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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

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

**LITHIUM NEVADA CORP.'S MOTION
TO SUPPLEMENT THE
ADMINISTRATIVE RECORD AND
TAKE JUDICIAL NOTICE**

Defendant-Intervenor Lithium Nevada Corp. ("Lithium Nevada") requests that the Court supplement the administrative record in this matter with the following documents previously submitted to the court in briefing opposing the motion for preliminary injunction:

- **Exhibit A:** February 2021 Thacker Pass Project Monitoring Plan (Lithium Nevada Opp'n to Mot. for Prelim. Inj., ECF No. 31, Ex. 7).

- **Exhibit B:** Nevada Department of Wildlife’s (“NDOW”) Hunter Information Sheet for Unit 031 (Lithium Nevada Opp’n to Mot. for Prelim. Inj., ECF No. 31, Ex. 10).

While these documents were not specifically incorporated into the Final Environmental Impact Statement (“FEIS”) or the Record of Decision (“ROD”) in this case, they fall squarely within the “limited exceptions” wherein the Court may supplement the administrative record with extra-record evidence. *Lands Council v. U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2004). Because these two exhibits are “augmenting materials [that] were merely explanatory of the original record” by defining technical terms, and do not present “new rationalization” for the decision at issue, they are “clearly admissible” under the recognized exceptions allowing consideration of certain extra-record evidence. *Bunker Hill Co. v. Env’t. Prot. Agency*, 572 F.2d 1286, 1292 (9th Cir. 1977).

BACKGROUND

Plaintiff Western Watersheds Project filed a motion for preliminary injunction to prevent cultural resource mitigation on less than half an acre of the Thacker Pass Project (“the Project”) in the case *Western Watersheds Project v. United States Department of Interior*, Case No. 3:21-cv-00103-MMD-CLB, (May 27, 2021), ECF No. 23. Lithium Nevada filed an opposition and attached multiple documents in support of its arguments that BLM satisfied its obligations under the National Environmental Protection Act (“NEPA”) and the Federal Land Policy and Management Act. *See* ECF No. 31. As relevant here, Lithium Nevada attached as Exhibit 7 the Project’s updated Monitoring Plan—approved in February 2021 pursuant to the ROD—to demonstrate that BLM fully analyzed and ensured compliance with water quality standards and appropriately adopted adaptive management. Lithium Nevada Opp’n to Mot. for Prelim. Inj. at 13–15, Ex. 7. In responding to issues raised in the motion alleging inadequacies in BLM’s wildlife analysis, Lithium Nevada pointed to Exhibit 10, the NDOW Hunter Information Sheet, to illustrate how the FEIS adequately analyzed cumulative impacts to wildlife in a geographic area larger than Project area. *Id.* at 32. The Court denied Plaintiff’s preliminary injunction, ECF No. 48, and consolidated *Western Watersheds Project* with lead

case *Bartell Ranch LLC v. McCullough*, Case No. 3:21-cv-00080-MMD-CLB on July 28, 2021.
ECF No. 60.

BLM now plans to submit the administrative record in *Bartell Ranch LLC*, but does not intend to include either the February 2021 Monitoring Plan or the NDOW Hunter Information Sheet. BLM reasoned that because the February 2021 Monitoring Plan post-dates the January 2021 ROD and the NDOW Hunter Information Sheet was not mentioned in the FEIS that neither should be included. But because both documents expound upon technical information included in BLM's analysis of the Project, they should be included in the administrative record to ensure fulsome review of BLM's decision to authorize the Project.

ANALYSIS

Extra-record evidence may be included in the administrative record "when supplementing the record is necessary to explain technical terms or complex subject matter." *Lands Council*, 395 F.3d at 1030 (citation omitted). "[P]ost-decision studies can be deemed a clarification or an explanation of the original information before the Agency, and for this purpose it is proper for [the Court] to consider them." *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811 (9th Cir. 1980). The district court may thus "consider [this] evidence relevant to the substantive merits of the agency action ... for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

Both Exhibits A and B fall under this exception. BLM developed Exhibit A's February 2021 Monitoring Plan after concluding "in the FEIS that the proposed Plan contains effective water-quality controls ... and this plan *will be finalized* before operations begin after receiving final input from [Nevada Department of Environmental Protection]." Lithium Nevada Opp'n to Mot. for Prelim. Inj. at 15 (emphasis added) (citing FEIS at 4-24-27, App. R at R-4).¹ The resulting February 2021 Monitoring Plan "include[d] a more detailed discussion of potential

¹ The FEIS did not need to include all mitigation details to be published because mitigation plans do "not need to be in 'final form to comply with NEPA's procedural requirements.'" *Id.* at 33 (quoting *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000)).

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1 monitoring and mitigation measures” for any impacts to the groundwater. *Id.* at 35. The Plan
2 outlines key technical information the ROD required Lithium Nevada to develop and should be
3 included as a supplement to the administrative record. *See, e.g.*, ROD at 11 (“LNC will
4 regularly monitor groundwater levels”); Ex. A at 8 (“The wells and piezometers listed in Table
5 1 will continue to be monitored before, during, and after mining and processing activities.”).
6 Given the Plaintiffs’ challenges to BLM’s properly adopted adaptive management, this
7 information provides the Court information to examine the actual mitigation activities that will
8 occur under the ROD. *Cf. Luciano v. United States*, No. 11-cv-1831 TLN-KJN, 2014 U.S. Dist.
9 LEXIS 54255, at *24 (E.D. Cal. Apr. 16, 2014) (denying supplementation of the record where
10 “the record itself is replete with examples of the factors the USFS considered in contemplating
11 Plaintiff’s proposed land exchanges”). Including the February 2021 Monitoring Plan in the
12 record enables the Court to understand the “highly technical nature of” adaptive management
13 mitigation and thus the “supplementary materials [can] aid the court in its understanding” of
14 BLM’s decision. *Asarco, Inc.*, 616 F.2d at 1159. The February 2021 Monitoring Plan is extra-
15 record evidence that falls under the exception allowing the Court to include explanatory
16 information of technical subject matter in the administrative record. *See Lands Council*, 395
17 F.3d at 1030.

18 Exhibit B’s NDOW Hunter Information Sheet similarly reveals increased detail within
19 the FEIS’s cumulative impact analysis within the pronghorn antelope cumulative effects study
20 areas (“CESAs”). The FEIS explained that it analyzed the wildlife within the NDOW Hunt
21 Unit 031, an area of land that reflects “an administrative boundary established based on
22 NDOW’s local familiarity and management of the species” of the pronghorn antelope. Lithium
23 Nevada Opp’n to Mot. for Prelim. Inj. at 32 (citing FEIS, App. A, Figure 4.5-1); *see also* FEIS
24 at 5-2, Table 5.1. If the NDOW Hunter Information Sheet is not included in the administrative
25 record, the Court is left with a simple reference to “Hunt Unit 031” in the description of the
26 CESA that BLM analyzed and will lack the detailed description of the breadth of that unit of
27 measurement. *See* Ex. B (describing the Unit’s elevation, terrain, and geographic boundaries).
28 While such a document may not be important to an agency’s decision given its familiarity with

such information, documents like the NDOW Hunter Information Sheet “that ‘illuminate[]’ or ‘explain’ the original record, but [do] not ... ‘advance new rationalizations for the agency’s action” may be helpful to the Court and supplement the administrative record. *Nw. Coal. For Alts. To Pesticides v. U.S. EPA*, No. C10-1919Z, 2012 U.S. Dist. LEXIS 85596, at *18 (W.D. Wash. June 20, 2012) (citation omitted); *see also Asarco, Inc.*, 616 F.2d at 1160 (noting examples of admissible material could include “background material on the operations of the Hayden smelter, and ... the process by which the EPA reached its decision”). Because the NDOW Hunter Information Sheet helps explain the technical term “Hunt Unit 031” and reveals the extensiveness of BLM’s cumulative effects analysis as it related to pronghorn antelope, that document should also be included in the administrative record. *See Lands Council*, 395 F.3d at 1030.

CONCLUSION

For all these reasons, the Court should grant this motion to supplement the administrative record.

Dated: October 22, 2021.

/s/ Laura K. Granier

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/ Laura K. Granier

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EXHIBIT INDEX

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