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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WESTERN WATERSHEDS PROJECT, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.,*

Defendants

and

LITHIUM NEVADA CORP.

Defendant-Intervenor

Case No. 3:21-cv-103-MMD-CLB

FEDERAL DEFENDANTS' SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The United States Bureau of Land Management issued its decision approving the Thacker Pass Project on January 15, 2021. That decision clearly requires Lithium Nevada's approved operations to be "conducted in compliance with BLM regulations and other applicable federal and state laws" and that Lithium Nevada may only conduct the approved operations after it "has complied with all federal, state, and local regulations, including all necessary permits from the Nevada Department of Environmental Protection and other federal, state, and local agencies."[1] That includes a water pollution control permit from NDEP.[2] On May 3, 2021, three and a half months after the agency action challenged in this lawsuit, NDEP sent a letter to Lithium Nevada indicating that it would limit its permit to restrict mining below the water table in light of modeling results predicting that backfill of the mine pit would result in groundwater exceeding Nevada water-quality standards.

Based on that letter, Plaintiffs argue in their Reply that BLM violated FLPMA's mandate to prevent unnecessary or undue degradation by approving the Thacker Pass Project in light of what Plaintiffs characterize as "a finding by [NDEP] that the project would violate state drinking water standards."[3] But BLM's approval of the project does not violate that mandate because its plain language requires compliance with, and does not authorize a violation of, those standards. Moreover, NDEP's application of Nevada's water-quality regulations to the Project during the post-approval permitting process does not render "arbitrary or capricious" BLM's conclusion drawn more than three months prior.

Finally, because the NDEP letter issued after the challenged decision, it cannot fall within any exception to the rule that review of an agency's decision is limited to the record before the agency—including the "bad faith" exception, which Plaintiffs have not proven.

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[1] Pls.' Ex. 1 ("ROD") at 21, ECF No. 23-1.

[2] ROD at 11, 21; *see also* Declaration of Kathleen L. Rehberg ¶ 4(a), ECF No. 30-2.

[3] Pls.' Reply at 22–23, ECF No. 32; Pls.' Response to Mots. to Strike at 3–6, ECF No. 37.

I. BLM reasonably determined that proposed operations would not violate applicable water-quality standards

BLM's surface-management regulations define "unnecessary or undue degradation," in part, as "conditions, activities, or practices" that fail to comply with the "performance standards in [43 C.F.R.] § 3809.420," 43 C.F.R. § 3809.5, which requires "[a]ll operators" to, among other things, "comply with applicable Federal and state water quality standards," *id.* § 3809.420(b)(5); *see also id.* § 3809.415(a) (requiring compliance with "other Federal and State laws related to environmental protection"). Here, BLM did what was required to ensure that Lithium Nevada's operations would not cause unnecessary or undue degradation: it explicitly approved the plans of operations subject to Lithium Nevada obtaining the necessary water pollution control permit from NDEP.[4]

Furthermore, and contrary to Plaintiffs' argument in their Reply, BLM's environmental analysis supports its determination that proposed operations would ultimately comply with Nevada water-quality standards. Based on extensive water-quality analysis, BLM concluded that concentrations of antimony "in the pit backfill pore water are predicted to exceed drinking water standards over the entire 300 years post-closure simulation period in each sub-pit area."[5] At the same time, however, it noted that "outflow with concentrations of antimony that exceed the 0.006 regulatory threshold would migrate" no more than "approximately one mile east-southeast of the pit" over that period, and "would not extend outside the Plan boundary."[6] To address those future potential effects, it conditioned the Project's approval on Lithium Nevada "monitor[ing] groundwater sources according to NDEP standards" and "maintain[ing] water quality for wildlife, livestock, and human consumption to State of Nevada standards," as well as updating the groundwater model every

[4] ROD at 11, 21.

[5] Pls. Ex. 2 ("FEIS") at 4-13, ECF No. 23-2.

[6] FEIS at 4-14.

five years based on information obtained through monitoring.[7] BLM then analyzed three mitigation plans "designed to directly mitigate the affected groundwater area or provide source control during backfilling," each of which was "expected to be an effective control to counter contaminant migration, if required."[8] Having acknowledged the potential for antimony in the mine footprint's groundwater to exceed drinking-water standards in decades, BLM ultimately and reasonably concluded that water-quality monitoring and measurement plans approved by both agencies were "expected to effectively mitigate impacts to groundwater quality downgradient from the pit" to address any future exceedence.[9] *Cf. Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1107 (9th Cir. 2016) (monitoring and mitigation sufficed under NEPA to address future water-quality exceedences).

NDEP's letter applying the regulations to its permitting decision does not, as Plaintiffs argue, indicate to the contrary or that BLM approved operations that would positively "violate state law."[10] Nevada's regulations do provide that "[a] facility . . . may not degrade the waters of the State to the extent that[,] (b) For groundwater: (1) The concentration of a constituent exceeds the greater of (I) A state or federal regulation prescribing standards for drinking water; or (II) The natural background concentration of the regulated drinking water constituent." Nev. Admin. Code § 445A.424(1)(b)(1). But they also allow NDEP to "exempt a body of groundwater or portion thereof" from those standards if the requisite information is "submitted as part of the application for the permit." *Id.* § 445A.424(2). This includes circumstances under which "[t]he impacted groundwater does not currently serve as a source of drinking water and," based on enumerated criteria, "the groundwater will not serve as a

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[7] ROD at 11. *See also* FEIS at 4-13–4-14, 4-24, 4-26–4-2 (setting forth monitoring and mitigation measures).

[8] Fed. Defs.' Ex. F, FEIS App'x P, Part 1 of 8 at 149–157, ECF No. 30-7 (describing proposed monitoring and mitigation plan).

[9] FEIS at 4-26.

[10] Reply at 23.

source of drinking water." *Id.* § 445A.424(2)(a). Here, the groundwater from the pit area is not anticipated to leave the mine footprint, even after 300 years;[11] so Plaintiffs' invocation of potential impacts on unspecified, future "water users in the area" is both unsupported and too speculative to require consideration. *See Great Basin*, 844 F.3d at 1107. Nevada also regulates pit lakes on a case-by-case basis to prevent degradation of surrounding groundwater or adverse effects on "the health of human, terrestrial, or avian life," Nev. Admin. Code § 445A.429(4), (5). In light of BLM's requirement that operations comply with these regulations, approval of the Project with measures for monitoring and mitigation of potential future exceedence did not constitute approval of operations that violate relevant regulations.

Finally, because NDEP issued its letter after BLM approved the plans of operations, BLM did not have the opportunity to account, before approval, for how NDEP would apply Nevada regulations to the Project. Regardless, both BLM's decision and its own regulations required the water pollution control permit as a condition precedent to Lithium Nevada conducting the approved operations. Because NDEP ultimately sets the conditions for that approval subject to Nevada regulations, NDEP's conclusions during that permitting process do not establish, as Plaintiffs argue, that BLM's approval of the Project authorizes a violation of Nevada water-quality regulations.[12]

II. The NDEP letter constitutes extra-record evidence subject to no exception

Federal Defendants also respectfully renew their request, which the Court denied without prejudice, that the NDEP letter be stricken. It unquestionably post-dates BLM's decision. And "[p]arties may not use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision," as Plaintiffs do here. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (internal quotation

[11] FEIS at 4-13–4-14.

[12] Plaintiffs suggest that any changes to the plan of operations would evade public review or environmental analysis. Reply at 23. Depending on the scope of changes needed, BLM's surface-management regulations may require submission of a modified plan of operations. 43 CFR 3809.431(a). BLM reviews modifications in the same manner as the initial plan, including compliance with NEPA obligations. 43 C.F.R. § 3809.432.

omitted). This is because, "[w]hen reviewing an agency decision, 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Id.* (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). BLM did not have the benefit of NDEP's application of Nevada water-quality regulations to the Project prior to its decision. So even if Plaintiffs could demonstrate that "one of the enumerated exceptions" to consideration of extra-record evidence "did apply, it would be of no matter, because 'exceptions to the normal rule regarding consideration of extra-record materials only apply to information available at the time, not post-decisional information.'" *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 600 (9th Cir. 2018).

Even if the letter were not barred as post-decisional information, Plaintiffs have not made the "strong showing of agency bad faith" necessary to establish that exception to the rule against consideration of extra-record material. *Inland Empire Pub. Lands Council*, 88 F.3d 697, 703-04 (9th Cir. 1996). For first time in their opposition to the motions to strike, Plaintiffs levelled the serious accusation that the agency "acted in 'bad faith'" because it argued that "the Project approval simply does not authorize Lithium Nevada to violate [relevant] Nevada law or regulations" in the face of a post-decisional determination by NDEP setting conditions for issuing a required permit.[13] As explained above, BLM's decision does not authorize a violation of relevant Nevada water-quality regulations. It explicitly required compliance and its environmental analysis contemplated monitoring and mitigation measures to address any potential exceedence. NDEP's subsequent determination that Nev. Admin. Code § 445A.424 prohibits it from issuing a permit when the data predicts a future exceedance of water-quality standards does not alter that requirement, and the letter thus does not constitute the necessary "well-nigh irrefragable proof of bad faith or bias on the part of government officials." *China Trade Ctr., L.L.C. v. WMATA*, 34 F. Supp. 2d 67, 70–71 (D.D.C. 1999) (internal quotations omitted), *aff'd* No. 99-7029, 1999 WL 615078, at *1 (D.C. Cir. July 2, 1999).

[13] Pls.' Response to Mots. to Strike at 5 (quoting Fed. Defs.' Opp. in Resp. to Pls.' Mot. for Prelim. Inj. at 24, ECF No. 30, albeit omitting the word "relevant" from the quotation).

Respectfully submitted this 16th day of July, 2021.

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