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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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| WESTERN WATERSHEDS PROJECT, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. DEPARTMENT OF THE INTERIOR, et al.,<br><br>Defendants,<br><br>and<br><br>LITHIUM NEVADA CORPORATION,<br><br>Intervenor-Defendant. | Case No.: 3:21-cv-0103-MMD-CLB<br><br>PLAINTIFFS' RESPONSE OPPOSING MOTIONS TO STRIKE (ECF #s 35 & 36) |

## INTRODUCTION

Plaintiffs oppose Defendants' Motions to Strike (ECF #s 35 & 36) the Nevada Department of Environmental Protection (NDEP) letter and the Declaration of Terry Crawforth submitted with Plaintiffs' Reply in support of their Motion for Preliminary Injunction (ECF #s 32-1, 32-4). Plaintiffs have repeatedly informed opposing counsel that they would not oppose BLM/LNC filing short surreplies to respond to the new evidence. *See* Cert. of Arwyn Carroll ¶ 3 (ECF #35-1), Decl. of Laura Granier ¶ 3 (ECF #36-1).[1] Since Plaintiffs do not oppose this Court granting BLM/LNC leave to file short surreplies, and the Court may properly consider the evidence under exceptions to the Record Rule, the Court should deny the Motions to Strike. *See* Pimentel & Sons Guitar Makers, Inc. v. Pimentel, 229 F.R.D. 208, 210 (D.N.M. 2005) (considering affidavits filed with reply brief where surreply had been filed); Greater Yellowstone Coal. v. Timchak, No. CV-08-388-E-MHW, 2008 WL 5101754, at *17 n. 14 (D. Idaho Nov. 26, 2008), aff'd in part, vacated in part, remanded, 323 F. App'x 512 (9th Cir. 2009) (denying motion to strike and considering surreply to respond to declarations filed with reply).

First, the NDEP letter falls within recognized exceptions to the "record rule" because "admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision," "supplementing the record is necessary to explain technical terms or complex subject matter," and BLM acted in bad faith because it knew the Project would violate state water quality standards, yet stated otherwise in its Response brief. *See* San Luis & Delta-Mendota Water Auth. V. Locke, 776 F.3d 971, 992 (9th Cir. 2014) (listing record rule exceptions).

BLM's Response Brief contends "BLM reasonably concluded that proposed operations would not violate applicable water-quality standards." BLM at 25 (ECF #30). But nearly two

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[1] Rather than seeking unopposed leave to file surreplies, Defendants have elected to file motions to strike and requested expedited consideration. As Plaintiffs notified opposing counsel, they also oppose Defendants' requests for expedited consideration, which prejudices them by denying them adequate time to respond. *See* Certification of Arwyn Carroll ¶ 4 (ECF #35-1). Nevertheless, Plaintiffs submit this brief on an expedited basis.

months earlier, NDEP had sent LNC a letter, copied to Ken Loda of BLM, notifying LNC/BLM that due to projected groundwater contamination, the Project as authorized would violate state law. NDEP letter at 3 of 6 (ECF #32-4). Now BLM/LNC try to shield these facts from the Court's scrutiny, claiming the Court cannot consider the NDEP letter because it post-dates the Record of Decision (ROD). The letter falls within the Ninth Circuit's exceptions to the Record Rule and Plaintiffs request that the Court take judicial notice of the letter, since it is a state government document whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201; Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information made publicly available on a government website).

Second, the Court may consider the Crawforth Declaration both because Plaintiffs use it only to show irreparable harm and because it falls within Record Rule exceptions. LNC concedes that "courts may consider extra-record evidence in determining whether a party will suffer irreparable harm in the absence of injunctive relief." LNC Mot. to Strike at 8 (citing Nw. Envtl. Def. Ctr. v. United States Army Corps of Eng'rs, 817 F. Supp. 2d 1290, 1300 (D. Or. 2011)). The Crawforth Declaration also falls within the relevant factors and complex subject matter Record Rule exceptions. *See* Locke, 776 F.3d at 992.

To rebut Plaintiffs' showing of irreparable harm, both BLM and LNC argued that Plaintiffs could not show irreparable harm to sage-grouse or sagebrush habitats from Historic Properties Treatment Plan (HPTP) excavations. *E.g.*, BLM at 10. Although neither submitted any declaration from a qualified sagebrush expert, BLM submitted the Declaration of Mark E. Hall, an archaeologist, which draws numerous erroneous inferences about impacts to sage-grouse from those activities. For instance, Mr. Hall claims that "one can question the suitability of the areas for Sage Grouse within 0.6 miles of the road [due to noise]." Hall Decl. ¶ 14 (ECF #30-1).

While Dr. Clait E. Braun's Declaration addresses some of this material, to make sure they carry their burden of showing irreparable harm, Plaintiffs filed the Declaration of Terry Crawforth, retired Director of the Nevada Department of Wildlife (NDOW), who provides further information about the Project's impacts to sage-grouse and other wildlife based upon his

42 years of experience working for NDOW. Mr. Crawforth states, for instance, "[a]s long as noise does not interfere with the lek site, the habitat is still likely to be used by sage-grouse," and the HPTP excavations would degrade the last significant south-facing winter habitat in the Montana Mountains, where he has seen "coveys" of sage-grouse in winter. Decl. of Terry Crawforth ¶¶ 23-25, 29-30 (ECF #32-1).

Both the NDEP letter and the Crawforth Declaration respond to arguments and evidence presented in BLM/LNC's response briefs. Responding to such arguments "is what a reply is for." Sobel v. Hertz Corp., No. 3:06 CV-00545-LRH, 2013 WL 5202027, at *8 (D. Nev. Sept. 13, 2013), modified, No. 3:06-CV 00545-LRH, 2013 WL 5824379 (D. Nev. Oct. 28, 2013). The Court may take judicial notice of the NDEP Letter and Plaintiffs rely upon the Crawforth Declaration exclusively to further prove they are likely to suffer irreparable harm, which LNC concedes is a proper use of extra-record evidence. Moreover, both the NDEP Letter and the Crawforth Declaration fall within the exceptions to the Record Rule. Because Plaintiffs do not oppose allowing Defendants to file short replies to the new evidence, *see* LNC Mot. to Strike at 5 n. 5, the Court should fully consider these highly relevant documents.

## I. The Court May Consider The NDEP Letter.

Plaintiffs do not dispute that evidence for claims challenging agency actions under the Administrative Procedure Act, 5 U.S.C. § 706(2), like the ones here, is generally limited to the Administrative Record. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (the "Record Review Rule"). The Ninth Circuit recognizes exceptions to this general rule, however:

> (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Sw. Ctr. for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996).

Indeed, the Ninth Circuit has long recognized that a court can consider extra-record evidence relevant to the substantive merits of the agency action for "background information" or

to "ascertain[] whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." Asarco, Inc. v. E.P.A., 616 F.2d 1153, 1160 (9th Cir. 1980). "[E]specially when highly technical matters are involved," a court may not be able to determine whether the agency considered all relevant factors "unless it looks outside the record to determine what matters the agency should have considered but did not." Id.

An agency may also look outside the record when "there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C.Cir.1998) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)). In American Bar Association v. United States Department of Education, for example, where the record was silent on a key issue, the District of D.C. allowed extra-record evidence—even though the evidence post-dated the challenged actions—because it was "highly relevant" and contradicted the agency's position in litigation that it had not changed its interpretation of law as alleged by the Plaintiffs. 370 F. Supp. 3d 1, 38 (D.D.C. 2019).

As an initial matter, it is worth noting that no Administrative Record has been filed here. As a result, this case differs substantially from most of the cases that BLM/LNC cite. Instead, like in American Bar Association the Record is bare because no record has been filed yet. Also like in that case, the NDEP letter—a government document— contradicts the agency's litigation position that it "reasonably concluded that proposed operations would not violate applicable water-quality standards." BLM at 25. On May 3, 2021, NDEP asserted in a letter addressed to LNC and copied to BLM:

> Modeling results predict that the proposed full backfill of the open pits with waste rock and coarse gangue material will result in ground water exceedances…up to 300 years post closure. As discussed during the virtual meeting between LNC and the Division on 6 April 2021, the Division cannot authorize a facility to degrade waters of the State and subsequently mitigate impacts. Pursuant to NAC445A.424, a facility, regardless of size or type, may not degrade waters of the State.

NDEP letter at 2-3 of 6. Yet nearly two months later, BLM claimed in briefing before this Court that "the Project approval simply does not authorize Lithium Nevada to violate Nevada law or regulations." BLM at 24.

When BLM made that statement, both BLM and LNC were well aware that the expert State agency, NDEP, believed the Project as authorized would violate State law due to impacts to groundwater. Indeed, NDEP had "implement[ed] a Permit limitation to restrict mining below the water table (regional aquifer) until additional studies can be completed and a mine plan is proposed which does not result in the degradation of waters of the State." NDEP Letter at 3 of 6. Thus, it would be reasonable for the Court to conclude the agency acted in "bad faith" when it later claimed the Project would not violate water quality standards. The letter also contradicts BLM's litigation position that the ROD did not authorize actions that would violate State law and is therefore "highly relevant" to Plaintiffs' claims that BLM violated NEPA and FLPMA. *See* Pls.' Reply at 22-23. For both reasons, the Court should consider the letter as extra-record evidence, like in American Bar Association.

The NDEP letter is also necessary to explain complex subject matter and show whether the agency considered all "relevant factors." The Project groundwater impacts are discussed in Appendix P to the FEIS—a 172-page, highly-technical report prepared by Piteau Associates for LNC. *See* LNC Ex. 6. Nevertheless, Plaintiffs and the Environmental Protection Agency (EPA) notified BLM that the Project would allow antimony, a harmful pollutant, to be released into groundwater in violation of water quality standards. Pls.' Mot. at 22 (ECF #23). BLM elected to disregard these comments. In its Response brief, BLM made an argument that appears plausible at first blush, claiming that "antimony levels would not exceed applicable ambient water quality standards," and therefore BLM "reasonably concluded" that approving the Project would not cause unnecessary or undue degradation. BLM at 24. The expert state agency's concurrence with Plaintiffs' (and the EPA's) assessment that the Project as approved would violate water quality standards deflates this rhetoric. BLM clearly did not consider all "relevant factors" because it ignored the violations. The Court can consider this evidence under Asarco.

Finally, since the NDEP letter is a state document whose accuracy cannot reasonably be questioned, the Court may take judicial notice of the letter. Fed. R. Evid. 201; Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information made publicly available on a government website). Judicial notice is warranted here as the expert state agency's conclusion that the Project would violate state water quality standards should not escape scrutiny by this Court.

## II. The Court May Consider The Crawforth Declaration.

The limited purpose a preliminary injunction serves—preserving the relative positions of the parties until the case can be heard on the merits—means that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981). A court "may even give inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984).

"[T]he submission of affidavits in support of or opposition to a preliminary injunction is both customary and appropriate." Bracco v. Lackner, 462 F. Supp. 436, 442 n. 3 (N.D. Cal. 1978). Courts in the Ninth Circuit frequently admit expert declarations like the Crawforth Declaration here to show irreparable harm. Souza v. California Dep't of Transportation, No. 13-CV-04407-JD, 2014 WL 1760346, at *7–8 (N.D. Cal. May 2, 2014) (finding irreparable harm based upon expert declaration), Bair v. California Dep't of Transp., No. C 10-04360 WHA, 2011 WL 2650896, at *3 (N.D. Cal. July 6, 2011) (same).

In response to Plaintiffs' Motion, both BLM and LNC attacked Plaintiffs' claims that the Historic Properties Treatment Plan (HPTP) activities would cause them irreparable harm, by portraying the effects of the 525 4.5 foot-deep holes and 130-foot-long, 9 foot deep trenches as "minimal." Neither BLM nor LNC offered a declaration from anyone qualified to testify as an expert on sage-grouse or sagebrush habitats. Instead, BLM filed a Declaration of archaeologist Mark E. Hall, which made several misleading assertions or insinuations regarding the effects to

sage-grouse from the HPTP activities—including that the Project area might be unsuitable for sage-grouse because it is located near a noisy road, that the disturbance would be minimal, and that adverse impacts would be mitigated because holes and trenches would be filled in and possibly reseeded. *See* Hall Decl. ¶¶ 13-15. BLM relied on Mr. Hall's Declaration in its Response brief to argue plaintiffs could not show irreparable harm to sage-grouse or sagebrush habitats because "[t]he contemplated disturbance would occur over a mile away from the nearest lek and affect less than 0.0001% of the Lone Willow Sage Grouse Population Management Unit (PMU)—and a portion of the area disturbed may not even be suitable for greater sage grouse." BLM at 10. BLM's failure to grasp the significance of impacts to sagebrush and sagebrush species only underscores the need for Dr. Crawforth's expert testimony.

Terry Crawforth's Declaration addresses the irreparable harm to sage-grouse and sagebrush from the HPTP activities—which BLM plainly misunderstands— by expanding upon facts already asserted to by Dr. Clait E. Braun. Mr. Crawforth addresses Mr. Hall's suggestion that harm would not occur since the sage-grouse habitat within 0.6 miles of a road might not be suitable for sage-grouse due to road noise:

> Disturbance to sage-grouse from noise impacts can interfere with lekking, when noise interference may prevent hens from locating dominant males. However, that habitat used for nesting or brood-rearing may be close to a road or other noise source does not mean it will not be used by sage-grouse. Sage-grouse hens typically nest within about 4-miles of the lek where they bred. As long as noise does not interfere with the lek site, the habitat is still likely to be used by sage-grouse.

Crawforth Decl. ¶ 25. Further, he annually "see[s] large coveys of wintering sage grouse on the Project site, often near the small pit in the middle of the Project area." *Id*. ¶ 24. As Dr. Braun has stated, "destruction of winter habitats can exert a powerful influence on sage-grouse populations by increasing movements during periods of environmental stress, causing sage-grouse to use suboptimal habitats and increasing loss to predation." Decl. of Dr. Clait E. Braun ¶ 32 (ECF #23-30). Moreover, "[s]ince sage-grouse typically nest within about 4 miles of the lek where they breed, sage-grouse that attend the Montana-10 lek likely use the mapped nesting and brood-rearing habitat in the Project area…." *Id*. ¶ 38. Mr. Crawforth and Dr. Braun confirm that sage-

grouse actually use the habitat in the Project area and will be adversely affected by its permanent destruction or degradation from the Project activities, including the HPTP.

Mr. Crawforth also responds to BLM's statements that the disturbed areas will be restored and possibly reseeded, and its suggestion that because the HPTP activities will occur over a mile from a lek and cover a small total area, their impacts to sage-grouse will be minimal. *See* BLM at 10. In truth, sagebrush cannot be successfully restored and the activities will "remove sagebrush that cannot be restored in our lifetimes and create a weed vector at each disturbed location. Even if LNC and/or BLM reseed the areas, they will not be able to re-create the quality of habitat removed." Crawforth Decl. ¶ 33; *see also* Braun Decl. ¶¶ 28, 30, 42 ("sagebrush, once destroyed, can take decades to re-establish"; "any kind of ground disturbance can act as a weed vector"; "destruction of fragile sagebrush habitats is a virtually permanent effect.") Thus, the HPTP excavations "have the immediate potential to harm sage-grouse and its habitat by impacting sagebrush or forbs used by sage-grouse." Braun Decl. ¶ 30. The HPTP will remove irreplaceable sagebrush habitat and create weed vectors at a network of sites throughout the area.

Further, "sage-grouse have high site-fidelity and will return to the same habitats they have seasonally used historically, even after those habitats have been degraded. When sage-grouse use degraded habitats it decreases their chances of successful breeding and survival." Crawforth Decl. ¶ 26. Although only a small total area of habitat will be disturbed, it is likely to exert an outsized effect because the Project area provides "the last, large scale, unburned south facing sagebrush ecosystem on the entirety of the Montana Mountains." *Id.* ¶ 29. The bottom line is, "[a]nimals need the sagebrush community at Thacker Pass for cover and food in the winter and if they don't have that there will be significant wildlife mortality…." *Id.* ¶ 31. Thus, that only a small total area may be disturbed and that LNC may fill in holes or reseed does not change the likelihood of irreparable harm to Plaintiffs' interests in sagebrush and sage-grouse and other wildlife in the Project area. *See* Pls.' Reply at 3 (describing interests); *see also* Pls.' Exs. 26-29 (Plaintiffs' declarations describing interests and harms).

Mr. Crawforth's declaration also responds to BLM's characterizations of its "robust NEPA analysis" and its contention that NEPA violations cannot cause irreparable harm. BLM at 2, 10. Plaintiffs have consistently asserted that "had this project not been fast-tracked for approval before the end of the Trump Administration, the FEIS might have been higher quality and might have done a better job taking into account public input." Decl. of Kelly Fuller ¶ 22 (ECF #23-27). Mr. Crawforth confirms that BLM provided inaccurate information about sage-grouse occupancy of the Project area at a public meeting and that BLM employee Ken Loda cut one public meeting short, claiming "that he was bound by the 1872 mining law and the recent presidential proclamation on strategic minerals and that he had to "get this project done, approved, and off his desk."" Crawforth Decl. ¶¶ 11-12. This supports Plaintiffs' assertions in their briefing and declarations that BLM's rushed NEPA process caused it to overlook environmental impacts and mitigation, causing them irreparable harm. *See* Pls.' Mot. at 37 (ECF #23); Pls.' Reply at 3-4 (ECF #32). Nevertheless, Plaintiffs have not relied upon Mr. Crawforth's testimony about the NEPA process in their briefing.

While BLM contends Plaintiffs are impermissibly relying on the Crawforth Declaration to determine the wisdom or correctness of the agency's decision, BLM is unable to point to anywhere in Plaintiffs brief where Plaintiffs do so. Plaintiffs rely on Mr. Crawforth's Declaration in a single paragraph of their Reply Brief, concerning irreparable harm. Pls.' Reply at 3 (ECF #32). Moreover, the Declaration is uncontroverted; while BLM claims it can rely on the reasonable opinions of its own qualified experts, no such expert has filed a declaration in this case or offered any opinion about whether the Project or HPTP excavations would cause irreparable harm to sage-grouse or sagebrush habitats. *See* BLM Mot. to Strike at 6. Given Mr. Crawforth's personal knowledge of the Project area, NEPA process, and wildlife impacts, his Declaration is relevant, useful, and should be considered by the Court. *See* Sementilli v. Trinidad Corp., 155 F.3d 1130, 1134 (9th Cir.1998) ("In determining whether expert testimony is admissible under Rule 702, the district court must keep in mind [the rule's] broad parameters of reliability, relevancy, and assistance to the trier of fact.")

LNC makes a strained argument that since Mr. Crawforth submitted NEPA comments on the Project, Plaintiffs cannot offer his expert declaration to show irreparable harm in litigation. Neither of the cases LNC cites supports this proposition. Mr. Crawforth qualifies as an expert in wildlife impacts by virtue of his knowledge, skill, training, education, and experience over the course of his 42 years working for NDOW. Fed. R. Evid. 402. Unlike in Citizens for a Better Way v. United States DOI, 2015 U.S. Dist. LEXIS 78705 (E.D. Cal. 2015), Mr. Crawforth is not a plaintiff in this action; instead, his Declaration shows that Plaintiffs' asserted interests in enjoying wildlife in their natural sagebrush habitats in the Project area will be irreparably harmed by the Project, including the HPTP activities. Plaintiffs extensively raised these issues in comments. *See, e.g.,* Appx. R at R-100-R-164; R-201-R-230. They have no obligation to present declarations they intend to rely on in litigation before litigation commences so the declarations can be included in the record; consideration of extra-record evidence is "precisely what the exceptions to the general rule in APA cases permit." Am. Bar Ass'n, 370 F. Supp. 3d at 39.

**CONCLUSION**

Plaintiffs filed additional evidence with their Reply in support of their Motion for Preliminary Injunction to respond to information presented in BLM/LNC's briefing and declarations and ensure the Court has the most "complete" record it can have at this stage. BLM/LNC do not object to three of the five new exhibits Plaintiffs submitted with their Reply brief. As Plaintiffs have demonstrated, the Court may consider both the NDEP letter and the Crawforth Declaration under recognized exceptions to the Record Rule.

Nevertheless, Plaintiffs do not dispute that it is only fair that BLM/LNC should be offered an opportunity to file short surreplies of no more than six pages each (together, the full twelve pages allowed for a reply brief by the Local Rules), to respond to the new evidence. That is why Plaintiffs repeatedly offered not to oppose potential motions for surreplies. The Court should consider the NDEP letter and Crawforth Declaration, which further demonstrate that Plaintiffs are entitled to injunctive relief because the Project as authorized will cause unnecessary and undue degradation by causing violations of State water quality standards, and the Project—

including the initial ground disturbance associated with the HPTP—will cause irreparable harm to their interests in sagebrush ecosystems, sage-grouse, and other wildlife that depend on those ecosystems. Plaintiffs respectfully request that the Court deny the Motions to Strike.

Respectfully submitted this 12th day of July, 2021.

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**CERTIFICATE OF SERVICE**

I, Talasi Brooks, hereby attest that I served the foregoing to all Defendants via this Court's ECF system, this 12th day of July, 2021.

*/s/ Talasi B. Brooks*