' undermined the required
18 consultation process and violated the NHPA." (Doc. 11 at 15). The Court agrees.

19 Under these facts, the BLM's early finding of No Historic Properties Affected under
20 the NHPA process, and Ha'Kamwe's subsequent exclusion from the APE, was arbitrary
21 and capricious. The same can be said of the BLM's refusal to revisit its determination that
22 Ha'Kamwe' was not within the APE such that a formal Section 106 consultation with the
23 Tribe should have taken place. *See W. Radio Servs. Co., Inc. v. Allen*, 147 F. Supp. 3d
24 1132, 1137–38 (D. Or. 2015), *aff'd*, 716 F. App'x 660 (9th Cir. 2018) ("An agency decision
25 is considered arbitrary and capricious 'if [it] entirely failed to consider an important aspect
26 of the problem, *offered an explanation for its decision that runs counter to the evidence*
27 *before the agency*, or is so implausible that it could not be ascribed to a difference in view
28

1 or the product of agency expertise.”) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm*
2 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added).

3 First, as Plaintiff points out, BLM’s Section 106 decision to exclude Ha’Kamwe’
4 from the APE conflicts with the ultimate findings in BLM’s Final EA. Unlike the
5 determination that the Project would *not* affect Ha’Kamwe’ during the Section 106 process,
6 the Final EA conducted under NEPA identifies numerous impacts the Project would have
7 on the springs, including:

- 8 (1) temporary visual effects from drilling equipment and surface disturbance;
9 (2) temporary noise and vibration from drilling activities and vehicular travel
10 through the area; (3) temporary disruption to cultural practices at and/or near
11 Ha’Kamwe’; (4) impacts to native wildlife and vegetation (removal of
vegetation, noise, human presence); (5) the potential for cumulative effects to
natural and cultural environments.

12 (final EA, Doc. 15-1 at 19). When this discrepancy was brought to BLM’s attention by the
13 ACHP, BLM’s “response was that they consider these impacts to be temporary and non-
14 physical, and do not meet the definition of ‘effects’ under Section 106.” (May 31, 2024,
15 letter from ACHP to BLM at Doc. 11-7 at 111). The ACHP noted its disagreement and
16 stated:

17 As defined in 36 CFR § 800.16(i), effect ‘means alternation to the
18 characteristics of a historic property qualifying it for inclusion in or eligibility
19 for the National Register.’ In this case, the characteristics of the historic
20 property qualifying it for inclusion in the National Register include (in
21 addition to the physical components of the property, such as the spring itself
22 and surrounding landscape features) the setting and feeling of Ha’Kamwe’
and its environs and the cultural practices conducted there, both of which will
be altered (albeit temporarily) by the drilling equipment and ground
disturbance proposed in close proximity.

23 (*Id.*). Though the ACHP encouraged the BLM to reconsider its evaluation considering the
24 perceived discrepancies between the Section 106 and NEPA analysis, the BLM did not do
25 so. (*Id.*)

26 The BLM’s decision to exclude Ha’Kamwe’ in the APE was arbitrary and based on
27 a definition of “effect” that has no support in the law. *See* 36 C.F.R. § 800.16(i) (broadly
28 defining “effects” as an “alteration to the characteristics of a historic property qualifying it

1 for inclusion in or eligibility for the National Register”). There is simply no exception in
2 the NHPA for “temporary” effects. *Id.*

3 Area of potential effects means the geographic area or areas within which an
4 undertaking may directly or indirectly cause alterations in the character or
5 use of historic properties, if any such properties exist. The area of potential
6 effects is influenced by the scale and nature of an undertaking and may be
different for different kinds of effects caused by the undertaking.

7 *Id.* Though the APE can be “influenced by the scale and nature” of a Project, effects that
8 are unquestionably identified cannot simply be ignored. *Id.* When Ha’Kamwe’ was
9 excluded from the APE, the formal Section 106 process was discontinued with the Tribe,
10 and it was denied this early opportunity to identify its concerns. See *Te-Moak Tribe*, 608
11 F.3d at 609. The BLM is obligated to give full consideration to the impacts identified in
12 the EA, as well as others not identified, *before* determining that they “do not meet the
13 definition of ‘effects’ under Section 106.” 36 C.F.R. § 800.3–800.6.

14 Indeed, the Tribe pointed out their concerns in its June 10, 2021, letter to BLM
15 asking it to take a hard look at the implications of the project. (Doc. 11-7 at 12–13). In
16 that letter, the Tribe asserted that BLM had failed to properly identify all cultural resources
17 that would be affected by the Plan—specifically, the omission of any effects the project
18 may have on Ha’Kamwe’. (*Id.* at 18–19). The Tribe argued that the APE was too narrowly
19 defined and requested that the APE be expanded to encompass effects on the Tribe’s land
20 and cultural resources and historic properties, including Ha’Kamwe’. (*Id.* at 29). The
21 ACHP also wrote BLM on January 11, 2023, to advise it to “reinitiate consultation with
22 the Hualapai Tribe to consider whether its determination is adequately supported, and to
23 reexamine its identification and evaluation measures as necessary.” (*Id.* at 48). The BLM
24 did not respond to Plaintiff’s June 2021 comments or the ACHP’s letter until it entered into
25 the MOU on February 9, 2024. (Doc. 15 at 9). The EA addresses some of Plaintiff’s
26 concerns “by updating the EA to require more rigorous procedures to plug boreholes if
27 water is encountered during drilling.” (*Id.*; final EA, Doc. 15-1 at 7). These
28 accommodations do not constitute reasoned evaluation of the undertaking’s effects on the

1 TCP, however, which is deemed eligible for listing on the National Register of historic
2 places. *See WildEarth Guardians*, 923 F.3d at 676.

3 Second, the Court finds the BLM arbitrarily substituted the Arizona Protocol
4 Agreement for its Section 106 obligations despite knowing that the Project potentially
5 affected the import and character of Ha’Kamwe’. Setting aside the issue of BLM’s
6 statutory authority to enter into an agreement that would purportedly supplant its NHPA
7 obligations,⁵ the Court agrees with the Tribe that the plain terms of the Agreement do not
8 allow the BLM to disregard its 106 obligations. The Agreement provides that “NEPA
9 documents should be used to facilitate Section 106 consultations, and the results of the
10 Section 106 process will inform the development and selection of alternatives in the NEPA
11 documents.” (Arizona Protocol Agreement of 2014, Doc. 15-9 at 11). The plain language
12 of the Agreement does not give the BLM license to ignore evidence of effects on a TCP
13 like Ha’Kamwe’—effects that are clearly acknowledged in the NEPA process—while
14 undertaking the NHPA process. (*See id.*) To reach such a conclusion would undermine
15 NHPA’s mandates and runs counter to a federal agencies’ recognition of “the government-
16 to-government relationship between the Federal Government and Indian tribes.” *Quechan*
17 *Tribe of Fort Yuma*, 755 F. Supp. 2d at 1108. The limited consultation BLM had with the
18 Tribe was certainly not “conducted in a manner sensitive to the concerns and needs of the
19 Indian tribe.” *Id.*

20 Finally, it appears that potential effects to the aquifer that feeds Ha’Kamwe were
21 not considered in BLM’s APE determination. *See* 54 U.S.C. § 306108; 36 C.F.R. § 800.
22 Plaintiff persuasively points out that the 2000 Manera Report used to bolster the final EA
23 indicates that Ha’Kamwe’s water may be sourced from the upper aquifer through
24 discharge—areas that Defendants concede will be subject to drilling in Phase 3. (Doc. 11-
25 7 at 123, 126; 2000 Manera Report, Doc. 15-16 at 36). Other potential risks are noted in
26 the Wright Report the Tribe provided to BLM and its March 13, 2024, comments, which

27 ⁵ The Court asked Defendants for the statutory authorities upon which it relies to support
28 its claim that the Protocol Agreement may be substituted for Section 106’s mandate, and
the Court was generally referred to Defendant’s pleadings. (Doc. 71 at 12). Nothing in
Defendants’ briefing clarifies this for the Court. (*See* Docs. 15, 40, 47 and 70).

1 note that Phase 3 could harm Ha’Kamwe’s flow, temperature and chemistry due to the
2 discharge of pollutants onto stream channels, improper abandonment of boreholes drilled
3 in Phases 1 and 2, and drilling into a fault—which could “drain the entire groundwater
4 system.” (Doc. 15-13 at 13; Doc. 71 at 52–53, 71, 81–82). The Wright Report concludes
5 that additional data must be collected to clarify the potential effects of exploratory drilling.
6 (Doc. 71 at 82). BLM responded by updating the EA to require more rigorous procedures
7 to plug boreholes if water is encountered during drilling, but does not directly address the
8 report or Mr. Wright’s opinions which challenge the basis of the final EA. (Doc. 15-14 at
9 2; Doc. 15 at 9). In sum, BLM approved the Phase 3 drilling project with certain
10 conditions, including: bringing in water from outside the Project area, allowing for tribal
11 monitoring, relocating the Project’s staging area, refining access roads to drill sites by
12 removing redundant routes to reduce overland travel disturbance and to keep all proposed
13 drilling and access for the project on public lands. (Doc. 15-1 at 7). However, BLM did
14 not address any of Mr. Wright’s identified risks associated with the dramatic increase in
15 drilling activity. (*See id.*)

16 BLM’s decision to exclude Ha’Kamwe’ arbitrarily and prematurely ended the
17 consultation process with the Hualapai Tribe without regard to Section 106. *Pit River*
18 *Tribe*, 469 F.3d at 787 (noting that the consultation “must be ‘initiated early in the
19 undertaking’s planning, so that a broad range of alternatives may be considered during the
20 planning process for the undertaking.’”) (citing 36 C.F.R. § 800.1(c)). The Tribe has
21 shown that it would have provided new information to refute the BLM’s “effects”
22 determination had it been consulted earlier in the Amendment’s approval process, such as
23 the discharge of pollutants onto stream channels and potential effects to Ha’Kamwe’s flow,
24 chemistry, and temperature. (Doc. 11-7 at 52–53, 81–82); *see also Te-Moak Tribe of W.*
25 *Shoshone of Nevada*, 608 F.3d at 610 (noting that a plaintiff must show that it would have
26 provided new information had it been consulted earlier in the approval process). At this
27 juncture, the Court concludes that Plaintiff has shown that it is likely to succeed on its
28 NHPA claim as it has demonstrated that BLMs decision to approve Phase 3 of the Project

1 was arbitrary, capricious and not in accordance with the NHPA. *See* 5 U.S.C. § 706(2)(A);
2 *Quechan Tribe of Fort Yuma*, 755 F. Supp. 2d at 1108.

3 2. NEPA

4 Plaintiff next argues that the Federal Defendants violated NEPA in two ways: (1)
5 by failing to consider reasonable alternatives that would have minimized the Project's
6 adverse effects on Ha'Kamwe' and other resources important to the Tribe; and (2) by
7 failing to take a hard look at impacts on Ha'Kamwe's water resources. (Doc. 11 at 9, 11).
8 It specifically notes that exploratory drilling is likely to impact Ha'Kamwe's flow and
9 temperature. (Doc. 35 at 13).

10 NEPA is a purely procedural statute that “does not mandate particular results, but
11 simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*,
12 490 U.S. 332, 350 (1989). Indeed, agencies may decide that “other values outweigh the
13 environmental costs” and may move forward with a proposed action so long as they
14 undergo the necessary process. *Id.* A court's role in reviewing an agency decision is
15 “simply to ensure that the agency has adequately considered and disclosed the
16 environmental impact of its actions and that its decision is not arbitrary or capricious.” *San*
17 *Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n*, 635 F.3d 1109, 1115 (9th Cir.
18 2011). *See also Indian River Cnty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 527 (D.C. Cir.
19 2019).

20 NEPA has two main aims: requiring agencies to “consider every significant aspect
21 of the environmental impact of a proposed action” and “inform the public that it has indeed
22 considered environmental concerns in its decision-making process.” *Baltimore Gas &*
23 *Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). “NEPA's purpose is to ensure
24 that ‘the agency will not act on incomplete information, only to regret its decision after it
25 is too late to correct.’ ” *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir.
26 2000) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)).

27 i. Consideration of Reasonable Alternatives

28 NEPA mandates that an agency must provide a detailed statement regarding the

1 alternatives to a proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii); *N. Alaska Env't Ctr. v.*
2 *Kemphorne*, 457 F.3d 969, 978 (9th Cir. 2006). The alternatives provision of NEPA
3 applies whether an agency is preparing an EIS or an EA, and NEPA's implementing
4 regulations require an EA to include "brief discussions of the need for the proposal, of
5 alternatives as required by [42 U.S.C. § 4332(2)(E)], of the environmental impacts of the
6 proposed action and alternatives, and a listing of agencies and persons consulted." *Native*
7 *Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005) (citing 40
8 C.F.R. § 1508.9(b)).

9 Under NEPA, "[c]onsideration of reasonable alternatives is necessary to ensure that
10 the agency has before it and takes into account *all* possible approaches to, and potential
11 environmental impacts of, a particular project." *Kemphorne*, 457 F.3d at 978.
12 (emphasis added). "[A]n agency's consideration of alternatives is sufficient if it considers
13 an appropriate range of alternatives, even if it does not consider every available
14 alternative." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir.
15 1990). "An agency need not . . . discuss alternatives similar to alternatives actually
16 considered, or alternatives which are 'infeasible, ineffective, or inconsistent with the basic
17 policy objectives for the management of the area.'" *Id.* (citations omitted).

18 "The stated goal of a project necessarily dictates the range of 'reasonable'
19 alternatives and an agency cannot define its objectives in unreasonably narrow terms."
20 *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (citation
21 omitted). The choice of alternatives is "bounded by some notion of feasibility" and an
22 agency is not required to consider "remote and speculative" alternatives. *Vt. Yankee*
23 *Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). The
24 "range of alternatives that must be considered in the [EA] need not extend beyond those
25 reasonably related to the purposes of the project." *Laguna Greenbelt, Inc. v. U.S. Dep't of*
26 *Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) (citation omitted). However, "failure to examine
27 a reasonable alternative renders an [EA] inadequate." *Alaska Survival v. Surface Transp.*
28 *Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) (citation omitted). "Those challenging the failure

1 to consider an alternative have a duty to show that the alternative is viable.” *Id.*

2 **a. BLM’s All or Nothing Approach**

3 The Tribe says the BLM failed to consider any reasonable alternatives before
4 approving the Project. (Doc. 11 at 15). It specifically suggested “approving fewer drilling
5 sites and locating them farther away from Ha’Kamwe’, based on further study of the
6 potential impacts on the underlying aquifer” as a reasonable alternative. (Doc. 35 at 13).

7 The Federal Defendants argue that Plaintiff cannot show a likelihood of success
8 here. (Doc. 15 at 16). They argue that Plaintiff cannot show that its proposed alternatives
9 are viable. (*Id.* (citing *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th
10 Cir. 2013) (“Those challenging the failure to consider an alternative have a duty to show
11 that the alternative is viable.”). The Federal Defendants state that Plaintiff proposed less
12 drilling, but that this proposal “ ‘begs the question,’ *Alaska Survival*, 705 F.3d at 1087, of
13 how BLM could achieve the Project’s purpose of ‘provid[ing] [AZL] an opportunity to
14 explore its valid existing mining claims’ while limiting its ability to conduct the exploration
15 necessary to assess potential deposits.” (*Id.*) The Federal Defendants also argue that BLM
16 reasonably considered “two alternatives” for a narrowly-scoped Project: approval in full or
17 denial in full. (*Id.*; Doc. 15-1 at 13–14 (“Under the No Action Alternative, the Proposed
18 Action would not be implemented.”). But this all or nothing approach was arbitrary and
19 capricious because BLM failed to consider an appropriate *range* of alternatives.
20 *Headwaters, Inc.*, 914 F.2d at 1181 (“[A]n agency’s consideration of alternatives is
21 sufficient if it considers an appropriate *range* of alternatives, even if it does not consider
22 every available alternative.”) (emphasis added); *see also Allen*, 147 F. Supp. 3d at 1137–
23 38 (“An agency decision is considered arbitrary and capricious “if [it] entirely failed to
24 consider an important aspect of the problem.”).

25 The Final EA states that there were no “proposed alternatives” to the Phase 3 drilling
26 project. (Final EA, Doc. 15-1 at 14 (“No alternative actions are proposed. . . No alternative
27 actions were evaluated in detail because none were identified that would have fewer
28 impacts than the Proposed Action.”). The Federal Defendants clarify in their Response

1 that the Tribe did not provide any specific proposals in its 2021 comments. (Doc. 15 at 17).

2 The Tribe's July 9, 2021, comments asked BLM to "complete its consultation with
3 the Tribes, supplement its EA with analysis that meets NEPA requirements, and then revisit
4 its alternatives analysis with inclusion of additional alternatives that better meet the
5 Hualapai's concerns and provide a more appropriate balance of [AZL's] and the public's
6 interests in resource protection." (Doc. 15-10 at 12). Then, in its March 13, 2024,
7 comments, the Tribe proposed specific alternatives. (Doc. 11-7 at 91). The Tribe proposed
8 approving one less drilling site (two instead of three), relocation of drill sites, approving
9 fewer total wells to be drilled, less new road construction and stricter controls on noise and
10 light pollution. (*Id.*) Again, alongside these comments the Tribe also sent BLM the Wright
11 report. (Doc. 15-12 at 4). So, before BLM filed the Final EA and approved Phase 3, it was
12 made aware of the Tribe's proposed alternatives in its March 13, 2024, comments. (*See id.*)
13 However, the Final EA, which was published in June of 2024, still states that "[n]o
14 alternative actions are proposed. Any possible alternative actions would be limited given
15 the narrow focus of the exploration drilling program. No alternative actions were evaluated
16 in detail because none were identified that would have fewer impacts than the Proposed
17 Action." (Doc. 15-1 at 14).

18 Here, Plaintiff has demonstrated a likelihood of success on BLM's failure to
19 consider reasonable alternatives claim because it failed to consider an "appropriate range
20 of alternatives." *Kemphorne*, 457 F.3d at 978. Plaintiff identified reasonable, viable,
21 alternatives in its March 13, 2024, comments such as approving fewer drilling sites and
22 locating them farther away from Ha'Kamwe'. (Doc. 11-7 at 91). Other than stating that
23 no alternatives were identified that would have fewer impacts than the Proposed Action,
24 BLM did not explain why it failed to consider any reasonable alternative. (Doc. 15-1
25 at 14). Likewise, BLM did not argue against the viability of Plaintiff's proposed
26 alternatives. (*See e.g.*, final EA, Doc. 15-1; Doc. 15). BLM addressed some of Plaintiff's
27 concerns, such as effects on groundwater levels, by requiring AZL to bring in its own water
28 from outside the Project area and to relocate a Project staging area. (Final EA, Doc. 15-1

1 at 7). However, one of the main alternatives the Tribe proposed was reducing the number
2 of total wells drilled (Doc. 11-7 at 6), which BLM did not address in the final EA.
3 (Doc. 15-1).

4 The Tribe also pointed out that the Final EA provides no analysis of geologic faults
5 and related impacts on the source for Ha’Kamwe’ and fails to analyze the potential for
6 exploration boreholes to intersect faults and fractures which could cause this drain
7 Mr. Wright warns of in its March 2024 comments. (Plaintiff’s March 13, 2024, comments,
8 Doc. 15-12 at 5). The proposed alternatives of drilling fewer wells and relocating drill sites
9 farther away from Ha’Kamwe’ are not “infeasible, ineffective, or inconsistent with the
10 basic policy objectives for the management of the area.” *Headwaters, Inc.*, 914 F.2d at
11 1181. They are reasonable alternatives that BLM should have considered in its range of
12 alternatives—evidenced by Mr. Wright’s Report and the Tribes March 2024 comments.
13 (Doc. 15-13 at 33; (Doc. 15-12 at 5). BLM acted arbitrary in its failure to examine these
14 reasonable alternatives, which renders the Final EA inadequate. *Alaska Survival*, 705 F.3d
15 at 1087.

16 Moreover, Plaintiff has set forth plausible evidence that the dramatic increase in
17 drilling activity also increases the risk of harm to the entire groundwater system.
18 (Mr. Wright’s testimony, Doc. 71 at 71 (“if you put in a lot of wells, you have a lot of
19 disturbance to the groundwater system.”)). Through this evidence, Plaintiff has met its
20 burden to show that drilling fewer boreholes could be a viable alternative. *See Alaska*
21 *Survival*, 705 F.3d 1073, 1087 So, the Court finds that Plaintiff has shown that it is likely
22 to prevail on this claim because the Federal Defendants did not consider an appropriate
23 range of alternatives or explain its failure to do so—which is insufficient under NEPA. *See*
24 *Wildearth Guardians v. U.S. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 891 (D. Mont.
25 2020) (“BLM cannot satisfy NEPA without some explanation.”).

26 ii. NEPA’s Hard Look Requirement

27 Plaintiff also argues that Defendants failed to take a hard look at the potential effects
28 of the drilling project prior to approval. (Doc. 11 at 18). It also argues that BLM’s basis

1 is unsupported because it does not know for certain whether the upper aquifer contributes
2 to Ha’Kamwe’. (*Id.*) The Federal Defendants argue that “BLM’s analysis for the Project
3 satisfies NEPA’s hard look standard by reasonably assessing impacts related to
4 groundwater conditions in the Project area and incorporating mitigation methods to
5 preserve water resources.” (Doc. 15 at 12). They also assert that Plaintiff’s insistence that
6 BLM should have conducted an independent hydrological study lacks merit. (*Id.* at 15
7 (citing *Patagonia Area Research Alliance v. United States Forest Service*, 2023 WL
8 5723395, at *2 (D. Ariz. Sept. 5, 2023) (rejecting a similar demand as “impractical” given
9 the limited scope of the exploratory drilling project at issue)). AZL argues that “[t]he
10 existence of a competing study that differently defines the aquifers does not undermine the
11 BLM’s ability to take a hard look at water resources.” (Doc. 28 at 11).

12 NEPA is a procedural statute, not mandating particular results but requiring agencies
13 to take a “hard look” at the environmental consequences of their decisions. *Westlands*
14 *Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). The hard look
15 requirement includes “both a complete discussion of relevant issues as well as meaningful
16 statements regarding the actual impact of proposed projects.” *Earth Island Inst. v. U.S.*
17 *Forest Serv.*, 442 F.3d 1147, 1172 (9th Cir. 2006), *abrogated on other grounds by Winter*,
18 555 U.S. 7. When reviewing that discussion, courts “ensure that the procedure followed
19 by the Service resulted in a reasoned analysis of the evidence before it.” *Friends of*
20 *Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). To support their
21 analysis, agencies shall “identify any methodologies used and reference . . . the scien[ce]
22 . . . relied upon” to support these methodologies. *Earth Island Inst.*, 442 F.3d at 1159–60.
23 NEPA and its implementing regulations set forth “action-forcing” procedures designed to
24 (1) ensure agencies take a “hard look” at the environmental effects of proposed actions and
25 (2) foster meaningful public participation. *Wildlands v. Adcock*, 2024 WL 2187671, at *4
26 (D. Or. Apr. 10, 2024) (citation omitted). A “hard look” requires consideration of all
27 foreseeable direct, indirect, and cumulative impacts. *Idaho Sporting Cong. v. Rittenhouse*,
28 305 F.3d 957, 963 (9th Cir. 2002); 40 C.F.R. § 1508.25(c) (stating that an agency “shall

1 consider” direct, indirect, and cumulative impacts). An agency fails to take a hard look
2 when an EA is speculative and conclusory. *See Greenpeace Action v. Franklin*, 14 F.3d
3 1324, 1335–36 (9th Cir. 1992). Importantly, if the “hard look” reveals the effects of the
4 action “may” be significant, the decision-maker cannot approve the action “unless it is
5 either analyzed in an EIS or modified to avoid significant effects.” *Nat’l Parks &*
6 *Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). At the same time,
7 “NEPA documents must concentrate on the issues that are truly significant to the action in
8 question, rather than amassing needless detail.” 40 C.F.R. § 1500.1(b).

9 **a. BLM’s Hard Look**

10 The Final EA concludes, based on the 2000 Manera Report, that Ha’Kamwe’ will
11 not be affected because (1) it is exclusively fed by the lower aquifer and (2) the lower
12 aquifer is completely secluded from the other two aquifers. (Doc. 15-1 at 25–26).
13 Contrarily, the EA notes that it is unclear whether there is any contribution of water to
14 Ha’Kamwe’ from the upper aquifer. (*Id.* at 25). Indeed, the 2000 Manera Report notes
15 that the water feeding Ha’Kamwe may be sourced from the upper aquifer through
16 discharge. (2000 Manera Report, Doc. 15-16 at 36).

17 The Court finds that it is likely that Plaintiff will prevail on this claim. The very
18 study on which BLM relied notes that the water feeding Ha’Kamwe may be sourced from
19 the upper aquifer— an area that AZL will reach during the Phase 3 drilling. This oversight
20 of a potential effect to the source of Ha’Kamwe’, by itself, demonstrates that BLM did not
21 consider all foreseeable direct, indirect, and cumulative impacts as it is required to. *See*
22 *Idaho Sporting Cong*, 305 F.3d at 963; 40 C.F.R. § 1508.25(c). Thus, because this part of
23 the EA is speculative and conclusory, BLM has failed its “hard look” requirement.
24 *Greenpeace Action*, 14 F.3d at 1335–36; *see also Or. Natural Desert Ass’n v. Rose*, 921
25 F.3d 1185, 1191 (9th Cir. 2019) (citation omitted) (holding that “general statements about
26 ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification” for
27 why the agency could not provide more “definitive information”).

28 Furthermore, the Wright Report contradicts the soundness of the EA’s conclusion

1 that the lower aquifer is isolated. Mr. Wright created a map which details several
2 lineaments and faults where AZL plans to drill. Mr. Wright testified that the
3 “hydrogeology of the site is riddled with fractures, and fractures in these types of
4 hydrogeologic systems transmit groundwater more quickly, more rapidly, than water
5 would be transmitted without the presence of the fractures.” (Doc. 71 at 62). The Wright
6 Report detailed that, based on a mixing of elements found in each aquifer, Ha’Kamwe’ is
7 fed by all three aquifers; not just the lower aquifer. (*Id.* at 69). The Wright Report was
8 submitted to BLM with the Tribe’s March 13, 2024, comments. (Doc. 11-7 at 86). BLM
9 responded by updating the EA to require more rigorous procedures to plug boreholes if
10 water is encountered during drilling, but does not directly address the report or opinions
11 which challenge the basis of the final EA. (Final EA, Doc. 15-1 at 7; Doc. 15 at 9). As
12 Plaintiff notes, where “the commenters’ evidence and opinions directly challenge the
13 scientific basis upon which the [EA] rests and which is central to it, [BLM is] required to
14 disclose and respond to such viewpoints . . . [Its] failure to disclose and analyze these
15 opposing viewpoints violates NEPA.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*,
16 349 F.3d 1157, 1167 (9th Cir. 2003) (citations omitted); *see also W. Watersheds Project v.*
17 *Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011) (“BLM was required to ‘assess and
18 consider . . . both individually and collectively’ the public comments received during the
19 NEPA process”) (quoting *Ctr. for Biological Diversity*, 349 F.3d at 1167). Plaintiff has
20 shown that BLM failed to address the Tribe’s comments, including Mr. Wright’s findings
21 and report which challenges the scientific basis upon which the Final EA rests. So, it has
22 demonstrated a likelihood of success on the merits of its failure to take a hard look claim.

23 In sum, Plaintiff has demonstrated a likelihood of success on the merits of its claims
24 that BLM violated the NHPA and NEPA. The Court will next address the second *Winter*
25 factor: whether Plaintiff has shown a likelihood of irreparable harm.

26 **B. Irreparable Harm**

27 Plaintiff argues that the Project’s impairment of cultural practices and degradation
28 of the area’s sacred character is irreparable even though the Project itself is temporary.

1 (Doc. 11 at 8, 20). For example, Plaintiff says members of the Tribe rely upon
2 Ha’Kamwe’s natural and cultural environment to hold or participate in funerals and
3 coming-of-age ceremonies and these ceremonies may be undertaken only at a single,
4 specific time, and are not repairable with monetary or equitable relief. (*E.g.*, Mapatis Decl.
5 ¶¶ 6–7 at Doc. 35-1). Plaintiff also argues that impacts to Ha’Kamwe’s flow and
6 temperature are likely to occur if AZL is not enjoined from completing Phase 3 of the
7 Project. (Doc. 35 at 19). Plaintiff has also offered testimony that the spring’s waters were
8 recently observed to be diminished—Mr. Wright testified that these testimonials are
9 evidence that impacts to the spring have already manifested. (Testimony of Mr. Brandon
10 Siewiyumptewa, Doc. 71 at 44; Testimony of Mr. Frank Mapatis, Doc. 71 at 108).

11 Defendants argue that Plaintiff identifies no concrete evidence to support its claim
12 that exploratory drilling is likely to impact Ha’Kamwe’s flow and temperature, much less
13 prove it a likelihood. (Doc. 40 at 2; Doc. 42 at 2). They argue that harm to its flow and
14 temperature are not likely because there is no evidence of harm from the planned
15 exploration as Ha’Kamwe’ is fed by the lower aquifer, not the upper. (Doc. 40 at 3). The
16 Federal Defendants also argue that Phase 3 will only “temporarily impact a small amount
17 of land near a single cultural property without disturbing the ground of that cultural
18 property. And tribal monitors may observe ground disturbing activities to provide
19 assurance that ground disturbances will avoid cultural resources.” (Doc. 15 at 21).

20 Under *Winter*, plaintiffs seeking a preliminary injunction must establish that
21 “irreparable harm is likely, not just possible.” *All. for the Wild Rockies*, 632 F.3d at 1131.
22 Irreparable harm is harm “that cannot be redressed by a legal or equitable remedy following
23 trial.” *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F. Supp. 2d 995, 1007 (C.D.
24 Cal. 2007) (internal quotation marks omitted). “Environmental injury, by its nature, can
25 seldom be adequately remedied by money damages and is often permanent or at least of
26 long duration, i.e., irreparable.” *Sierra Club v. Bosworth*, 510 F.3d 106, 1033 (9th Cir. 200)
27 (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)). “Damage to or
28 destruction of any” cultural or religious sites “easily” meets the irreparable harm

1 requirement. *Quechan Tribe of Fort Yuma*, 755 F.Supp.2d at 1120.

2 The Court finds that Plaintiff is likely to suffer irreparable injury if the Court does
3 not convert the TRO into a PI. AZL is prepared and ready to drill 131 boreholes on land
4 that is immediately adjacent to, and on three sides of, Ha’Kamwe’. The Phase 3 drilling
5 project is a dramatic increase in drilling from Phases 1 and 2—increasing from 49 total
6 holes in the first two phases to 131 holes in Phase 3. (Doc. 46-1 at 5; 47-1 at 3). At the
7 hearing, Mr. Wright testified that this increase in drilling activity similarly increases the
8 risk of groundwater disturbance due to the “the horizontal and vertical hydrologic
9 connectivity permeability of the groundwater system.” (Mr. Wright’s testimony,
10 Doc. 71 at 71). The 2000 Manera Report used to bolster the BLM’s Final EA also indicates
11 that Ha’Kamwe’s water may be sourced from the upper aquifer through discharge—areas
12 that Defendants concede will be subject to drilling in Phase 3. (2000 Manera Report,
13 Doc. 15-16 at 36). Though Defendants point out that they have failed to encounter any
14 groundwater in their past exploratory drilling, the Phase 3 drilling project will be on a much
15 larger scale and in different locations closer to Ha’Kamwe’. Notably, Mr. Wright testified
16 that these locations lay on fault lines, which could be impacted by AZL’s planned drilling
17 depth. (Mr. Wright’s testimony, Doc. 71 at 62, 72).

18 Furthermore, as discussed above, Mr. Wright’s report raises various issues as to the
19 soundness of the Final EA’s conclusion that the lower aquifer is isolated. Mr. Wright
20 testified that the “hydrogeology of the site is riddled with fractures, and fractures in these
21 types of hydrogeologic systems transmit groundwater more quickly, more rapidly, than
22 water would be transmitted without the presence of the fractures.” (Mr. Wright’s
23 testimony, Doc. 71 at 62). Mr. Wright has also detailed that, based on a mixing of elements
24 found in each aquifer, Ha’Kamwe’ is fed by all three aquifers; not just the lower aquifer.
25 (*Id.* at 69). The Court found Mr. Wright credible and his testimony persuasive. His
26 testimony and corresponding report demonstrate that irreparable harm is likely, not just
27 possible. *All. for the Wild Rockies*, 632 F.3d at 1131. So, Plaintiff meets the irreparable
28 harm requirement because it has shown that damage to Ha’Kamwe’, a culturally significant

1 site for the Tribe, is likely. *Quechan Tribe of Fort Yuma*, 755 F.Supp.2d at 1120 (stating
2 that “[d]amage to or destruction of any” cultural or religious sites “easily” meets the
3 irreparable harm requirement).

4 Because the Court finds that Plaintiff has demonstrated irreparable harm through its
5 impact to Ha’Kamwe’s character argument, the Court will not address its impairment of
6 cultural practices argument as they are substantially intertwined. The Court will next
7 jointly address the last two *Winter* factors: the balance of equities and the public interest.

8 **C. Balance of Equities and Public Interest**

9 Because the last two factors merge when the government is a party, the Court will
10 consider together whether the balance of equities weigh in the Plaintiff’s favor and whether
11 the public interest favors injunctive relief in conjunction. *See Drakes Bay Oyster Co.*, 747
12 F.3d at 1092; *see also Winter*, 555 U.S. at 20. Plaintiff argues that the balance of equities
13 tips sharply in its favor and advances the public interest because the Project will cause
14 permanent harm to the Tribe’s sacred property: Ha’Kamwe’. (Doc. 11 at 15). The Federal
15 Defendants and AZL argue that the balance of equities and public interest weigh against
16 an injunction because drilling for lithium is one part of the United States’ larger effort to
17 transition to renewable sources of energy and the public interest may be thwarted by
18 preventing lithium extraction. (Doc. 15 at 24; Doc. 28 at 14).

19 “[D]istrict courts must give serious consideration to the balance of equities.” *Earth*
20 *Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (citation omitted). In doing so,
21 courts must consider “all of the competing interests at stake.” *Id.* “The basic function of
22 a preliminary injunction is to preserve the status quo pending a determination of the action
23 on the merits.” *Chalk v. United States Dist. Court Cent. Dist.*, 840 F.2d 701, 704 (9th Cir.
24 1988). “Status quo is defined as the last, uncontested status which preceded the pending
25 controversy.” *Susanville Indian Rancheria v. Leavitt*, 2007 U.S. Dist. LEXIS 18702, at
26 *21 (E.D. Cal. Feb. 28, 2007) (quoting *Regents of the Univ. of Cal.*, 747 F.2d 511, 514 (9th
27 Cir 1984)). “The public interest analysis for the issuance of a[n] injunction requires [the
28 court] to consider whether there exists some critical public interest that would be injured

1 by the grant of [injunctive] relief.” *Pure Wafer Inc. v. City of Prescott*, 275 F. Supp. 3d
2 1173, 1179 (D. Ariz. 2017) (citation omitted).

3 Lithium exploration is an important public interest at a time when the United States
4 is striving to transition to renewable sources of energy. (Doc. 15 at 24). However, this
5 interest does not outweigh the potential damage the Phase 3 drilling project may cause to
6 Ha’Kamwe’, which is central to the Hualapai Tribe life-way. Nor does it permit a federal
7 agency to short-cut its regulatory consultation obligations or reasoned evaluation of the
8 effects of its undertaking. And this Court finds that irreparable harm from the Phase 3
9 drilling project is not just potential, it is likely. *See supra* Section III.B. “When the
10 proposed project may significantly degrade some human environmental factor, injunctive
11 relief is appropriate.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th
12 Cir. 2001) (internal quotation marks omitted). Thus, the balance of equities and public
13 interest tip in Plaintiff’s favor and require an injunction to preserve the status quo pending
14 a determination of this action on the merits. *See Chalk*, 840 F.2d at 704. Conversely,
15 refraining from granting injunctive relief could be fatal to the historic and cultural
16 importance of Ha’Kamwe’. *See League of Wilderness Defs./Blue Mountains Biodiversity*
17 *Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (“we conclude that the balance
18 of equities tips toward [the plaintiffs] because the harms they face are permanent, while the
19 intervenors face temporary delay.”) (citing *Amoco Prod. Co.*, 480 U.S. at 545 (“the balance
20 of harms will usually favor the issuance of an injunction to protect the environment.”))

21 **D. Bond**

22 Plaintiff argues that the Court should deny AZL’s request for a “significant” bond.
23 (Doc. 35 at 18). AZL argues for a bond and states that it will incur significant expenses if
24 its operations are enjoined. (Doc. 28 at 15). AZL has not, however, argued why a bond
25 should be required or proposed an amount. (Doc. 28 at 15). AZL instead argues, in
26 essence, that Plaintiff has not disclosed its financial position, so, the Court should not waive
27 the Bond requirement. (*Id.*) Plaintiff substantiated its financial position at the hearing, so,
28 the Court will waive Rule 65(c)’s bond requirement.

1 Federal Rule of Civil Procedure 65(c) permits a court to grant preliminary injunctive
2 relief “only if the movant gives security in an amount that the court considers proper to pay
3 the costs and damages sustained by any party found to have been wrongfully enjoined or
4 restrained.” Fed. R. Civ. P. 65(c). The Rule “invests the district court with discretion as to
5 the amount of security required, if any.” *Johnson v. Couturier*, 572 F.3d 1067, 1086
6 (9th Cir. 2009) (quotation and citation omitted). The court “may dispense with the filing
7 of a bond when it concludes there is no realistic likelihood of harm to the defendant from
8 enjoining his or her conduct.” *Id.* “It is well established that in public interest
9 environmental cases the plaintiff need not post bonds because of the potential chilling
10 effect on litigation to protect the environment and the public interest.” *Central Or.*
11 *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012). “Federal courts
12 have consistently waived the bond requirement in public interest environmental litigation,
13 or required only a nominal bond.” *Id.*

14 Plaintiff says the Hualapai Tribe is unable to pay a large bond, and any sums would
15 “come directly from Tribal resources needed by the Hualapai Tribe to provide essential
16 governmental services.” (Doc. 11 at 23). Chairman Clarke testified at the hearing that a
17 bond of “any dollar” amount in this matter would have “a drastic effect on the tribe.”
18 (Doc. 71 at 136). Chairman Clarke stated that the tribe’s sources of revenue come from
19 grants, contracts, and the Grand Canyon Resort Corporation. (*Id.* at 133). Clarke stated
20 that the median income for tribal members is approximately \$42,000 per year and that their
21 unemployment rate is approximately 13%. (*Id.* at 135).

22 The Court will waive Rule 65(c)’s bond requirement because of the potential
23 chilling effect to the Hualapai Tribe’s general fund and its demonstration that it is unable
24 to pay a large sum. *Connaughton*, 905 F. Supp. 2d at 1198.

25 **IV. Conclusion**

26 For the foregoing reasons, the Court finds Plaintiff has satisfied the four-part
27 standard set forth in *Winter* for preliminary injunctive relief. The Motion will therefore be
28 granted.


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Accordingly,

IT IS ORDERED that Plaintiff's Motion for a Temporary Restraining Order followed by a Preliminary Injunction (Doc. 11) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants are **ENJOINED** from authorizing or allowing any ground disturbance, construction, operations, drilling, or any other activity approved by the BLM's July 9, 2024, Decision Letter or its June 6, 2024, Decision Record, Finding of No Significant Impacts, and Final Environmental Assessment until this case is fully resolved on the merits or until further order of the Court. No bond is required from the Tribe.

Dated this 5th day of November, 2024.



Honorable Diane J. Humetewa
United States District Judge