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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' MOTION TO STRIKE THE DECLARATION OF TERRY CRAWFORTH AND PLAINTIFFS' EXHIBIT 35, AND MEMORANDUM IN SUPPORT

EXPEDITED CONSIDERATION REQUESTED

INTRODUCTION

Plaintiffs have submitted two pieces of evidence that clearly fall outside of the administrative record with their reply brief. Though Plaintiffs purport to rely on the Declaration of Terry Crawforth[1] to support their showing of alleged irreparable harms arising from the Project's impacts on the greater sage grouse and its habitat, Crawforth himself is not a plaintiff in this action nor a member of the plaintiff organizations, and does not speak to the harms that any *Plaintiff* will allegedly suffer. Instead, he offers opinions directly challenging the Agency's environmental analysis and the NEPA process itself through improper extra-record, post-decisional, expert-opinion evidence, which may not be considered on merits review of an agency decision under the APA. His declaration should therefore be stricken. Should the Court decline to strike it, however, Federal Defendants respectfully request that the Court limit its consideration of that declaration to the paragraphs cited in Plaintiffs' reply memorandum, and only in connection with the harms element of the preliminary-injunction standard. And because Plaintiffs' Exhibit 35,[2] a May 3, 2021 letter from the Nevada Department of Environmental Protection (NDEP) to Defendant-Intervenor Lithium Nevada, clearly post-dates the decision challenged in this case, it likewise should not be considered in connection with the success-on-the-merits element.

Counsel for Federal Defendants has conferred with Counsel for Plaintiffs and Defendant Intervenor, but was unable to resolve the issues presented in this motion. *See* Certification of Arwyn Carroll. Defendant Intervenor does not oppose the relief sought in this motion.

Federal Defendants further respectfully request that this motion be considered on an expedited basis, to allow the parties to direct their argument accordingly at the upcoming July 21, 2021 hearing on Plaintiffs' motion for a preliminary injunction. Counsel for Federal

[1] ECF No. 32-1.

[2] ECF No. 32-4.

Defendants likewise conferred with Plaintiffs' counsel in connection with this request, but the parties were unable to come to agreement. *See id.*

ARGUMENT

I. Plaintiffs may not rely on extra-record evidence to support a the likelihood of success on the merits

Plaintiffs challenge BLM's approval of the Thacker Pass Project through the judicial review provisions of the APA.[3] Under the APA, judicial review of an agency action is based on the administrative record before the agency, rather than on a factual record created *de novo* in the reviewing court. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The fact finding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking."); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). Therefore, the Court's consideration of the "likelihood of success on the merits" element of the preliminary injunction test must be based on the administrative record rather than a *de novo* factual record created by witness testimony. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*); *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048 (9th Cir. 2013); *W. Watersheds Project v. BLM*, No. 3:11-CV-00053-HDM, 2011 WL 1233561, at *1-2 (D. Nev. Mar. 28, 2011). Though BLM has not yet finished compiling the complete administrative record for the decision challenged in this action, the attached declaration of Kenton M. Loda sets forth the

[3] Although Plaintiffs allege violation other statutes, including the Federal Land Policy and Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA"), these statutes do not contain an independent waiver of sovereign immunity, and thus judicial review is conducted under the auspices of the APA. *See, e.g., Lands Council v. McNair,* 537 F. 3d 981 (9th Cir. 2008) (*en banc*) (reviewing NEPA claims under APA standards); *ONRC Action v. BLM*, 150 F.3d 1132, 1135 (9th Cir. 1998) ("A party alleging violations of NEPA and FLPMA can bring an action under the APA challenging an 'agency action.'").

documents submitted in support of and opposition to Plaintiffs' motion for a preliminary injunction that comprise part of, and will be included in, that administrative record.

Any testimonial evidence going to the merits of Plaintiffs' claims would be extra-record and not properly before this Court. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992-93 (9th Cir. 2014) (finding that declarations on merits issues is extra-record evidence not properly considered by court). Declarations are therefore admissible and appropriate only on the issue of injury or the balance of harms. Here, Plaintiffs purport to offer Crawforth's declaration in support of their harms arguments.[4] But Crawforth himself is not a plaintiff in this action. Nor does he claim to be a member of any Plaintiff organization. And he does not opine on the harms that Plaintiffs themselves allegedly will suffer if an injunction does not issue, which is what Plaintiffs must establish, *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and in support of which Plaintiffs have submitted several declarations from their members. Instead, Crawforth attacks the adequacy of the NEPA process itself[5] and offers opinion evidence on the impacts of the Thacker Pass Project to wildlife, including the greater sage grouse and its habitat,[6] which follows the Plaintiffs' arguments on the merits of their NEPA claim concerning BLM's consideration of the Project's impacts on the greater sage grouse.[7]

In short, though Plaintiffs purport to rely on the Crawforth declaration to establish Plaintiffs' alleged harms, the declaration appears to invoke extra-record testimonial evidence "to determine the correctness or wisdom of the agency's decision" concerning those impacts which, as explained below, is something a court is "never permitted" to do. *San Luis*, 776 F.3d at 993 (quoting *Asarco, Inc. v. U.S. Env't Prot. Agency,* 616 F.2d at 1160); *see also W. Watersheds Project v. BLM*, 2011 WL 1233561, at *1-2 (D. Nev. Mar. 28, 2011) (striking declaration

[4] *See* Pls.' Reply, ECF No. 32 at 3–4.

[5] Crawforth Decl. ¶¶ 10–14.

[6] *Id.* ¶¶ 15–34.

[7] *E.g.*, Pls. Mot. for Prelim. Inj. Relief and Mem. in Supp., ECF No. 23, at 27; Pls. Reply at 19–20.

submitted with preliminary injunction motion as improper extra-record evidence in light of "the pleadings, documents, and administrative record on file"). The Court thus should not consider the Crawforth declaration in connection with Plaintiffs' likelihood of success showing because it falls into three categories of evidence that should not be considered on judicial review of agency action under the APA: (1) extra-record evidence, (2) evidence post-dating the challenged decision, and (3) expert testimony. The NDEP letter, on which Plaintiffs clearly rely in their merits argument regarding BLM's water-quality analysis,[8] likewise falls into the first two of these categories. Federal Defendants therefore request that the Court strike both documents or, with respect to the Crawforth declaration, at least, limit its consideration to those paragraphs cited by Plaintiffs in their reply brief—specifically, paragraphs 18, 26, and 28–33[9]—and only to the extent that they address the harms element of the preliminary-injunction analysis.

A. The Crawforth declaration and NDEP letter constitute extra-record evidence

As discussed above, the Court's consideration of the merits of an APA case is limited to the administrative record, rather than a *de novo* factual record created by witness testimony. *Lands Council*, 537 F.3d at 987. The Loda Declaration establishes that neither document will be part of the administrative record.

In the Ninth Circuit, a reviewing court may consider evidence beyond the administrative record in APA cases only under the following limited circumstances: "(1) if necessary to determine whether the agency has considered all relevant factors and explained its decision, (2) when 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." *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 703-04 (9th Cir. 1996) (internal quotations omitted). To the extent

[8] Pls. Reply at 22–23.

[9] *See id.* at 3.

that Plaintiffs wish to introduce evidence on the merits, they bear the burden of demonstrating that the record before the court is inadequate and that the proffered evidence falls within one of these narrow exceptions. *San Luis*, 776 F.3d at 992-93. They have not attempted to do so with either the Crawford declaration or the NDEP letter. Nor could they succeed.

First, Plaintiffs cannot rely on expert declarations to determine whether BLM considered all relevant factors and adequately explained its decision. The documents submitted in support of and opposition to Plaintiffs' motion that will be included in the administrative record, as described in the Loda Declaration, are sufficient for this Court to evaluate the agency's analysis and make a determination of likelihood of success on the merits. And in any event, Plaintiffs have provided any additional documents they believe are relevant for this Court's consideration by including those documents as exhibits to their Motion for Preliminary Injunction and Reply. Expert declarations are not necessary for that purpose. *See San Luis*, 776 F.3d at 993. Nor is evidence, like the NDEP letter, that is proffered "as a basis for questioning the agency's scientific analyses or conclusions" with respect to the Project's water-quality impact. *Id.*

Nor does either piece of evidence satisfy any of the other three exceptions. Plaintiffs have not argued that the agency has relied on documents not in the record or attempted, through either document, to explain technical terms or complex subject matter. And Plaintiffs have not argued, based on either document, that the agency acted in bad faith.

Plaintiffs thus cannot demonstrate that these documents may be considered on the likelihood of success on the merits. And even if the Court were to "admit[ ] extra-record evidence under one of these exceptions, the court cannot use such evidence 'to determine the correctness or wisdom of the agency's decision.'" *W. Expl. LLC v. U.S. Dep't of the Interior*, No. 3:15-CV-491-MMDVPC, 2015 WL 7195156, at *2 (D. Nev. Nov. 16, 2015) (quoting *San Luis*, 776 F.3d at 993).

B. The Crawforth declaration and NDEP letter post-date the challenged decision

"[E]ven if 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 of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 601 (9th Cir. 2018); *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (affirming decision to strike evidence that post-dated decision at issue). By definition, the administrative record will not include post-decisional documents. *See Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012).

Crawforth appears to have digitally signed his declaration on June 30, 2021; it thus post-dates the January 15, 2021 decision challenged in this action by more than six months and may not be considered in connection with Plaintiffs' showing of a likelihood of success on the merits. *See id.* The same holds true for Plaintiffs' reliance on the NDEP letter, dated May 3, 2021—more than three months after the decision issued. Such post-hoc critiques are thus inappropriate and deprive the agency of the ability to respond to criticisms within the administrative record. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

C. Crawforth offers expert opinion to counter the agency's reasoned decision on the impact of the Project on wildlife

Finally, as discussed above, Crawford—who is not a plaintiff in this action—opines on the impacts of the Thacker Pass Project on wildlife in the Thacker Pass area. His declaration thus further constitutes an attempt to engage in inappropriate *post hoc* second-guessing of the agency's expertise in violation of the APA. "The APA gives an agency substantial discretion 'to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" *San Luis.* at 992 (quoting *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378 (1989)). It would be fundamentally unfair to allow a plaintiff to find an expert to submit a declaration questioning

an agency's reasoned decision after the agency's decision has been made. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992).

Plaintiffs instead have the opportunity to present information to BLM during the notice and comment process. 40 C.F.R. § 1503.1. But once the decision approving the Project issued, the record should not be re-opened "as a forum for the experts to debate the merits." *San Luis.*, 776 F.3d at 993. For this reason, courts routinely strike expert declarations presented to contest an agency's conclusions. *See W. Watersheds Project v. BLM*, 2011 WL 1233561, at *1-2; *Border Power Plant Working Group v. Dep't of Energy*, 467 F. Supp. 2d 1040, 1051-53 (S.D. Cal. 2006); *Spiller v. Walker*, No. A-98-CA-255-SS, 2002 U.S. Dist. Lexis 13194, *26-27 (W.D. Tex. July 19, 2002) ("[A]ny legal conclusions and post-[decision] evidence within the declarations and argumentation offered simply to contest the agencies' experts are not admissible."). Because the Crawforth declaration constitutes extra-record opinion evidence offered to critique and counter BLM's analysis of the Project's impacts on wildlife, it should be stricken.

II. The Court should not consider evidence provided for the first time in reply

Finally, Federal Rule of Civil Procedure 6 requires that "[a]ny affidavit supporting a motion must be served with the motion." Fed. R. Civ. P. 6(c)(2). This requirement allows the opposing party to respond to the evidence in its opposition. Accordingly, "[t]he Court should not consider new evidence filed in a reply brief without giving the non-moving party an opportunity to respond." *Klemme v. Shaw*, No. 2:05-cv-01263-PMP-LRL, 2007 WL 9728680, at *2 (D. Nev. Apr. 20, 2007) (citing *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 13 F. Supp. 2d 1064, 1071 (D. Nev. 1998)). "The theory behind such a rule is to preserve the right of the party defending a motion to have adequate opportunity to respond to legal and factual allegations made in the papers." *United States v. Kahre*, No. 2:05-CR-121-DAE-RJJ, 2009 WL 10715471, at *4 (D. Nev. Feb. 26, 2009).

The Crawforth declaration does not contain any information that Plaintiffs could not have provided at the time that they filed their motion. Nor have Plaintiffs offered any

explanation for their belated submission of this declaration, beyond that it is offered in response to arguments and evidence in Federal Defendants' or Lithium Nevada's oppositions to Plaintiffs' motion. But the single paragraph addressing contemplated actions under the Historic Properties Treatment Plan (HPTP) does not address the HPTP itself or any information provided therein that Plaintiffs did not have at the time their motion was filed.[10] And Plaintiffs have not offered any explanation for failure to submit the NDEP letter with their motion.

Though Plaintiffs' counsel proposed agreeing to a limited surreply to address their late-filed evidence, *see* Carroll Cert., such relief would not address the core issues with the declaration and NDEP letter set forth above. Because Plaintiffs improperly rely on the NDEP letter to support their merits argument, and to the extent that the Crawforth declaration challenges BLM's NEPA process itself or addresses the merits of Plaintiffs' claims concerning BLM's analysis of the Project's impacts on wildlife, no countering evidence would be properly presented and further argument on improper evidence would exacerbate that issue. As discussed above, extra-record evidence should not be considered in evaluating the likelihood of success on the merits. If, however, the Court is inclined to consider this evidence in resolving the likelihood of success on the merits, Federal Defendants respectfully request an opportunity to briefly address it either in writing or at oral argument.

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[10] *Compare* Crawforth Decl. ¶ 33 *with* Declaration of Talasi B. Brooks (ECF No. 23-25) ¶ 7.

CONCLUSION

The Court's consideration of the likelihood of success on the merits element of the preliminary-injunction standard should be limited to evidence considered by the agency in rendering the challenged decision. As a result, Federal Defendants respectfully request that the NDEP letter and Crawforth's declaration be stricken—or, with respect to the latter, at least that the Court limit its consideration to the paragraphs cited by and relied on by the Plaintiffs in support of their argument concerning alleged irreparable harms.

Respectfully submitted this 9th day of July, 2021.

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