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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BARTELL RANCH, LLC, et al.,
Plaintiffs,
v.
ESTER M. McCULLOUGH, et al.,
Defendants,
and
LITHIUM NEVADA CORP.,
Defendant-Intervenor.

Lead Case:
Case No. 3:21-cv-00080-MMD-CLB

LITHIUM NEVADA CORP.'S RESPONSE TO PLAINTIFFS WESTERN WATERSHEDS PROJECT, GREAT BASIN RESOURCE WATCH, BASIN AND RANGE WATCH, AND WILDLANDS DEFENSE'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

I. INTRODUCTION

Defendant-Intervenor Lithium Nevada Corporation ("Lithium Nevada") submits this opposition to Plaintiffs Western Watersheds Project, Great Basin Resource Watch, Basin and Range Watch, and Wildlands Defense's (collectively, "WWP") motion to complete the administrative record or, in the alternative, supplement the record or take judicial notice of certain documents identified by WWP. The documents WWP seeks to add are not appropriate

for inclusion in the administrative record nor are they relevant for the Court's consideration as extra-record evidence or by judicial notice.

II. BACKGROUND

WWP conflates the National Environmental Policy Act ("NEPA") review conducted by BLM and the separate and distinct state permitting process and seeks to improperly enlarge the administrative record in this proceeding with documents from the state's process. As outlined in the Thacker Pass Mine Project's ("the Project") Final Environmental Impact Statement ("FEIS"), NEPA authorization is only the first step. A project must also receive all relevant state permits to commence operations. BLM's Record of Decision ("ROD") is conditioned on Lithium Nevada's receipt of all required state permits before BLM issues a notice to proceed for the Project. This requirement is standard and the state permitting may overlap with, but often occurs after completion of the NEPA review. More specific mitigation actions are subsequently detailed in the state permits under state law.[1]

While the NEPA process was underway for the federal authorization at issue here, Lithium Nevada submitted its application to the Nevada Division of Environmental Protection ("NDEP") for a state Water Pollution Control Permit. That application included "a comprehensive groundwater quality monitoring plan … for review and approval *prior to commencement of mining*." TPEIS-0384 at AR-045574 (emphasis added) (FEIS at 4-26). NDEP regulations prohibit the state's issuance of a permit authorizing any discharge into "any waters of the State … [w]hich would result in the degradation of existing or potential underground sources of drinking water." NRS 445A.490(3). Thus, in addition to its own NEPA review and thorough analysis of extensive technical data, analyses and related reports, by requiring Lithium Nevada to obtain a Water Pollution Control Permit from NDEP, BLM could confidently conclude that Lithium Nevada's proposed operations would not proceed if there was cause for concern that they would violate water-quality standards.

[1] *See, e.g.*, *Water Pollution Control Permit – Lithium Nevada Corp.*, NEVADA DIVISION OF ENVIRONMENTAL PROTECTION at 3–19, https://ndep.nv.gov/uploads/documents/NEV2020104dpFY22.pdf.

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In the course of NDEP's review, as typically occurs, the agency raised questions, sought further information and worked with the applicant and relevant technical experts to ensure protection of the waters of the state. WWP seeks to turn that state review process into support for its challenge here of the NEPA authorization. While BLM's review occurred separate from the state's consideration, notably, Lithium Nevada resolved the issues NDEP raised in the state review and NDEP approved and issued its Water Pollution Control Permit and Mine Reclamation Permit on October 28, 2021. *See Notice of Proposed Action - BMRR - Thacker Pass Project*, NEVADA DIVISION OF ENVIRONMENTAL PROTECTION, http://ndep.nv.gov/posts/notice-of-proposed-action-bmrr-thacker-pass-project. Thus, if this Court were to consider the state's permitting file on the Project it would support approval. To the extent WWP disagrees with the State's issuance of that permit, there is a separate process for any review of that decision and it is not appropriate to conflate the issues before this court with any challenge of that separate state agency decision.

While BLM required that Lithium Nevada apply for and receive the NDEP permits before proceeding with the project construction, BLM did not participate in the NDEP permitting process. Lithium Nevada is required to apprise BLM of the progress of its various permits, *see* TPEIS-0384 at AR-045574 (FEIS at 4-26), but the state permitting process is analytically and jurisdictionally distinct from the federal NEPA process. Furthermore, NDEP submitted formal comments within the NEPA process that raised none of the concerns outlined in the separate state permitting process letters that WWP seeks to introduce in this proceeding. *See* TPEIS-0519 (NDEP's Bureau of Safe Drinking Water submitted a NEPA comment noting that the project would require a public drinking water permit). The letters that NDEP sent to Lithium Nevada and copied to BLM as part of NDEP's state permitting process simply alerted BLM to the progress of the state permit. Those letters are not part of the administrative record because they were not considered by BLM in the separate federal NEPA process. The other drafts and underlying information that WWP requests be included in the administrative record are equally irrelevant and, therefore, WWP's motion should be denied.

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III. ARGUMENT

The administrative record compiled by BLM and certified as complete creates a presumption of regularity. *Goffney v. Becerra*, 995 F.3d 737, 748 (9th Cir. 2021) ("an agency's statement of what is in the record is subject to a presumption of regularity. We must therefore presume that an 'agency properly designated the Administrative Record absent clear evidence to the contrary.'" (citations omitted)). A party who disputes the completeness of the record has the burden to overcome that presumption. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (denying supplementation of the record because the plaintiff failed to meet the "heavy burden to show the additional materials" qualified under an exception); *California v. U.S. Dep't of Labor*, No. 2:13-cv-02069-KJM-DAD, 2014 U.S. Dist. LEXIS 57520, at *27 (E.D. Cal. Apr. 24, 2014) (acknowledging "plaintiffs' heavy burden to rebut the presumption of administrative regularity").

Supplementation of an administrative record is "decidedly … the exception not the rule." *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1324 (D.C. Cir. 1984) (citation omitted); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) ("Keeping in mind the Supreme Court's concerns with reviewing court factfinding, we have approached these exceptions with caution, lest 'the exception … undermine the general rule.'" (citation omitted)). Supplementation of the record is only appropriate (1) if the information is necessary to determine whether the agency has considered all relevant factors in explaining its decision, (2) if the agency has demonstrably relied on documents not in the record, (3) if the information is necessary to explain technical terms or complex subject matter, or (4) when the plaintiff makes a showing of agency bad faith. *See Lands Council v. U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005). WWP does not meet its burden to overcome the presumption of regularity to supplement the administrative record with its requested documents.

WWP claims that if the Court does not supplement the record with WWP's three categories of requested documents, the Court will be accepting BLM's "fictional account of the actual decisionmaking process" and omitting documents that BLM at least indirectly relied on under the second *Lands Council* exception. ECF 111 at 8 (citation omitted). But WWP provides

no evidence to support its bald accusation that BLM's certified complete administrative record reflects a "fictional account" of the decision making process. WWP further argues that the NDEP letters and the NDOW Comment letter should supplement the administrative record under the first "all relevant factors" exception, ECF 111 at 15, that the letters are necessary to explain technical terms under the third exception, and are admissible under the fourth "bad faith" exception, because WWP contends that BLM acted in bad faith by excluding NDEP's and NDOW's letters.

WWP provides no factual support for its positions and fails to articulate "reasonable, non-speculative grounds for the belief that the alleged documents were considered by the agency and not included in the record" under the second exception. *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1239 (E.D. Cal. 2013) (citation omitted). WWP claims that BLM intentionally excluded two NDEP letters because those letters, according to WWP, present a "contrary position." But the letters themselves make clear that NDEP was identifying issues relevant to state permitting regulations and not expressing federal NEPA concerns and, notably, NDEP issued the state permit that is the subject of those letters (as noted above). *See* ECF 111 at Ex. 1, Attachments B & C. In addition, WWP does not provide clear evidence that the BLM heavily relied on the letters yet excluded them and, therefore, fails to satisfy the *Lands Council* exception one or two. Nor does WWP provide a plausible reason to include the letters as explaining technical matter or as evidence of bad faith under *Lands Council* exceptions three or four. While BLM does reasonably anticipate the state agencies will comply with Nevada law in its review and consideration of the permit applications, the state process operates under state law, not under BLM's federal oversight. BLM is merely kept apprised of the progress and does not rely on the documents in those permitting proceedings to substitute for its own formal comment and review process. There is no "technical matter" that requires explanation through the NDEP letters and there is no bad faith in the reasonable anticipation that the state agency will follow state law. As such, NDEP's letters documenting its state permitting process are irrelevant to the NEPA process under review in this case and it would be inappropriate to supplement the record, consider the documents as extra-record evidence, or take judicial notice of those letters.

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WWP also fails to provide clear evidence that the Preliminary Draft Environmental Impact Statement ("PDEIS") contained information considered and not already included in the record under the second *Lands Council* exception. *Safari Club Int'l v. Jewell*, No. CV-16-00094-TUC-JGZ, 2016 U.S. Dist. LEXIS 195006, at *13 (D. Ariz. July 7, 2016). WWP *speculates* that Lithium Nevada was given access to review the PDEIS and, therefore, it must be included in the record. This is untrue. The PDEIS was not shared with Lithium Nevada. *See* Ex. 1. Lithium Nevada was not provided the DEIS until it was publicly available. Therefore, WWP's erroneous allegation that Lithium Nevada was provided the PDEIS is not a basis to include it in the administrative record. *Asse Int'l, Inc. v. Kerry*, No. SACV 14-00534-CJC(JPRx), 2018 U.S. Dist. LEXIS 115514, at *7 (C.D. Cal. Jan. 3, 2018).

WWP's final request is puzzling. WWP acknowledges that BLM included a summary of all the comments NDOW submitted as a cooperating agency in the NEPA process, yet WWP deems the summary a bad faith "attempt to preclude this Court from reviewing the … NDOW comments," implying that BLM's summaries exclude certain of NDOW's comments. ECF 111 at 17. But, the 24-page summary of NDOW's comments alongside BLM's responses clearly demonstrate that NDOW raised numerous issues about the Project. *See* TPEIS-0359. It strains credulity that BLM nefariously omitted "the full meaning" of the comments in its summary. WWP provides no evidence to support its insinuation, and the summaries in the record are sufficient for the Court to understand and review NDOW's contributions to the NEPA process. *See Luciano v. United States*, No. 11-cv-1831 TLN-KJN, 2014 U.S. Dist. LEXIS 54255, at *24 (E.D. Cal. Apr. 16, 2014) (denying supplementation of the record where "the record itself is replete with examples of the factors the USFS considered in contemplating Plaintiff's proposed land exchanges"). Because WWP provides no reason why the summary alone "effectively frustrates judicial review" without the inclusion of the underlying NDOW Comment letter, or why the common and authorized practice to provide summaries is unlawful here, WWP cannot overcome the presumption of regularity to supplement the record under any of the *Lands Council* exceptions. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).

WWP's motion to supplement the record should be denied in its entirety.

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A. The Administrative Record Includes the Documents Considered in the NEPA Process.

WWP argues that all four of the *Lands Council* exceptions justify supplementing the record with the two letters NDEP sent as courtesy copies to BLM during NDEP's Water Pollution Control Permitting process. WWP argues these NDEP letters are relevant under the first *Lands Council* exception because many parts of the FEIS indicate BLM expects NDEP and its divisions will be "responsible for [the Project's] surface water quality and groundwater protection" through the permits those agencies will need to issue under the approved adaptive management plan. ECF 111 at 10–11.[2] But WWP ignores three critical points. First, BLM's statements simple reflect the state's jurisdiction over water quality and groundwater protection. BLM does not participate in or rely upon the separate state permitting process which often occurs after BLM completes its review. Second, the state's permitting process is separate from BLM's NEPA process. Third, WWP fundamentally misunderstands the function of adaptive management plans within the NEPA process. Thus, WWP fails to demonstrate that BLM relied on the NDEP letters or that the letters were relevant to BLM's NEPA analysis.

BLM may appropriately anticipate that state regulators will ensure that once a Project is approved under NEPA the project proponent will subsequently have to comply with all state law requirements including obtaining necessary state permits. The proponent also must continue in its compliance with adaptive management that becomes part of the state permitting requirements. *See* TPEIS-0384 at AR-045513 (observing in the FEIS at 1-3 that "[r]eclamation … would be completed in accordance with BLM and NDEP regulations."); *id.* at AR-045574 (stating in the FEIS at 4-26 that "LNC would submit a comprehensive groundwater quality monitoring plan to the BLM and NDEP for review and approval prior to commencement of mining"). The fact that

[2] WWP also argues that BLM "must have considered the NDEP letters" and they should also supplement the record under the second *Lands Council* exception. ECF 111 at 9. But WWP's argument here is circular. WWP argues BLM must have relied on NDEP's letters because it approved the Project in the ROD with reference to NDEP's cooperation, but WWP also claims that those same letters catalog many dire risks and "contrary science" the Project presents to groundwater that WWP claims BLM ignored. *Id.* at 10. WWP does not make a coherent argument that the letters were considered but not included under the second *Lands Council* exception. As noted above, NDEP has issued the state water pollution control permit that is the subject of these letters.

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BLM identified the subsequent steps the proponent is required to complete in order to construct the mine does not, as WWP argues, equate to BLM relying on NDEP's specific issues raised in its separate permitting process. Distinct from NEPA, "the water quality regulatory agencies … prepare *additional* analysis, conduct monitoring, and require mitigation as needed to ensure compliance with all applicable standards before permits could be approved." *W. Org. of Res. Councils v. BLM*, 591 F. Supp. 2d 1206, 1222 (D. Wyo. 2008); *see also Okanogan Highlands All. v. Williams*, 236 F.3d 468, 472 (9th Cir. 2000) (acknowledging that state water pollution permits were outside of the NEPA process by noting that the Forester did not "use the [state water pollution permit mitigation] plan itself or the data therein" submitted by the project applicant to the state regulator in its NEPA analysis and thus did not "journey outside the record"). Thus, in conducting the required environmental review, agencies are "entitled to rely upon the certification from the [applicable state agency] that the project [will] meet[] the relevant water quality conditions" required by the Project's ROD. *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 956 (9th Cir. 2008). The specifics of those separate state permitting processes are not relevant to the federal NEPA analysis. *Cf. S. Fork Band Council of W. Shoshone v. U.S. DOI*, 588 F.3d 718, 726 (9th Cir. 2009) (per curiam) ("A non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency's obligations under NEPA."); *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (emphasizing that state processes are separate, the court warned "existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis").

Were the Court to conclude that any document that BLM is copied on in any related state permitting process must be included in *BLM's* administrative record, BLM would be forced to wait until all such state permitting decisions concluded before issuing the ROD. That is simply not the law or the process and would conflict with and undermine one of the purposes of adaptive management in the NEPA process. "The procedural requirements of NEPA do not force agencies to make detailed, unchangeable mitigation plans for long-term development projects." *Or. Nat. Desert Ass'n v. BLM*, No. 08-1271-KI, 2011 U.S. Dist. LEXIS 131784, at *55 (D. Or.

Nov. 15, 2011) (citation omitted). To do so would tie the hands of agencies and a proponent from using the best information that is compiled from ongoing monitoring and analysis. Federal NEPA review runs on a different track from the state permitting processes, which the EPA acknowledged in its comments on the Project observing "NDEP's Water Pollution Control Permit may involve other monitoring and mitigation requirements" than those outlined in the FEIS. TPEIS-0695, Detailed Comment at 2. While "it would be incongruous to conclude that the [agency] has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary," that is just what WWP is arguing for here. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352–53 (1989). Instead, under NEPA the NDEP may submit comments, which it did, flagging a further permit would be necessary, TPEIS-0519, and then conduct its own, separate permitting process.[3] This is precisely how adaptive management works and it allows for more effective mitigation.

Because the NDEP letters are a product of a separate permitting process unrelated to BLM's NEPA review, the letters are not relevant and do not meet the first *Lands Council* exception for supplementation in the record. WWP later attempts to justify supplementation of the record with the NDEP letters under *Lands Council* exception three, claiming the letters help explain the "highly technical matters [that] are involved" in "water pollution, wildlife, and other serious Project impacts." ECF 11 at 16. But WWP "fails in [its] motion to identify a single complex or technical issue than only can be explained" with the NDEP letters as a guide. *United States v. Iron Mt. Mines*, 987 F. Supp. 1250, 1262 (E.D. Cal. 1997) (declining to supplement the

[3] The caselaw WWP cites to support its argument that BLM "studiously ignore[ed]" the NDEP letters, ECF 111 at 9, is inapposite to the current situation. In *American Wild Horse Preservation Campaign v. Salazar*, the expert declarations the agency ignored were heavily relied upon within filed comments during the NEPA process, the declarations had been submitted multiple times to the agency and were central to a pending lawsuit on the same type of agency action. 859 F. Supp. 2d 33, 38, 42–46 (D.D.C. 2012); *see also Ctr. For Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1164–65, 1167 (9th Cir. 2003) (concluding the agency needed to respond to properly filed NEPA comments); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (determining the agency insufficiently considered a report in the NEPA record). Here, the NDEP letters were not addressed to BLM as a comment in the NEPA process and, NDEP did submit its comments which BLM considered and are part of the record. Nor were they central to a pending lawsuit on the same type of agency action. BLM was simply copied on the letters as an observer of the separate state permitting process. These letters were not part of the NEPA process.

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record where the movant could not show bad faith, reliance on extra-record evidence, or that the requested documents explained technical terms).

WWP then argues that BLM exhibited bad faith by "attempt[ing] to preclude this Court from reviewing the NDEP letters" by excluding them from the record. ECF 111 at 17. But if this were enough to demonstrate "bad faith" then every document BLM decides is not appropriately within the record would constitute "bad faith" which clearly is not the law. Simply arguing "that the Court should look beyond the existing record," *Carlsson v. U.S. Citizenship & Immigr. Servs.*, No. 2:12-cv-07893-CAS(AGRx), 2015 U.S. Dist. LEXIS 39620, at *24–25 (C.D. Cal. Mar. 23, 2015), with no "independent evidence of improper conduct" does not "establish the requisite bad faith." *San Luis Obispo Mothers for Peace v. U.S. NRC*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc); *see also Liangcai Dai v. U.S. Citizenship & Immigr. Servs.*, No. CV 16-05381 AB (AFMx), 2017 U.S. Dist. LEXIS 225692, at *7 (C.D. Cal. Apr. 7, 2017) ("[T]he existence of a disagreement with an agency decision is not a substantial showing of bad faith…. [such that] Plaintiffs … me[e]t the high bar of showing a bad-faith exception to the record rule for their APA claims."). The fact that a state agency raised concerns in a separate permitting process (and ultimately resolved those concerns and issued the permit) does not even "'raise[] the *specter* of improper motive and bad faith" much less "establish the requisite 'strong showing of bad faith or improper behavior' necessary to justify" supplementing the record. *Protect Lake Pleasant, Ltd. Liab. Co. v. Johnson*, No. CIV 07-0454-PHX-RCB, 2008 U.S. Dist. LEXIS 118275, at *24–25 (D. Ariz. May 5, 2008) (citation omitted). WWP fails to demonstrate that the NDEP letters meet any of the exceptions to overcome the presumption of regularity to supplement the record in this case.

B. The NDEP Letters Should Not be Admitted as Extra-Record Evidence or Subject to Judicial Notice.

WWP's failure to demonstrate the letters should supplement the record is dispositive of WWP's alternative arguments that the Court consider the NDEP letters as extra-record evidence or take judicial notice of the factual statements therein. "[A] party cannot circumvent the rules governing record supplementation by asking for judicial notice instead of

supplementation…. [A] party must still satisfy one of the ... exceptions to the general rule against supplementation." *Today's IV, Inc. v. Fed. Transit Admin.*, No. LA CV13-00378 JAK (PLAx), 2014 U.S. Dist. LEXIS 151185, at *21 n.8 (C.D. Cal. Sep. 12, 2014) (citation omitted). BLM "did not rely on the information contained in the [WWP's] proffered documents, nor does the information address issues not already present in the record." *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990). Ultimately, WWP has

> 'not demonstrated that the criteria used by NDEP ha[s] any relevance to a NEPA analysis…. [T]he NDEP Notice does not assist in understanding either the subject matter of this case or BLM's decision.' The [NDEP letters were] not relied on by the Bureau, [are] not necessary to explain technical terms, and do[] not demonstrate bad faith on the part of the Bureau.

Great Basin Mine Watch v. Hankins, 456 F.3d 955, 976 (9th Cir. 2006) (denying admittance of an NDEP notice as extra-record evidence). The Court should deny WWP's request to take judicial notice of or otherwise admit the NDEP letters in this NEPA proceeding.[4] Moreover, given NDEP's issuance of the permit that is the subject of these two letters, if the Court were to take judicial notice of the letters, in order to provide for complete and fair context of those letter the Court then also should take judicial notice of NDEP's decision to issue the permit which also demonstrates the state agency's satisfaction of any issues raised during those separate proceedings.

C. WWP Erroneously Asserts that Lithium Nevada Received the PDEIS and, Therefore, it Must Be Included in the Administrative Record.

Many different agencies cooperate in the preparation of an EIS. *N. Plains Res. Council v. U.S. BLM*, Nos. CV 03-69-BLG-RWA, CV 03-78-BLG-RWA, 2005 U.S. Dist. LEXIS 4678, at *35 (D. Mont. Feb. 25, 2005); *see* 40 C.F.R. § 1506.2(a) ("Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so."). The drafts shared amongst those agencies are deliberative because BLM

[4] The letters from NDEP and the U.S. Army Corps of Engineers (the Corps) that BLM did include in the record are clearly distinguishable from the two permitting process letters WWP raises here. *See* ECF 111 at 12 n.4. TPEIS-0477 and TPEIS-0414 are a final permitting decision from NDEP and the Corps' authorization of certain aspects of the Project. WWP cannot point to any letters included in the record that represent those agencies' deliberations *prior* to authorizing the Project, but those separate agency permitting deliberations are exactly what WWP urges the Court insert into the administrative record here.

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"cooperate[s] with State and local agencies to the fullest extent possible" by soliciting and sharing internal deliberations. 40 C.F.R. § 1506.2(c). When evaluating an AR, "privileged materials are not part of the administrative record in the first instance." *Asse Int'l, Inc.*, 2018 U.S. Dist. LEXIS 115514, at *7; *see Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 85 (D.D.C. 2018) ("[T]o the extent there are other internal, deliberative (and predecisional) documents that the agency did consider, those documents would be protected by the deliberative process privilege and thereby should not be added to the record."). It is a "settled proposition[]" that "further judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the working of another branch of Government and should normally be avoided." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (citation omitted). As discussed above, WWP is wrong in its allegation that Lithium Nevada received the PDEIS. *See* Ex. 1. Lithium Nevada did not receive the DEIS until it was made publicly available. *Id.* Moreover, irrespective of the pre-decisional deliberative nature of the PDEIS, WWP does not carry its burden to demonstrate that the PDEIS should supplement the record as a "relevant factor" the BLM should have considered under the first *Lands Council* exception or because the agency demonstrably relied on the PDEIS under the second *Lands Council* exception. *See* ECF 111 at 12–14.

The fact that a draft document exists does not "'overcome' the presumption of regularity" that the agency properly excluded the document. *Save the Colo. v. U.S. DOI*, 517 F. Supp. 3d 890, 897 (D. Ariz. 2021). WWP must provide "clear evidence" to overcome the presumption, but it only asserts that the PDEIS was written and circulated and therefore must have been "heavily relied" upon by BLM. *W. Watersheds Project v. BLM*, No. 3:11-cv-00053-HDM-VPC, 2012 U.S. Dist. LEXIS 1068, at *3 (D. Nev. Jan. 4, 2012); *see* ECF 111 at 12–14. WWP does not explain what statement or information within the PDEIS that BLM should have or could have utilized in its decision that is not already included in the record. "The limited evidence provided by Plaintiffs shows only that the outstanding documents were in the agency's possession. Courts have repeatedly found that possession is insufficient to prove actual consideration." *Safari Club Int'l*, 2016 U.S. Dist. LEXIS 195006, at *13. As such, WWP does not substantiate its request to include the PDEIS as relevant or considered under the first or

second *Lands Council* exceptions. *Save the Colo.*, 517 F. Supp. 3d at 897–98 (concluding that "allowing deliberative materials in the administrative record would chill frank discussion … [and] harm the quality of agency decisions" and declined to supplement the record with "draft documents"); *see Cape Hatteras Access Pres. All. v. U.S. DOI*, 667 F. Supp. 2d 111, 115 (D.D.C. 2009) (concluding it would not supplement the record with an earlier BiOp that had been incorporated into the decision under review because "the already substantial administrative record[] makes it unclear how judicial review could be any more effectual were the Court to consider the BiOp").

Even were WWP able to articulate "clear evidence" that the PDEIS included information that BLM relied on, the PDEIS was deliberative and is not properly part of this record. *See Save the Colo.*, 517 F. Supp. 3d at 897 (observing this "Court is not in a position to 'probe the mental processes' of agency decision-makers and interfere with the government's ability to craft well-considered policy by requiring the Department to supplement the administrative record with deliberative" and draft documents). The ROD for the Project clearly stated that "NDOW, NDCNR (represented by the Sagebrush Ecosystem Technical Team), and Humboldt County accepted the invitation [to] …. participate[] as cooperating agencies during the [NEPA] process and through regular meetings in *internal* document review actively coordinated with the BLM on this EIS." TPEIS-0452 at AR-052521 (emphasis added). As such, NDOW, NDCNR, and Humboldt County all signed MOUs with BLM affirming that they would "maintain the confidentiality of pre-decision work products" that they received through the NEPA process. *See* TPEIS-0470 at AR-052978 (Humboldt County); *id.* at AR-052985 (NDCNR); *id.* at AR-052991 (NDOW). Lithium Nevada did not receive a copy of the PDEIS nor did Lithium Nevada receive the DEIS prior to it being available to the public. WWP presents no evidence to suggest that the relevant coordinating state and federal agencies failed to uphold their confidentiality requirements. *See* Ex. 1. Sending the PDEIS to the cooperating state agencies and requesting their feedback under the confidentiality provisions in the MOUs is still covered under the deliberative process privilege because "the state agency is, in effect, drawn into the deliberative process and consulted as to the outcome" by the BLM. *GE v. U.S. EPA,* 18 F. Supp. 2d 138, 142

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(D. Mass. 1998) (concluding that the deliberative process privilege applied to data requested and received from state agencies because "letters from a federal agency to a state agency that solicit or respond to the state agency's input in an effort to coordinate and tailor joint regulatory efforts may be no less a part of the federal agency's deliberative processes than the state agency's recommendations or advice when acted on at the federal level"); *cf. Am. Trucking Ass'ns v. City of Los Angeles*, No. CV 08-4920-CAS (CTx), 2009 U.S. Dist. LEXIS 135198, at *15–17 (C.D. Cal. Nov. 12, 2009) (concluding that a state agency did not waive deliberative process under FOIA when it disclosed certain documents to a federal agency due to the express confidentiality clause in a statute referring to the two entities).[5]

D. Conservation Group Plaintiffs Provide no basis for including the NDOW Comment Letter.

WWP argues that BLM provided no "legitimate excuse" for omitting the original NDOW Comment letter in the administrative record, even though the record included a detailed spreadsheet listing every NDOW comment and the BLM's response. ECF 111 at 3. WWP ignores the express provisions of the applicable regulations and that BLM routinely provides summaries of comments received on the DEIS. 40 C.F.R. § 1503.4(b) ("All substantive comments received on the draft statement (*or summaries thereof* where the response has been exceptionally voluminous), should be attached to the final statement…." (emphasis added)); *see also Mont. Wilderness Ass'n & Greater Yellowstone Coal. v. McAllister*, No. CV 07-39-M-DWM, 2008 U.S. Dist. LEXIS 136212, at *59 (D. Mont. Sep. 30, 2008) (acknowledging that the FEIS may include substantive comments received on the DEIS "or summaries thereof" (citing 40 C.F.R. § 1503.4(b)); *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 163 F. Supp. 2d 1222, 1247 (D. Or. 2001) (observing that the agency "summarizes

[5] WWP argues that even if the PDEIS is deliberative, BLM "failed to justify why purely factual matters" were not segregated out of the PDEIS and included in the record. 111 at 14 n.6. BLM did not assert a privilege over documents in the record, it properly omitted deliberative documents *from* the record, and as such does not need to assert the deliberative process privilege or segregate out materials from non-record documents in a privilege log as a consequence of asserting the privilege. *See Save the Colo.*, 517 F. Supp. 3d at 902 ("Because this Court has held that deliberative documents are not part of the record to begin with, there is no reason for the Department to file a privilege log as to these documents." (internal citation omitted)).

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5441 KIETZKE LANE, SUITE 200
RENO, NV 89511-2094

the public comments the agency received, and summarizes its responses to those comments), *overruled on other grounds League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1193 (9th Cir. 2002).

WWP's only argument as to why the detailed summary is insufficient for the Court to review BLM's reasoning is that, according to WWP, without the underlying letter "the full meaning of the summary is not clear." ECF 111 at 17. But WWP does not explain what is not clear about the summary. This vague insinuation that the summary somehow mischaracterizes NDOW's actual comments does not explain what information WWP believes is obscured by the summaries. WWP does not describe why the Court should supplement the record with the NDOW Comment letter to understand whether BLM failed to consider "all relevant factors," whether the "highly technical matter" in the summary would be better explained, or how the use of a summary instead of every piece of underlying data constitutes "bad faith." ECF 111 at 15–17. Without "'concrete evidence' showing that the [underlying letter] was before the agency" such that it was "heavily relied upon" when "the agency made its current decision," WWP cannot carry its burden to supplement the record, proffer the NDOW Comment letter as extra-record evidence, or judicially notice the letter. *Pinnacle Armor, Inc.*, 923 F. Supp. 2d at 1240–41 (citation omitted); *see also Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 28 (D.D.C. 2013).

Attempting to supplement the record with "underlying documents" that are only referred to "by the agency decisionmaker … 'stretches the chain of indirect causation to its breaking point and cannot be a basis for compelling completion of an Administrative Record.'" *Save the Colo.*, 517 F. Supp. 3d at 898 (citation omitted). "[T]he agency is entitled to a strong presumption that the record properly designates all data directly or indirectly considered by the decisionmakers." *Banner Health*, 945 F. Supp. 2d at 27–28. "[T]he mere fact that the [BLM] had [the original letter] available to it does not …. meet [WWP's] burden to prove [this letter] belong[s] in the record." *Oceana, Inc.*, 290 F. Supp. 3d at 82. WWP must "identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents or data that are 'likely' to exist as a result of documents or other data that are included in the administrative record." *Alegre v. United States*, No. 16-cv-2442-AJB-

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5441 KIETZKE LANE, SUITE 200
RENO, NV 89511-2094

KSC, 2021 U.S. Dist. LEXIS 211670, at *15 (S.D. Cal. July 29, 2021) (citation omitted). WWP here supposes that BLM somehow erased the context of NDOW's comments by using a summary, which is belied by the plain text of the summary. *See* TPEIS-0359 at AR-045040, AR-045042 (24-page summary of NDOW's comments expressing NDOW's "significant concern[s]" about the NEPA process timeline and "highlight[ing] [its] concern" about particular aspects of the PDEIS). Nowhere does WWP explain how the underlying letter, as opposed to the summary that includes BLM's response to each comment, is "sufficiently integral to the final analysis that was considered by the Secretary, and the Secretary's reliance thereon sufficiently heavy, so as to suggest that the decisionmaker constructively considered it." *Banner Health*, 945 F. Supp. 2d at 28; *see also Nw. Env't Advocates v. U.S. Fish & Wildlife Serv.*, No. 3:18-CV-01420-AC, 2019 U.S. Dist. LEXIS 219178, at *20 (D. Or. Dec. 20, 2019) (denying supplementation of the record with a prior BiOp because "explicit references to a particular document, even when made by the agency in relevant contexts, do not necessarily demonstrate the document was before that agency when the decision was made").

Ultimately, where BLM "cogently explained how it [addressed NDOW's comments] … [the] raw underlying source [letters] are not needed to determine whether the agency considered the relevant factors." *Lee Mem'l Hosp. v. Burwell*, 109 F. Supp. 3d 40, 54 (D.D.C. 2015); *see also Granat v. USDA*, No. 2:15-cv-605-MCE-EFB, 2016 U.S. Dist. LEXIS 42784, at *11–12 (E.D. Cal. Mar. 29, 2016) (declining to supplement the AR with data from a prior Land Management Plan ("LMP") that was incorporated into the challenged plan because "[t]he LMP is already included in the administrative record, and the Forest Service relied on the management direction contained therein, not the administrative record that underlies it, in creating the" challenged plan" (emphasis added)). Furthermore, because WWP has "made no showing that the existing administrative record does not include the underlying" letter's information adequately through the summary provided, it does not overcome the presumption of regularity that the administrative record is complete. *NRDC v. Norton*, No. 1:05-CV-01207 OWW TAG, 2006 U.S. Dist. LEXIS 32827, at *26 (E.D. Cal. May 13, 2006). And if WWP means to "argue that because the BLM did not make available the underlying [letter] to come to its conclusion

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RENO, NV 89511-2094

that … it did not independently analyze the data[,] …. [t]his implication is not supported by any evidence." *Desert Protective Council v. U.S. DOI*, 927 F. Supp. 2d 949, 966 (S.D. Cal. 2013). BLM provided a 24-page spreadsheet listing every comment NDOW made in its letter and provided an answer or explanation as appropriate to each comment. *See generally* TPEIS-0359. This document is detailed and explanatory and WWP fails to provide any evidence that BLM considered something within the underlying letter that is not also in the summary in the record. "There are no allegations of bad faith or technical subject matter that [the letter] could explain, and the [letter is] not necessary to determine if the [BLM] considered relevant factors in its decision." *Conservation Cong. v. U.S. Forest Serv.*, 409 F. Supp. 3d 861, 872 (E.D. Cal. 2019). Because the NDOW Comment Letter does not fall under any *Lands Council* exceptions, the Court should deny the request to supplement the record with the letter.[6]

CONCLUSION

For all these reasons, the Court should deny WWP's motion to supplement the administrative record, to consider the documents extra-record or to take judicial notice of them.

Dated: November 12, 2021.

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RENO, NV 89511-2094

[6] Because WWP does not justify how the NDOW Comment letter falls under any *Lands Council* exceptions, it is also not properly included in the record, considered as extra-record evidence, or judicially noticed. *See Today's IV, Inc.*, 2014 U.S. Dist. LEXIS 151185, at *21 n.8.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/ *Laura K. Granier*
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EXHIBIT INDEX

EXHIBIT	DESCRIPTION	# OF PAGES
1.	Declaration of Catherine Clark	2

17705974_v1

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5441 KIETZKE LANE, SUITE 200
RENO, NV 89511-2094