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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,)	Case No.: 3:21-cv-80-MMD-CLB
)	(LEAD CASE)
Plaintiffs,)	
)	
v.)	CONSERVATION GROUP
)	PLAINTIFFS' MOTION
ESTER M. MCCULLOUGH, et al.,)	ON THE
)	ADMINISTRATIVE RECORD
Defendants,)	
and)	
)	
LITHIUM NEVADA CORPORATION,)	
)	
Intervenor-Defendant.)	

1			
2	WESTERN WATERSHEDS PROJECT, et al.,)	Case No.: 3:21-cv-103-MMD-CLB
3)	(CONSOLIDATED CASE)
4	Plaintiffs,)	
5)	
6	and)	
7)	
8	RENO SPARKS INDIAN COLONY, et al.,)	
9)	
10	Intervenor-Plaintiff,)	
11)	
12	and)	
13)	
14	BURNS PAIUTE TRIBE)	
15)	
16	Intervenor-Plaintiff,)	
17)	
18	v.)	
19)	
20	UNITED STATES DEPARTMENT OF THE)	
21	INTERIOR, et al.,)	
22)	
23	Defendants,)	
24)	
25	and)	
26)	
27	LITHIUM NEVADA CORPORATION,)	
28)	
	Intervenor-Defendant.)	

INTRODUCTION

Plaintiffs Western Watersheds Project, Great Basin Resource Watch, Basin and Range Watch, and Wildlands Defense (collectively “WWP”) submit this Motion and Memorandum requesting that this Court order Federal Defendants, U.S. Bureau of Land Management, et al. (“BLM”), to complete the Administrative Record (“AR”), or in the alternative, that this Court either supplement the record with, or take judicial notice of, government agency documents improperly excluded from the AR.¹

¹ Pursuant to the parties’ approved Joint Stipulated Schedule (ECF #94), the filing of this Motion stays briefing on the merits. The issues, claims, and defenses in this case are summarized in the parties’ Joint Proposed Case Management Report (ECF #28).

1 First, the Court should order BLM to complete the AR with two letters from the Nevada
2 Division of Environmental Protection, Bureau of Mining Regulation and Reclamation (“NDEP”)
3 sent to both Lithium Nevada Corp. (“LNC”) and BLM in October and December of 2020, that
4 detail NDEP’s serious concerns about the environmental impacts from the Thacker Pass Project.
5 BLM asserts that despite receiving these documents, it did not consider them, even though it relies
6 upon the important and concurrent permitting role played by NDEP in BLM’s review of the
7 Project.

8 Second, the Court should order Federal Defendants to complete the AR with BLM’s
9 Preliminary Draft Environmental Impact Statement (“PDEIS”) which BLM provided to the
10 Nevada Department of Wildlife (“NDOW”), Humboldt County, other state and federal agencies
11 (and based on the record LNC as well), along with the comments from NDOW and these other
12 agencies. BLM did include in the AR a BLM-created summary of the NDOW comments
13 responding to the PDEIS, AR Doc. TPEIS-0359 (June 5, 2020), where NDOW raised significant
14 concerns about the Project, but BLM refused to include the NDOW comment letter itself.

15 BLM asserts that the PDEIS is exempted from inclusion in the AR as a BLM privileged
16 “deliberative” document. Yet any such exemption, even if valid, was waived when BLM provided
17 that document to NDOW, Humboldt County, other agencies (and likely LNC). Nor has BLM any
18 legitimate excuse for failing to provide the NDOW comments on the PDEIS (or any comments
19 from the other agencies), rather than just a BLM-produced summary of those NDOW comments.

20 BLM improperly excluded each of these records from the AR. WWP respectfully requests
21 that the Court order BLM to complete the AR with the missing records. In the alternative, WWP
22 requests that the Court consider the NDEP letters as extra-record materials necessary to determine
23 “whether the agency has considered all relevant factors and has explained its decision,” and/or are
24 “necessary to explain technical terms or complex subject matter.” Lands Council v. Powell, 395
25 F.3d 1019, 1030 (9th Cir. 2005). Finally, WWP requests that if the Court does not complete or
26 supplement the AR with these records, it take judicial notice of the NDEP letters, as they are
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government documents whose veracity cannot reasonably be questioned.

FACTUAL BACKGROUND

BLM lodged what they considered a sufficient AR on July 30, 2021. After review of the AR and pursuant to the parties' approved Joint Stipulated Schedule (ECF #94), and Joint Proposed Case Management Report (ECF #28), WWP and counsel for BLM (along with Plaintiff Bartell Ranch in the consolidated case, as well as intervenors LNC, Reno-Sparks Indian Colony and the Burns Paiute Tribe), communicated with government counsel, via numerous emails, to attempt to resolve numerous issues with the AR's adequacy. WWP listed the improperly excluded documents, provided the justification for their inclusion in the record (the same justification set forth herein), and provided the two NDEP letters to BLM. Although BLM agreed to include some other requested documents that were originally excluded from the AR, BLM refused to include the NDEP letters, the BLM's PDEIS, and NDOW's comments on the PDEIS.² These records are described in more detail below.

1. NDEP Permitting Letters Sent to BLM.

a. *October 29, 2020 NDEP Letter*

The October 29, 2020 NDEP letter, entitled **Water Pollution Control Permit Application – Technical Comments, Thacker Pass Project**, was sent from NDEP to LNC and was copied and sent to, and received by, BLM's Project Lead, Ken Loda. (Attachment B to Flynn Declaration). In that letter, NDEP raised serious concerns about the environmental impacts from the Project and the lack of adequate information showing how LNC would prevent, in particular, the water pollution caused by the Project.

For example, NDEP highlighted the fact that the Project would violate state groundwater standards. "Based on the most recent predictive groundwater modeling results, elevated

² The attached Declaration of Plaintiffs' counsel Roger Flynn provides true and correct copies of the NDEP letters as well as true and correct copies of various emails between the parties' counsels regarding the administrative record. (Exhibit 1).

1 antimony concentrations will occur outside the proposed final pit shell but are expected to
 2 remain within the approved Thacker Pass project boundary. The Division does not allow
 3 degradation of waters of the State and will therefore enforce Profile I or the demonstrated
 4 background water quality immediately outside the pit boundary.” NDEP Letter at 6 (§50). *See*
 5 *also* letter at 2 (§7)(“Figures 6.9 and 6.10 show antimony exceedances leaving the pit
 6 boundary. A method of source mitigation must be selected, described in the tentative plan for
 7 permanent closure, and appropriately bonded prior to Permit issuance.”)

8 *b. December 30, 2020 NDEP Letter*

9 NDEP’s December 30, 2020 letter to LNC, entitled **Review of Tentative Plan for**
 10 **Permanent Closure, Thacker Pass Project**, was likewise sent to, and received by BLM.
 11 (Attachment C to Flynn Declaration). In that letter, NDEP raised significant concerns about the
 12 Project’s impacts and lack of supporting information and plans to prevent pollution. NDEP
 13 continued to stress issues related to the Project’s releases of contaminated water into the
 14 environment. For example, NDEP detailed its concerns with contamination from the tailings
 15 facility:

16
 17 Considering the acidic nature of the tailings material, infiltration through the clay layer
 18 may lead to the development of poor-quality leachate emanating from the facility and
 19 impacting waters of the State. In the absence of evidence demonstrating the ability of the
 20 clay layer to maintain the required hydraulic conductivity, the Division requires that the
 TPPC include a high-density (HDPE) or similar impermeable material to be used to
 encapsulate the CTFS [Clay Tailings Filter Stack].

21 Dec. 30 NDEP letter at 2. *See also* Dec. 30, 2020 letter at 3 (“The Division is not only
 22 concerned with ARD [Acid Rock Drainage]; neutral leachate is also a concern. This
 23 includes aluminum, antimony, arsenic, iron manganese, sulfate, and TDS as examples.”)

24 2. BLM’s Preliminary Draft EIS Sent to NDOW and others and NDOW’s Comments.

25 The PDEIS is an early draft of the EIS sent to NDOW, Humboldt County, and other
 26 agencies for comments. In a document that BLM did not include in its initial production of the
 27 AR, but subsequently produced to the parties this month (received by WWP counsel on October
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1 13, 2021), LNC prepared a 15-page powerpoint/slide-show dated April 16, 2020, entitled
 2 “Thacker Pass Project, Draft Environmental Impact Statement & Alternatives Summary.” AR
 3 TPNHPA-085 (Exhibit 4). That LNC document showed the cover of the PDEIS, dated the day
 4 before, April 15, 2020 (Exhibit 4, PDF p. 13 of 16).

5 The cover page of the PDEIS stated that the document was a “Cooperative Agency Review
 6 Draft, 4/15/20” showing that it was sent to the “Cooperating Agencies” working with BLM on the
 7 EIS. Those agencies include NDOW, Humboldt County, and the Nevada Department of Natural
 8 Resource Conservation. *See* Cover page of ROD (Exhibit 3)(listing Cooperating Agencies).
 9 LNC’s possession of the cover, if not the rest of the PDEIS, begs the question of how LNC was
 10 able, on April 16, 2020 (the day after the PDEIS was dated), to summarize and discuss the Project
 11 alternatives that BLM analyzed in the EIS process, when the Draft EIS was not released to the
 12 public until July 31, 2020, if BLM did not share the PDEIS with LNC? (*See* ROD, at 7, Exhibit 3,
 13 noting the July 31st release date).

14 In response to the PDEIS, NDOW raised serious concerns regarding the Project’s impacts
 15 to greater sage-grouse and other species, and BLM’s failure to properly analyze these impacts
 16 during the NEPA process. Although BLM summarized NDOW’s comments on the PDEIS, AR
 17 TPEIS-0359 (Exhibit 5), BLM never produced the original NDOW comments on the PDEIS, or
 18 those of any other cooperating agency.

19
 20 3. BLM’s Rationale for Refusing to Complete the AR With the NDEP Letters, BLM’s
 21 PDEIS, and NDOW Comments.

22 BLM refused to complete the AR with each record, even though it does not dispute that it
 23 possessed each record at the time of the ROD. Indeed, in response to Plaintiffs’ counsels’
 24 communications to government counsel, BLM’s attorney admitted that BLM had received the
 25 NDEP letters and BLM cannot deny that it possessed its own PDEIS or the NDOW comments on
 26 the PDEIS. Nevertheless, BLM refused to include these critical documents in the AR, claiming
 27 that BLM did not consider the NDEP letters and that the PDEIS was a deliberative document not
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1 included in the AR.

2 Regarding the NDEP letters, BLM claimed they were excluded from the AR because:

3 [T]he particular issue cited is one of compliance with a State of Nevada permitting process,
 4 separate from the BLM's NEPA analysis and outside BLM's direct regulatory authority.
 5 BLM was cc'ed pursuant to the MOU between BLM, USFS, and NDEP/BMRR (MOU #
 6 BLM-MOU-NV921-3809-2019-014) regarding permitting procedures for projects where
 7 two or more of the entities have a specific level of regulatory participation. Furthermore,
 8 BLM did not rely on this correspondence in its decision making and NDEP was neither a
 9 cooperative agency nor a commenter on the Thacker Pass EIS.

10 Email from Leilani Doktor (DOJ counsel) to Plaintiffs' counsel dated September 16, 2021.

11 Attachment A to Flynn Declaration (PDF page 17 of 52).

12 BLM also asserted that the PDEIS it sent to NDOW, Humboldt County and other agencies
 13 was properly excluded because "the PDEIS is a deliberative (draft) document and not part of the
 14 AR." Email from DOJ/BLM attorney Leilani Doktor to all counsel, dated September 16, 2021
 15 (Attachment A to Flynn Declaration, PDF pages 17-18 of 52). Although BLM did include in the
 16 AR a BLM-produced summary of NDOW's comments on the PDEIS (AR TPEIS-0359), BLM did
 17 not respond to WWP's request that it include the actual comments from NDOW.³

18 ARGUMENT

19 BLM's reasons for excluding records from the AR that were actually before it at the time
 20 of the challenged ROD do not pass muster and the records are necessary to complete the AR.
 21 BLM cannot claim it did not at least consider the NDEP permitting documents, which it does not
 22 dispute that it received, as BLM itself relies on NDEP's review and permitting of the Project to
 23 support BLM's review and approval of the Project. Even if BLM did not directly consider the
 24 letters before it, it must have indirectly considered them when it determined to rely on NDEP's
 25 permitting process.

26 Regarding BLM's PDEIS and NDOW comments, BLM's sending and disclosure of the
 27 PDEIS to NDOW, Humboldt County, and other independent third-parties, waived any purported
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³ WWP continues to have concerns that the omission of these records from the AR suggests that others were improperly omitted and joins in the Record motion filed by Plaintiff Edward Bartell.

1 legitimate claim of privilege shielding that document from this Court’s review. Finally, BLM has
2 provided no rationale at all for refusing to include the actual NDOW comments on the PDEIS.

3 Judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., is based
4 upon a review of the “whole record” developed during the agency’s decision-making process.
5 Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). If the administrative
6 record is incomplete, the court will be unable to determine “whether an agency considered the
7 relevant factors and has provided an explanation that rationally connects the data with the choice
8 made.” Id. A complete administrative record is thus essential for effective review. The proper
9 scope of an administrative record is broad, and includes “everything that was before the agency
10 pertaining to the merits of its decision.” Portland Audubon Soc’y. v. Endangered Species Comm.,
11 984 F.2d 1534, 1548 (9th Cir. 1993). Requiring the “whole record,” including both favorable and
12 unfavorable information, prevents the agency from presenting essentially a “fictional account of
13 the actual decisionmaking process.” Id.

14 The administrative record is “not necessarily those documents that the **agency** has
15 compiled and submitted as ‘the’ administrative record.” Thompson v. U.S. Dep’t of Labor, 885
16 F.2d 551, 555 (9th Cir. 1989)(emphasis in original). Rather, “[t]he ‘whole’ administrative record
17 ... consists of all documents and materials directly or indirectly considered by agency decision-
18 makers and **includes evidence contrary to the agency’s position.**” Id. (internal quotation marks
19 omitted)(emphasis added). *See* W. Watersheds Project v. BLM, 2012 WL 13937, *1 (D. Nev.
20 2012)(same, *quoting Thompson*).

21 Although agency defendants enjoy a presumption that an administrative record is
22 complete, “[a] plaintiff may rebut this presumption with clear evidence to the contrary.”
23 Indigenous Environmental Network v. U.S. Department of State, 2018 WL 1796217, *2 (D. Mont.
24 2018)(citations omitted). “A plaintiff provides clear evidence to the contrary if the plaintiff can
25 identify the ‘allegedly omitted material with sufficient specificity’ and ‘provide reasonable, non-
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1 speculative grounds for the belief that the alleged documents were considered by the agency and
 2 not included in the record.” Id. The plaintiff also can show that the agency “applied the wrong
 3 standard in compiling the record.” Id.

4 Plaintiffs meet that standard here because they have specifically defined the missing
 5 records and have reasonable, non-speculative grounds to believe the agency considered them,
 6 based upon its own statements in the FEIS and otherwise. There is no dispute that the October and
 7 December 2020 NDEP letters, the BLM’s PDEIS, and NDOW’s comments to BLM on that
 8 PDEIS, were “before the agency” when it issued the challenged January 15, 2021 ROD. BLM
 9 must have considered the NDEP letters regarding water quality because the FEIS relied on NDEP
 10 permitting processes extensively to support its conclusion that no adverse effects to groundwater
 11 from the Project would occur.

12 BLM does not deny that it has the PDEIS and considered NDOW’s comments on the
 13 PDEIS, but instead asserts the PDEIS is exempt from disclosure as deliberative—even though it
 14 shared the PDEIS outside of the federal government, waiving any such privilege. BLM did not
 15 explain why it did not include NDOW’s original comments on the PDEIS in the AR. BLM must
 16 provide these crucial records to this Court and the parties in the AR.

17
 18 **I. The Letters From NDEP Are Required To Complete the Record.**

19 BLM claims it did not consider letters from NDEP that it actually received: “BLM did not
 20 rely on this correspondence in its decision making and NDEP was neither a cooperative agency
 21 nor a commenter on the Thacker Pass EIS.” Email from Leilani Doktor (DOJ counsel) to
 22 Plaintiffs’ counsel dated September 16, 2021. Attachment A to Flynn Declaration (at PDF page 17
 23 of 52). Both parts of this rationale are false as the AR reflects that BLM was extensively involved
 24 with NDEP in its review of the Thacker Pass Project.

25 “One part of an agency – here, [the BLM Nevada Field Office] – may not simply remain
 26 studiously ignorant of material scientific evidence well known to the agency and brought directly
 27 to its attention in timely-filed comments.” American Wild Horse Preservation Campaign v.
 28

1 Salazar, 859 F. Supp. 2d 33, 43 (D.D.C. 2012). Indeed, BLM is required by NEPA to review
 2 relevant documents it receives on a proposed project, especially those from expert agencies such
 3 as NDEP and NDOW bringing to light contrary science. Agencies must disclose and respond to
 4 those viewpoints or countervailing information in the final impact statement itself.

5 Because the commenters' evidence and opinions directly challenge the scientific basis
 6 upon which the Final EIS rests and which is central to it, we hold that [the agencies] were
 7 required to disclose and respond to such viewpoints in the final impact statement itself. ...
 8 The Service's failure to disclose and analyze these opposing viewpoints violates NEPA
 9 and 40 C.F.R. § 1502.9(b) of the implementing regulations. *Cal. v. Block*, 690 F.2d [753]
 10 at 770–71 [9th Cir. (1982)](stating that NEPA's requirement that responsible opposing
 11 viewpoints are included in the final impact statement "reflects the paramount
 12 Congressional desire to internalize opposing viewpoints into the decisionmaking process to
 13 ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a
 14 decision").

15 Ctr. For Biol. Diversity v. U.S. Forest Service, 349 F.3d 1157, 1167 (9th Cir. 2003)(citations
 16 omitted). *See also* Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704 (9th Cir. 1993)(agency
 17 required to address the criticisms disputing evidence upon which the final statement's
 18 management strategy rested); 40 C.F.R. §1502.9(b)("Final environmental impact statements shall
 19 respond to comments....").

20 Moreover, the FEIS itself acknowledges that "NDEP **actively coordinated with BLM** on
 21 this EIS." FEIS at 1-2 (Exhibit 2, FEIS excerpts)(emphasis added). The ROD reiterates this point:
 22 "Coordination was also conducted between the BLM and the Nevada Division of
 23 Environmental Protection (NDEP) Bureau of Mining Regulation and Reclamation (BMRR)
 24 as specified within Memorandum of Understanding (MOU) 3000-NV920-0901, MOU for
 25 Mining and Mineral Related Activities within the State of Nevada." ROD at 6 (Exhibit 3).

26 Indeed, LNC specifically provided BLM with a full copy of the company's water pollution
 27 control permit application to NDEP (the same permit that is the subject of the October and
 28 November 2020 NDEP letters). *See* LNC letter to BLM dated April 2, 2020 transmitting permit
 application (Attachment F to Flynn Declaration). Thus, BLM was well aware of the NDEP
 permitting issues and cannot credibly assert it never saw NDEP's letters to LNC raising its water

1 quality and other concerns – letters that were sent to BLM for its consideration.

2 The FEIS further details BLM’s reliance on the NDEP permitting process as part of
3 BLM’s review of the Project. In BLM’s response to comments on the Draft EIS, included as
4 Appendix R to the FEIS (excerpts in Exhibit 2), BLM repeatedly relies on the NDEP permitting
5 process to support BLM’s conclusion that the Project will comply with all water quality standards
6 and other permitting requirements.

7 For example, public comments on the Draft EIS raised serious concerns about water
8 pollution emanating from the Clay Tailings Filter Stack (CTFC) tailings waste facility. In
9 response, instead of providing any detailed analysis, BLM relied on NDEP’s permitting process –
10 “The NDEP and BMRR are responsible for surface water quality and groundwater protection.
11 Tailings disposal is subject to NDEP-BMRR and federal regulations and requires permits and
12 approvals from the NDEP-BMRR including a water pollution control permit and mine reclamation
13 permit.” AR-067642 (Exhibit 2 FEIS excerpts). The NDEP water pollution control permit is the
14 subject of the October and December 2020 NDEP letters.

15 BLM relied on the NDEP permitting process to respond to other comments as well:

16 Tailings impoundments for disposal of mining and processing wastes are subject to
17 regulation and permitting by the Nevada Department [sic, Division] of Environmental
18 Protection (NDEP) bureau of Mining Regulation and Reclamation (BMRR) under Nevada
19 regulations for Mining Facilities (NAC 445A.350-NAC 445A.447). Major permits that
20 would be required for construction and operation of the facility are identified in EIS
21 Appendix O, Regulatory Setting and Project Permits, Table O.2 Major Permits and
22 Approvals. The NDEP BMRR has established requirements for waste rock, overburden
and ore characterization and evaluation and for ecological risk assessment for proposed
mining projects, including the disposal of naturally-occurring radioactive material from
mining projects.

23 FEIS Appx R, AR-067637 (Exhibit 2 FEIS excerpts). In response to public comments on the
24 groundwater pollution caused by the mine pit, BLM acknowledged that “LNC would provide the
25 BLM and NDEP with a groundwater quality management plan for review and approval.” *Id.*, AR-
26 067639.

27 Further, BLM’s ROD specifically links BLM’s review and approval of the Project and
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1 the required financial assurance (or bond) required under BLM and NDEP regulations.
 2 “Surface disturbing activities approved in this decision shall not begin until the BLM Nevada
 3 State Office issues a decision accepting the reclamation financial guarantee. In addition to
 4 approval of the reclamation financial guarantee from the BLM, LNC must also seek
 5 concurrence from the Nevada Division of Environmental Protection, Bureau of Mining
 6 Regulation and Reclamation.” ROD at 21 (Exhibit 3).

7 The excluded NDEP letter reiterated BLM’s acknowledgement of the need for a joint
 8 BLM/NDEP approved bond to cover the costs of Project closure, especially in light of the
 9 evidence that “show antimony [a toxic metal] exceedances leaving the [mine] pit boundary.”
 10 NDEP Oct. 29, 2020 letter at 2, ¶7 (Attachment B to Flynn Declaration).

11 In light of its “coordination” with NDEP and its reliance on NDEP permitting processes to
 12 assert the Project will comply with all state and federal laws, BLM cannot credibly assert that it
 13 ignored NDEP’s permitting communications to LNC that it received.⁴
 14

15 **II. The Preliminary Draft EIS Cannot Be Considered a Privileged “Deliberative”**
 16 **Document Because BLM Sent It To Independent Third Parties, Including NDOW,**
 17 **Humboldt County, and Other Agencies. Nor Has BLM Provided Any Reason for**
 18 **Excluding the NDOW Comments to BLM**

19 BLM does not claim that it did not consider its own PDEIS that it sent to NDOW,
 20 Humboldt County and other third parties, or NDOW’s comments on the PDEIS. Instead, it argues
 21 that the PDEIS is not part of the AR because “the PDEIS is a deliberative (draft) document and
 22 not part of the AR.” Email from DOJ/BLM attorney Leilani Doktor to all counsel, dated
 23 September 16, 2021 (Attachment A to Flynn Declaration, at PDF pp. 17-18 of 52). Although BLM

24 ⁴ Indeed, BLM included in the AR another letter regarding site permitting from NDEP to LNC, with
 25 copy to BLM – yet the October and December 2020 letters were not. *See* October 26, 2020 letter
 26 from NDEP to LNC, AR 053082-083 (Attachment D to Flynn Declaration). There are also
 27 permitting letters from other agencies, such as the U.S. Army Corps of Engineers to LNC, without
 28 a copy to BLM, that were nevertheless included in the record. *See, e.g.*, July 28, 2017 U.S. Army
 Corps of Engineers letter to LNC, AR TPEIS-0414 (Attachment E to Flynn Declaration).

1 included in the AR a BLM-produced summary of NDOW's comments on the PDEIS (AR TPEIS-
 2 0359)(Exhibit 5), BLM refused to include the PDEIS, or the actual comments from NDOW,
 3 despite WWP's requests.⁵

4 The exemption from disclosure for truly "deliberative" documents stems from exemption 5
 5 under the Freedom of Information Act ("FOIA"), under which the Supreme Court and federal
 6 courts have analyzed federal agency claims for this exemption (and which BLM asserts here).
 7 "Exemption 5 protects from disclosure 'inter-agency or intra-agency memorandums or letters
 8 which would not be available by law to a party other than an agency in litigation with the agency.'
 9 5 U.S.C. § 552(b)(5). To qualify, a document must thus satisfy two conditions: its source must be
 10 a government agency, and it must fall within the ambit of a privilege against discovery under
 11 judicial standards that would govern litigation against the agency that holds it." Department of
 12 Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

13 The exemption applies only to federal government agencies: "[T]he communication must
 14 be 'inter-agency or intra-agency.' 5 U.S.C. § 552(b)(5). Statutory definitions underscore the
 15 apparent plainness of this text. With exceptions not relevant here, 'agency' means 'each authority
 16 of the Government of the United States,' § 551(1), and 'includes any executive department,
 17 military department, Government corporation, Government controlled corporation, or other
 18 establishment in the executive branch of the Government ..., or any independent regulatory
 19 agency,' § 552(f)." Klamath, 532 U.S. at 9.

20 The privilege does not include independent non-federal agencies such as NDOW and
 21 Humboldt County, to which BLM sent the PDEIS. See St. Michael's Convalescent Hosp. v.
 22 California, 643 F.2d 1369, 1373-74 (9th Cir. 1981)(rejecting privilege assertion as to documents
 23 held by state agencies acting pursuant to federal Medicaid regulations, because the definition of
 24 "agency" "does not encompass state agencies or bodies," and also because the federal government
 25

26
 27 ⁵ BLM did not provide any justification why NDOW's comment letter to BLM, rather than just
 28 BLM's summary of those comments, should not be included in the AR.

1 did not exercise the supervision “needed to characterize the state bodies as federal agencies”);
 2 Buford v. Holladay, 133 F.R.D. 487, 494 (S.D. Miss. 1990)(“deliberative process privilege should
 3 not be extended to include state governmental agencies.”).

4 Thus, BLM waived any asserted claim of “deliberative” privilege when it sent the PDEIS
 5 to NDOW, Humboldt County and other agencies. “If the information has been or is later shared
 6 with third parties, the privilege does not apply.” Mead Data Central v. U.S. Dep't of Air Force, 566
 7 F.2d 242, 253, and n.24 (D.C. Cir. 1977).⁶

8 Since NDOW, Humboldt County, and the Nevada Department of Natural Resource
 9 Conservation, (and certainly LNC) are not “federal agencies” or acting in any capacity so as to
 10 extend the “deliberative” exemption, any assertion of privilege was waived by sharing the PDEIS
 11 outside of the federal government. How could LNC have a copy of the cover of the PDEIS, and be
 12 able to summarize and discuss the Project alternatives reviewed in the PDEIS on April 16, 2020
 13 (the day after the PDEIS was dated), when the Draft EIS was not released to the public until July
 14 31, 2020, if BLM did not share the PDEIS with LNC?

15 Any deliberative exemption has been waived by these disclosures and the PDEIS, and
 16 NDOW’s comments to BLM, are properly part of the Administrative Record.

17 18 **III. This Court Should Supplement the Record with the NDEP Letters and NDOW** 19 **Comments**

20 In the alternative, if this Court does not hold that BLM should have included the withheld
 21 NDEP 2020 letters (or the NDOW comments on the PDEIS) in the AR, this Court has broad
 22 authority to consider these relevant documents which discuss the Project’s significant
 23 environmental impacts that are central to this case.

24 These documents fit under the well-established rule that extra-record materials are proper

25
 26 ⁶ Even if BLM did not waive the “deliberative” privilege by sending the PDEIS to outside third-
 27 parties, it failed to justify why purely factual matters contained in the PDEIS, which are not covered
 28 by that privilege, were not included in the record. See Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861
 F.2d 1114, 1118 (9th Cir. 1988); Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1972).

1 to show that the agency failed to consider “all relevant factors” prior to making a decision, to
 2 explain fully agency decisions, and to explain complex subject matter. *See* Animal Defense
 3 Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified* 867 F.2d 1244 (9th Cir. 1989),
 4 *citing* Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986). An agency may not unilaterally
 5 define the “record” for purposes of judicial review in order to exclude materials that are part of the
 6 complete record, or prevent a court from considering relevant agency documents in environmental
 7 cases, such as this one. Thompson, 885 F.2d at 555.

8 Indeed, judicial review would be thwarted if courts were unconditionally restricted to the
 9 agency’s designated record. Rather, courts may inquire beyond the administrative record under
 10 certain well-established exceptions to the general “record review” rule. *See* National Audubon
 11 Soc. v. U.S. Forest Serv., 46 F.3d 1437, 1447 (9th Cir. 1993). The Ninth Circuit recognizes
 12 exceptions to this general rule, relevant to this case:

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

17 Sw. Ctr. for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996).
 18 *See also* Thompson, 885 F.2d at 555 (“The reviewing court can go outside the administrative
 19 record ... to determine whether the agency considered all the relevant factors.”); Hells Canyon
 20 Preservation Council v. Jacoby, 9 F.Supp.2d 1216, 1221-3 (D. Or. 1998) (articulating the
 21 exceptions to the record rule and compiling cases).

22 The Ninth Circuit, and district courts within the Circuit, have routinely admitted extra-
 23 record evidence in NEPA cases. *See, e.g.,* Idaho Conservation League v. Mumma, 956 F.2d 1508,
 24 1520, n. 22 (9th Cir. 1992); City of Davis v. Coleman, 521 F.2d 661, 675 (9th Cir. 1975); Natural
 25 Resources Defense Council v. Duvall, 777 F. Supp. 1533, 1534, n. 1(E.D. Cal. 1991)(allowing
 26 new materials to show that the agency failed to consider all relevant factors); Blue Oceans
 27 Preservation Soc’y v. Watkins, 767 F. Supp. 1518, 1527 (D. Haw. 1991)(accepting affidavits from
 28

1 plaintiffs' experts); Portland Audubon Society v. Lujan, 712 F. Supp. 1456, 1476 (D. Or. 1989),
 2 *aff'd in part, rev'd in part on other grounds*, 884 F.2d 1233 (9th Cir. 1989); Greenpeace U.S.A. v.
 3 Evans, 688 F. Supp. 579, 584 (W.D. Wash. 1987)(permitting introduction of expert's
 4 declarations); Village of False Pass v. Watt, 565 F.Supp. 1123, 1141 (D. Alaska 1983).

5 Courts in the Ninth Circuit have recognized numerous exceptions to this general rule,
 6 particularly where extra-record information is used to determine whether an agency
 7 considered all of the relevant factors, to explain an agency determination, or to determine
 8 whether an agency's "course of inquiry was insufficient or inadequate." *Alpine Lakes*
 9 *Protection Society v. U.S. Forest Serv.*, 838 F.Supp. 478, 481 (W.D.Wash.1993); *see also*
Hells Canyon Pres. Council v. Jacoby, 9 F.Supp.2d 1216, 1223 (D.Or.1998)(collecting
 cases).

10 Ursack, Inc. v. Sierra Interagency Black Bear Group, 2009 WL 2422784, *6 (N.D. Cal. 2009).

11 As the U.S. Supreme Court has noted, judicial review requires the court to engage in a
 12 "substantial inquiry" into the nature of a federal agency's decision. Citizens to Preserve Overton
 13 Park, 401 U.S. at 415-16. The Ninth Circuit has found that it "cannot adequately discharge its duty
 14 to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered
 15 relevant matters." ASARCO, Inc. v. EPA, 516 F.2d 1153, 1160 (9th Cir. 1980). "[I]t is both
 16 unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record. It will
 17 often be impossible, especially when highly technical matters are involved, for the court to
 18 determine whether the agency took into consideration all relevant factors unless it looks outside
 19 the record to determine what matters the agency should have considered but did not." Id.

20 Here, as detailed above, BLM excluded documents which concern the water pollution,
 21 wildlife, and other serious Project impacts. These are particularly "relevant factors" to this Court's
 22 consideration of whether the BLM fully considered the Project's impacts from these operations.
 23 These missing documents are highly relevant to this case on the merits.

24 For example, BLM's ROD was based on BLM's statement that the Project would comply
 25 with all Nevada state environmental standards and requirements (as it must under BLM's mining
 26 regulations at 43 C.F.R. Part 3809). "No work is authorized under the [mining] Plan until LNC has
 27 complied with all federal, state, and local regulations, including obtaining all necessary permits
 28

1 from the Nevada Department [sic, Division] of Environmental Protection and other federal, state,
2 and local agencies.” ROD at 21 (Exhibit 3). BLM’s response brief at the preliminary injunction
3 stage stated that “BLM reasonably concluded that proposed operations would not violate
4 applicable water-quality standards.” BLM Response at 25 (ECF #30).

5 The October and December 2020 NDEP letters contradict that conclusion as that has yet to
6 be determined by NDEP. Indeed, as shown in those letters, NDEP raised serious concerns about
7 the Project’s ability to meet all environmental standards, and informed LNC and BLM of those
8 concerns in those two letters.

9 BLM’s attempt to preclude this Court from reviewing the NDEP letters and NDOW
10 comments also shows bad faith by the agency, especially because the NDEP letters contradict
11 BLM’s position in this case that the Project will not threaten to violate Nevada water quality
12 protective standards. *See Helena Hunters and Anglers v. Marten*, 470 F. Supp. 3d 1151, 1167 (D.
13 Mont. 2020)(ordering supplementation of record under bad faith exception when agency
14 “intentionally concealed” a document that contradicted the agency’s position in the decision under
15 review).⁷ Similarly, the summary of the NDOW comments shows that NDOW raised serious
16 concerns about the impact of the Project to wildlife and the accuracy of the wildlife impacts
17 analysis—but the full meaning of the summary is not clear without being able to review the
18 document the state agency was commenting on, nor NDOW’s comments themselves.

19 Overall, because BLM did not include these critical documents in the AR, and has now
20 stated that it did not consider the critical “relevant factors” and complex issues raised by the
21 NDEP letters, this Court should supplement the record with these agency documents.
22
23
24

25 ⁷ This Court previously did not find that there was agency bad faith when it granted BLM/LNC’s
26 Motion to Strike the May 3, 2020 NDEP letter discussing the same water quality issues and
27 concerns, but that Order (ECF #42) was based on the fact that the May 3 letter post-dated the
28 BLM’s January 15, 2020 ROD. The situation is very different with the October and December
2020 NDEP letters, which were received by BLM well before the ROD was issued.

1 **IV. This Court Should Take Judicial Notice of the NDEP Letters**

2 This Court also has broad authority to take judicial notice of the NDEP letters received by
 3 BLM decisionmakers and allow the parties to rely on them in briefing on the merits. “[A] court
 4 may take judicial notice of ‘records and reports of administrative bodies.’ *Interstate Natural Gas*
 5 *Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir.1953).” Mack v. S. Bay Beer
 6 Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). *See also Or. Natural Desert Ass'n v. Bureau of*
 7 Land Mgmt., 625 F.3d 1092, 1112 n.14 (9th Cir. 2008)(judicial notice of public agency
 8 documents, including agency guidance and handbooks, in an APA case); City of Las Vegas v.
 9 FAA, 570 F.3d 1109, 1113 n.1 (9th Cir. 2009).

10 Although this Court did not take judicial notice of NDEP’s May 3, 2021 letter regarding
 11 the Project’s failure to comply with Nevada environmental requirements, that ruling was based in
 12 large part on the fact that NDEP’s May 3, 2021 letter was issued after the issuance of the ROD on
 13 January 15, 2021. ECF #42. That is not an issue here, as all of the government documents in this
 14 Motion pre-date BLM’s ROD.

15 **CONCLUSION**

16 For the forgoing reasons, WWP respectfully requests that this Court order BLM to
 17 complete the record with the withheld NDEP, NDOW, and BLM documents identified herein.

18 In the alternative, WWP requests that this Court supplement the record with the NDEP
 19 letters and NDOW comments or, at a minimum, take judicial notice of the documents so that the
 20 parties may rely upon them in briefing on the merits.

21
 22 Respectfully submitted this 22nd day of October, 2021.

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20 **LIST OF EXHIBITS**

21 Exhibit 1: Declaration of Plaintiffs' counsel Roger Flynn, attaching emails between Plaintiffs'
22 counsel and government counsel (Attachment A), the excluded NDEP documents,
23 (Attachments B and C), and other AR documents (Attachments D and E).

24 Exhibit 2: BLM Final EIS for the Thacker Pass Project (excerpts).

25 Exhibit 3: BLM Record of Decision for the Thacker Pass Project (ROD).

26 Exhibit 4: LNC Powerpoint Summary of Draft EIS, April 16, 2020.

27 Exhibit 5: BLM Summary of NDOW comments on PDEIS.

28 **Certificate of Service**

I, Roger Flynn, hereby certify that I submitted the foregoing, with all exhibits/attachments, to all parties, via this Court's ECF filing system, this 22nd day of October, 2021.

/s/ Roger Flynn