

Exhibit 1

Conferral Email 1

Dominic Carollo

From: Doktor, Leilani (ENRD) <Leilani.Doktor@usdoj.gov>
Sent: Friday, September 17, 2021 9:47 AM
To: Dominic Carollo; 'Will Falk'; Rick Eichstaedt; Talasi Brooks; Laura K. Granier; Roger Flynn; Julie Cavanaugh-Bill; kent@winnemuccalaw.com; Chris Mixson; Terry Lodge
Cc: Carroll, Arwyn (ENRD)
Subject: RE: Response 2 to AR Requests in Bartell Ranch v. McCullough, 3:21-cv-00080 (D. Nev.)

Dominic,

We will advise if BLM cannot find any of the emails listed in the spreadsheet. For the third party contracts, we do not see a basis for why those contracts are properly a part of the AR as they are not materials considered during the decision making process. Similarly, do you have a basis for your assertion that IMs should be a part of the AR? While IMs provide guidance to the agency, they are not binding and are not materials considered for the purposes of making a decision for any decision challenged in this case so they are also not a part of the AR.

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From: Dominic Carollo <dcarollo@carollolegal.com>
Sent: Friday, September 17, 2021 12:09 PM
To: Doktor, Leilani (ENRD) <Leilani.Doktor@usdoj.gov>; 'Will Falk' <falkwilt@gmail.com>; Rick Eichstaedt <rick@wheatlawoffices.com>; Talasi Brooks <tbrooks@westernwatersheds.org>; Laura K. Granier <LKGranier@hollandhart.com>; Roger Flynn <wmap@igc.org>; Julie Cavanaugh-Bill <julie@cblawoffices.org>; kent@winnemuccalaw.com; Chris Mixson <c.mixson@kempjones.com>; Terry Lodge <tjlodge50@yahoo.com>
Cc: Carroll, Arwyn (ENRD) <Arwyn.Carroll@usdoj.gov>
Subject: [EXTERNAL] RE: Response 2 to AR Requests in Bartell Ranch v. McCullough, 3:21-cv-00080 (D. Nev.)

Leilani:

Your email appears to miss several items from my Aug. 24 and Aug. 26 emails, including but not limited to the IM's I sent about third-party contracting. Also, for the missing Bartell emails, I provided a spreadsheet of the missing emails. Please advise if BLM cannot find any of the emails referenced in detail in the provided spreadsheet. In addition, unless I'm missing it in the AR, I still have not seen the third-party contract(s) for the EIS that you reference below. Please provide any such contracts immediately.

As for the broader issue about deliberative process privilege, I think we will need to bring this issue before the court. At the very least, we will need to preserve the issue for appeal. Also, based on what I know right now about the third-party contractor situation, I don't think the privilege applies the way you present it. See *Alliance for the Wild Rockies v. Pena*, 2017 WL 8778579 (D. Or.2017). Unlike in *Pena*, here it seems that LNC had direct oversight and control over at least some of the contractors. One of them, Tyler Cluff, is currently serving as an expert for LNC in a separate water right protest proceeding and is relying on the same work he did for the EIS. It's inconceivable to me how Mr. Cluff, and likely other contractors, could have been considered a federal employee as you assert below. I also request to be included in the AR any contracts or "disclosure statements" signed by Mr. Cluff or any other contractors that worked on, or contributed, to the EIS. See IM 2006-011, previously provided. All communications regarding third-party contracting should be included in the AR as well.

Nothing in this email should be construed as a concession or waiver of other items discussed in your email. Unfortunately, there appears to be several issues that will need to be addressed in motions practice.

Thanks.

Dominic

Carollo Law Group LLC
Sent remotely from Microsoft Surface

From: Doktor, Leilani (ENRD) <Leilani.Doktor@usdoj.gov>
Sent: Thursday, September 16, 2021 2:16 PM
To: 'Will Falk' <falkwilt@gmail.com>; Rick Eichstaedt <rick@wheatlawoffices.com>; Talasi Brooks <tbrooks@westernwatersheds.org>; Laura K. Granier <LKGranier@hollandhart.com>; Roger Flynn <wmap@igc.org>; Dominic Carollo <dcarollo@carollolegal.com>; Julie Cavanaugh-Bill <julie@cblawoffices.org>; kent@winnemuccalaw.com>; Chris Mixson <c.mixson@kempjones.com>; Terry Lodge <tjlodge50@yahoo.com>
Cc: Carroll, Arwyn (ENRD) <Arwyn.Carroll@usdoj.gov>
Subject: Response 2 to AR Requests in Bartell Ranch v. McCullough, 3:21-cv-00080 (D. Nev.)

Dear counsel,

BLM has reviewed your AR requests. As a general matter, several of you raised an issue about the inclusion of internal deliberative documents. This administrative record "consists of all documents and materials *directly or indirectly considered* by agency decision-makers," regardless of whether they support or undercut the agency's position. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Because pre-decisional agency deliberations, such as internal memoranda, drafts of decisions, and e-mails between agency employees, do not constitute evidence considered directly or indirectly by the decision maker, those documents cannot form the administrative record. As Roger likely remembers, we have already explored this issue before this court. *Great Basin Resource Watch, et al. v. US DOI, et al.*, No. 3:19-CV-661-LRH, ECF No. 52, (D. Nev. Dec. 10, 2020). And the District of Nevada agrees that "such [deliberative] documents should not be part of the Administrative Record for public policy reasons." *Id.* at 2; *See also United States v. Carpenter*, No. 3:99-CV-00547-RLH, 2011 WL 4763675, at *3 (D. Nev. Oct. 7, 2011).

Moreover, the fact that some materials do not belong in the record in the first instance should not be conflated with privileged materials. BLM has not asserted a privilege with regard to deliberative materials and is not required to. *California v. U.S. Dep't of Labor*, No. 2:13-cv-2069-KJM-DAD, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014); *accord Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, No. CV ELH-16-1015, 2017 WL 3189446, at *22 (D. Md. July 27, 2017) ("no privilege log is required for deliberative materials that are not properly part of the administrative record in the first instance"). For materials that BLM is asserting

a privilege for, such as confidential cultural information, it has properly redacted those materials and provided logs and explanations for the parties throughout this litigation and will continue to do so. We hope that with this background of the District of Nevada's positions we can avoid any unnecessary litigation on the issue of what comprises the administrative record.

Beyond that overarching issue, BLM has reviewed each specific request and provided the following answers in blue. Please let us know if there are any specific documents you would like to discuss further.

1. Bartell requests (Aug. 18 and Aug. 26, 2021 email):

- To add a bit more context, it seems to me the record is very likely missing substantial intra-agency communications as well as communications with the third-party consultant. In addition, depending on the nature of the relationship of the consultant, it seems to me internal communications of the consultant may also be subject to disclosure in the AR. I am requesting to see the contract under which the third-party consultant provided assistance with the EIS. It is also questionable that there are no higher level Interior communications given the contention that this project is a National priority. This is a non-exclusive list of concerns. For instance, there are also missing communications with my client and the agency. In short, compared to other similar cases I have litigated, the record seems rather, if not very, sparse.
 - **Response:** Pursuant to the MOU between BLM and LNC, LNC to entered into a contract with ICF to work as a contractor under BLM's direction to complete the Environmental Impact Statement in the record. The general procedures for third party contracts are in the National Environmental Policy Act Handbook, H-1790-1, in Section 13.5. For purposes of the administrative record, these contractors are considered to be federal employees. Therefore, correspondence between BLM and ICF contractors was considered internal and deliberative. Any items that were limited in distribution to BLM, BLM contractors, or other Federal agencies that were not project action agencies were identified as internal and deliberative. *Golden Gate Salmon Ass'n v. Ross*, No. 117CV01172LJOEPG, 2018 WL 3129849, at *13 (E.D. Cal. June 22, 2018).

For those missing communications between BLM and your client. BLM has added some communications to the AR that were not in the previous version. But if there are any specific communications you are referring to, could you please provide them to BLM for consideration?

- The AR seems to contain very little documentation with respect to field work. For instance, the EIS reports baseline data that was apparently the result of inventorying and measuring seeps, springs and other water resources. Stevens, et al. (included in the AR at TPEIS-0642) explains that "Field data sheets are the most efficient and reliable information documentation for Level 1 and 2 springs inventories. Multi-staff team information compilation and detection of data entry errors is impossible without hard copy field sheets, and springs-related data have proven too complex for on-site electronic data entry systems." However, we do not see field data sheets for a lot of baseline data reported in the EIS, including (but not limited to) with respect to seeps and springs. Please check with BLM to see if they required the third-party contractor to provide any field data sheets (or similar documentation) to BLM. This would be for not only for inventorying and monitoring seeps and springs, but also for streams, well drilling, monitoring and pumping, core drilling, wildlife, etc. If BLM was provided such field work documentation, such records should be part of the AR. If not, please confirm in writing that BLM did not require the third-party contractor to provide field data sheets or similar field work documentation in support of reports and other work product for the EIS.
 - **Response:** One of the purposes for baseline reports is to summarize field data collection and the conclusions that could be reasonably drawn therefrom. BLM has the expectation that contractors

with appropriately credentialed staff will provide accurate data and conclusions in a professional manner, regardless of the scientific area with which the study is concerned. We were not provided any of the field reports for data collected by the hydrologic contractors and relied on those contractors' baseline reports which are included in the EIS.

- In the FEIS, at AR-067621, BLM states in response to a comment: "P149) The Commenter correctly points out PZ17-01 data required a datum correction....The data was confirmed to be valid. The adjustment did not occur to data collected during the pumping test in October 2018, does not affect drawdown calculations, and the sensor was not malfunctioning. Only the elevation of the sensor placement was adjusted to match field observations." For this topic, please check with BLM and provide all field notes and any other records, communications or data currently in BLM's possession regarding this "adjustment," including but not limited to: (1) when "the elevation of the sensor placement was adjusted"; (2) who made the adjustment; (3) the magnitude of the adjustment; (4) how data pre- and post-adjustment was verified to be valid; (5) communications with LNC or third-party consultants concerning comment P149; and (6) field notes or data sheets of all pump tests.
 - **Response:** The response to Comment P.149 is an accurate summary of the entire communication BLM had with the contractor regarding this comment. The contractor's reports as cited in the EIS are adequate for BLM's analysis.

2. LNC requests (Aug. 24 emails):

- February 2021 Monitoring Plan, the February 2021 version of the Plan of Operations
 - **Response:** This document post-dates both the FEIS and ROD, and thus was not considered by the decision maker as part of the FEIS or ROD. Moreover, this version of the Plan of Operations hasn't been officially approved as yet.
- The Nevada and Northeastern California GSG Proposed LUPA/Final EIS (which relates to the use of BSUs as the sage-grouse area of analysis); the final ARMPA is in the record, so the underlying FEIS should be there too.
 - **Response:** BLM will include the FEIS.
- The NDOW Hunting Information Sheet that we attached as Ex. 10 to our response to the motion for preliminary injunction
 - **Response:** This document was not directly or indirectly considered by BLM for the Thacker Pass EIS or ROD.
- February 2021 Thacker Pass Project Monitoring Plan
 - **Response:** This document post-dates both the FEIS and ROD, and thus was not considered by the decision maker as part of the FEIS or ROD.
- The monitoring plan as part of the updated Plan of Development and as evidence of the evolving mitigation plan for water is relevant to the technical issues before the Court.
 - **Response:** This document post-dates both the FEIS and ROD, and thus was not considered by the decision maker as part of the FEIS or ROD.
- One of the three reference documents used to calculate the emissions factors for the sulfuric acid plant's tail gas scrubber was not in the Administrative Record. Specifically: 2019a. "LNC_Emissions Inventory_RH.xlsx." Provided by D. Whitehead, Lithium Nevada Corporation, to E. Huelson, Air Sciences, October 1. It's listed in the Appendix K references at AR-066010.

- **Response:** The document is not in the AR because BLM was not a party to the particular correspondence and BLM does not even believe it has it.
- The NDOW sage grouse tracking locations and 30 radio-marked birds are based on a telemetry study performed by NDOW across the Montana Mountains, as shown on the attached map from NDOW (which we understand NDOW likes to maintain as confidential).
 - **Response:** BLM has the map being referred to here and as noted, NDOW-generated data is protected by a data-sharing agreement between NDOW and BLM. BLM could add the map if it would be subject to the Protective Order.
- The Kings Valley Lithium Exploration EA, Decision Record and FONSI.
 - **Response:** This document will be included in the NHPA-AR.

3. WWP Requests (Aug. 17 and Aug. 23 emails):

- The numbering of the Record suggests that some documents have been omitted. For example, the numbering jumps from TPEIS-0006 to TPEIS-0009, and the Index includes numerous similar gaps. Please provide a privilege log describing the records omitted and the privilege(s) claimed.
 - **Response:** As noted in the beginning of this email. Deliberative documents are not a part of the record because they were not evidence directly or indirectly considered by the decision maker. These documents are not subject to a privilege log because BLM is not asserting privilege over these documents. Document numbering in no way indicates that documents should have been included in the AR, that certain documents have been omitted for inappropriate reasons, or that a privilege log is necessary. If plaintiffs believe that specified documents should be included in the AR but are not, plaintiffs should specify what those documents are.
- The Record also seems to be missing communications between BLM and NDOW, NDEP, EPA, LNC, and LNC's contractors regarding the Project. For example, the attached October 29, 2020 letter (*Attached to email*) from NDEP to LNC and cc'ed to Ken Loda at BLM, should be part of the Record but was not. This gives us reason to believe that other similar communications must be missing. Did BLM search for such communications in compiling the Record? The Record should include all Project-related communications.
 - **Response:** BLM respectfully disagrees – the particular issue cited is one of compliance with a State of Nevada permitting process, separate from the BLM's NEPA analysis and outside BLM's direct regulatory authority. BLM was cc'ed pursuant to the MOU between BLM, USFS, and NDEP/BMRR (MOU # BLM-MOU-NV921-3809-2019-014) regarding permitting procedures for projects where two or more of the entities have a specific level of regulatory participation. Furthermore, BLM did not rely on this correspondence in its decision making and NDEP was neither a cooperative agency nor a commenter on the Thacker Pass EIS.
- The Record must include the 2015 Great Basin ROD adopting the 2015 Nevada/Northeastern California Greater sage-grouse ARMPA. This document is filed with our PI Motion as Exhibit 8. TPEIS-0298, the 2015 Nevada/Northeastern California Greater sage-grouse ARMPA, is misidentified in the Index and does not include the ROD.
 - **Response:** BLM agrees that the index misidentifies the ARMPA and will revise the index to indicate that the ROD is not included in TPEIS-0298. BLM will add the ROD adopting the ARMPA as a separate entry.
- The PDEIS is not part of the Record. Please provide the PDEIS and all comments and markup versions of the PDEIS from any other entity.

- **Response:** In accordance with the previous discussion, the PDEIS is a deliberative (draft) document and not part of the AR.
- The Record should include the 2009 NDOW survey documenting winter sage-grouse use of the Project area, referenced in, for example, TPEIS-0025.
 - **Response:** BLM considered the Report at TPEIS-0025, which lists a 2009 NDOW survey in its references. But, the reference to the survey was not considered by the decision maker – only the report which was included in the record.
- TPEIS-0034 is an excerpt from a conference brochure. Please provide the entire document.
 - **Response:** Like the other presentations and materials from the conference, the rest of the brochure is irrelevant and was not considered as part of the decision and underlying NEPA analysis.
- Please provide all Project-related communications that have not already been provided, or the detailed reasons why such communications were not included in the Record submitted to the Court and the parties.
 - **Response:** BLM has included in the AR all non-deliberative communications

Thanks,
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