THOMAS L. SANSONETTI
Assistant Attorney General
BRIAN C. TOTH
RACHEL DOUGAN
Trial Attorneys
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0639 / 616-5082
Facsimile: (202) 305-0506

McGREGOR W. SCOTT
United States Attorney
EDMUND F. BRENNAN
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2766
Facsimile: (916) 554-2900

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SIERRA NEVADA FOREST PROTECTION CAMPAIGN, PLUMAS FOREST PROJECT EARTH ISLAND INSTITUTE; and CENTER FOR BIOLOGICAL DIVERSITY, non-profit organizations,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; JACK BLACKWELL, in his official capacity as Regional Forester, Region 5, United States Forest Service; and JAMES M. PEÑA,

Federal Defendants,

and

QUINCY LIBRARY GROUP, an unincorporated citizens group; and PLUMAS COUNTY,

Defendant-Intervenors.

Case No. 2:04-cv-2023-MCE-GGH

FEDERAL DEFENDANTS' COMBINED REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' EXTRA-RECORD DECLARATIONS AND RESPONSE TO PLAINTIFFS' MOTION TO SUPPLEMENT ADMINISTRATIVE RECORD

Date: April 18, 2005
Time: 9:00 a.m.
Location: 15th Floor
Courtroom No. 3

INTRODUCTION

Plaintiffs in this case are challenging the Forest Service's decision to authorize a forest management project, the Meadow Valley Defensible Fuel Profile Zone and Group Selection Project, on the Plumas National Forest, near Quincy, California. Federal Defendants moved to strike numerous extra-record declarations and other materials that Plaintiffs submitted along with their motion for summary judgment on the grounds that the materials do not fit any of the narrow exceptions to the general rule that review is based on the administrative record that was before the agency at the time of its decision.[1]/

Plaintiffs' argument in opposition ignores the Ninth Circuit's recent enumeration in Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005) of only *four* limited exceptions and that court's instruction to construe the exceptions narrowly. Plaintiffs overstate the extent to which courts allow extra-record materials by urging a general exception for cases involving the National Environmental Policy Act ("NEPA"), an untenable position in view of the caselaw. Their argument further demonstrates that Plaintiffs' declarations constitute impermissible "technical testimony . . . elicited for the purpose of determining the scientific merit of the [agency's] decision," that the Ninth Circuit has found should be excluded. Asarco, Inc v. U.S. Envtl. Prot. Agency, 616 F.2d 1153, 1161 (9th Cir. 1980). Federal Defendants' motion to strike should therefore be granted.

Plaintiffs have also moved to supplement the administrative record with more extra-record materials, including the Declaration of Dennis C. Odion ("Second Odion Decl."), the Declaration of Don C. Erman ("Erman Decl."), and other documents attached to the Declaration of Rachel Fazio ("Fazio Decl."), including two exhibits from the record for an entirely different

---

[1]/ Federal Defendants moved to strike the following: Declaration of Monica L. Bond ("Bond Decl.") (Doc. No. 27); Declaration of Jennifer A. Blakesley ("Blakesley Decl.") (Doc. No. 28); Supplemental Declaration of Chad T. Hanson ("Supp. Hanson Decl.") (Doc. No. 30); Declaration of Dennis C. Odion ("Odion Decl.") (Doc. No. 33); and Attachments 4 through 9 to the Declaration of George M. Torgun ("Torgun Decl.") (Doc. No. 35).

forest management project, the Basin Project, which is not being challenged in this case.[2]/ In attempting to justify the consideration of these documents, Plaintiffs rely upon the same overstated interpretation of the limited exceptions recognized by the Ninth Circuit and ignore the presumption that the administrative record is properly designated absent clear evidence to the contrary. Because Plaintiffs' new declarations and documents from the Basin project do not fit the limited exceptions to the record review rule, their motion to supplement should be denied.[3]/

ARGUMENT

I. PLAINTIFFS' EXTRA-RECORD MATERIALS SHOULD BE STRUCK

A. The Exceptions to the Record Review Rule are Narrowly Construed and Should Not Be Expanded By This Court

Plaintiffs acknowledge--as they must--that as a general matter, "the scope of judicial review of agency action is limited to review of the administrative record." Pls.' Opp. to Mot. to Strike and Mem. in Supp. of Mot. to Supp. Admin. R. ("Pls.' Opp.") (Doc. No. 68) at 1-2. A fundamental flaw that runs through Plaintiffs' entire brief, however, is that they interpret the exceptions to the administrative record so broadly as to render the general rule meaningless. Cf. Lands Council, 395 F.3d at 1030 ("The scope of these exceptions permitted by our precedent is constrained, *so that the exception does not undermine the general rule*.") (emphasis added).

As Federal Defendants pointed out in their opening brief, the Ninth Circuit has recognized four narrow exceptions to the general rule that review is to be based on the administrative record. See Fed. Defs.' Mem. in Supp. of Mot. to Strike (Doc. No. 46) at 3-4; Animal Def. Council v. Hodel, 840 F.2d 1432, 1436-37 (9th Cir. 1988). Plaintiffs argue that there is a special exception for cases involving NEPA, and that extra-record evidence should be

---

[2]/ The lead Plaintiff in this case is among several groups challenging the Basin Project in a separately filed lawsuit. See Sierra Nevada Forest Protection Campaign v. Rey, No. 2:05-CV-00205-MCE-GGH (E.D. Cal.).

[3]/ Plaintiffs combined their brief in opposition to Defendants' motion to strike with their brief in support of their motion to supplement the administrative record. Pursuant to a stipulation by the parties and for more efficient presentation of the issues, Federal Defendants are combining their reply in support of their motion to strike with their response to Plaintiffs' motion to supplement.

admitted more liberally in such cases. Id. at 3-4. Plaintiffs' arguments simply overstate the extent to which extra-record evidence is permitted.

The argument that there is a NEPA exception to the general rule of administrative record review is not supported by recent Ninth Circuit caselaw. In Lands Council, a plaintiff environmental organization which was challenging a forest management project under NEPA and the National Forest Management Act ("NFMA") argued that the district court had erred by refusing to supplement the administrative record with new evidence that allegedly "would have shown that the Forest Service did not address a substantial environmental risk posed by the Project." 395 F.3d at 1029. The Ninth Circuit, however, rejected this argument and specifically enumerated four "*narrow* exceptions" to the general rule: (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if 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. Id. at 1030 (citing Southwest Ctr., 100 F.3d at 1450).[4]/

The Ninth Circuit's opinion in Lands Council did not recognize any "NEPA exception," despite the fact that the case involved NEPA claims and the plaintiff there had argued that the extra-record evidence would have shown that the agency did not address a substantial environmental factor. See id. at 1029. Rather, the Ninth Circuit again cautioned that the "exceptions are narrowly construed and applied," explaining:

> The scope of these exceptions permitted by our precedent is constrained, *so that the exception does not undermine the general rule.* Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making.

Id. at 1030 (emphasis added); see also Airport Cmty. Coalition v. Graves, 280 F. Supp.2d 1207, 1213 (W.D. Wash. 2003) (noting that consideration of "new information represents 'Monday

---

[4]/ See also Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996) (quoting Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 997 (9th Cir. 1993) (per curiam) and Nat'l Audubon Soc'y v. U.S. Forest Serv., 46 F.3d 1437, 1447 n.9 (9th Cir. 1993)).

morning quarterbacking.' If the court were to consider this new information in an arbitrary and capricious analysis, the court would effectively transform that analysis into *de novo* review, a level of review for which the court is not authorized.").

Plaintiffs argument that because this case involves NEPA, the Court has leeway to admit extra-record evidence as a routine matter, is simply untenable. See Pls.' Opp. at 3, 4. To support their argument, Plaintiffs refer to County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978). Contrary to Plaintiffs' argument, that case does not stand for the proposition that a general NEPA exemption to record review exists. In County of Suffolk, a 1977 case from the Second Circuit, the court held that the deferential arbitrary and capricious standard of review should *not* be applied in NEPA cases and, therefore, the introduction of extra-record evidence was permitted. Id. at 1384. The Suffolk court's reliance on a more-probing standard of review than "arbitrary and capricious" has since been rejected by the Supreme Court in Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). In Marsh, the Court held that a reviewing court, in determining the validity of an agency's decision under NEPA, must employ the arbitrary and capricious standard. Marsh, 490 U.S. at 378. Thus, Plaintiffs' reliance on County of Suffolk is unavailing and this case cannot serve as the basis for Plaintiffs' claim that there is a broad "NEPA exception" to the well established rule confining judicial review of an agency action to the administrative record.

Another case upon which Plaintiffs rely as evidence of a "NEPA Exception" has also been weakened by a subsequent decision. Plaintiffs cite a 1978 case from the District of Minnesota for the proposition that in NEPA cases, courts "cannot be restricted to the administrative record." Pls.' Opp. at 4 (citing Como-Falcom Coalition, Inc. v. U.S. Dep't of Labor, 465 F. Supp. 850, 856 n.1 (D. Minn. 1978)). The Eighth Circuit has since held, however, that exceptions to the rule of administrative record review "apply only under *extraordinary circumstances*, and are not to be casually invoked unless the party seeking to depart from the record can make a *strong showing* that the specific extra-record material falls within one of the limited exceptions." Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 766 (8th Cir. 2004) (emphasis added). As the court explained in that case, which involved some NEPA claims:

> When there is a contemporaneous administrative record and no need for additional explanation of the agency decision, there must be a strong showing of bad faith or improper behavior before the reviewing court may permit discovery and evidentiary supplementation of the administrative record

Id. (internal citations and quotations omitted). The court then rejected the argument that additional explanation was necessary and refused to consider the plaintiffs' declarations.

Plaintiffs cite Asarco for the proposition that it is "unwise to 'straight-jacket' the reviewing court with the administrative record." Pls.' Opp. at 5. In that case, however, the Ninth Circuit actually held the district court went "too far" in admitting extra-record evidence, and noted that "[c]onsideration of the evidence to determine the correctness or wisdom of the agency's decision is *not* permitted." Asarco, 616 F.2d at 1160 (emphasis added). Other courts have reiterated this principle as well. See Ctr. for Biological Diversity v. Federal Highway Admin., 290 F.Supp.2d 1175, 1200-1201 (S.D. Cal. 2003); see also Sierra Club v. Dombeck, 161 F. Supp. 2d 1052, 1062-63 (D. Ariz. 2001) ("Consideration of evidence outside the administrative record to determine correctness or wisdom of an agency's decision is not permitted . . . ."); Alsea Valley Alliance v. Evans, 143 F. Supp.2d 1214, 1216-17 (D. Or. 2001).[5]/ In sum, the Court should reject Plaintiffs' argument that extra-record declarations are permissible under a "NEPA exception," as such a finding would be contrary to the Ninth Circuit's recent direction that courts must narrowly construe any exceptions to the administrative record rule. Lands Council, 395 F.3d at 1030.

B. Plaintiffs' Scientific Declarations Do Not Fit Any Exception to the General Rule that Review is Based on the Record And Therefore Should Not Be Considered

As Federal Defendants explained in their opening brief, Plaintiffs have submitted four declarations that offer scientific opinions about the merits of the Meadow Valley Decision: the Odion Declaration, Bond Declaration, Blakesley Declaration, and Supplemental Hanson

---

[5]/ Plaintiffs also cite Nat'l Audubon Soc'y v. U.S. Forest Serv., 46 F.3d 1437 (9th Cir. 1993), but they fail to note that the court in that case considered extra-record material in part because the statute at issue called for accelerated judicial review. Id. at 1447, 1448 (relying upon "the limited scope and applicability of [the provision at issue], *especially its accelerated judicial review procedures*") (emphasis added).

Declaration (collectively, "Scientific Declarations"). These declarations do not fit any exception to the record review rule and should therefore be struck. Plaintiffs repeatedly attempt to justify their Scientific Declarations as falling within a "NEPA exception." See Pls.' Opp. at 7, 8, 9, 10, 14. As explained above, however, the Ninth Circuit has not recognized a special exception for NEPA cases. Because the Ninth Circuit and the Supreme Court have instructed courts not to expand the exceptions, the Court should not adopt a "NEPA exception" as Plaintiffs argue. Plaintiffs' Scientific Declarations cannot be justified on this basis.

Nor can the Scientific Declarations be justified on the grounds that they simply explain technical and complex subject matter. While Federal Defendants acknowledge that Plaintiffs' Scientific Declarations purport to provide certain definitions and explanations of terms that are also explained within the administrative record, it is also clear that they are not simply being used for that purpose. Rather, Plaintiffs' attempt to explain, through the declarations, why they believe the agency should have arrived at a different conclusion is more the type of "technical testimony . . . elicited for the purpose of determining the scientific merit of the [agency's] decision," that the Ninth Circuit has found should be struck. Asarco, 616 F.2d at 1161.

The District Court of Oregon recently rejected declarations purportedly submitted for such a purpose in Alsea Valley. 143 F. Supp. 2d at 1216-17. There was no dispute that the record in that case involved complex issues relating to the genetics of hatchery salmon versus wild salmon. Arguing that the record was complex, plaintiffs provided an extra-record declaration "in order to facilitate the court's analysis and understanding of the basis for defendants' decision and its legality under the ESA." Id. at 1216. Plaintiffs contended that the declaration was proper because it did "not rely on materials outside of the Record but merely 'summarizes and explains the original record . . . and offers no post-record rationalizations." Id.

As the Alsea court recognized, however, the issue is not so simple. "[A] party may not circumvent the general rule, that judicial review is limited to the administrative record, by simply labeling a declaration as 'assisting the court.'" Id. In Alsea, as here, rather than providing technical assistance, the declarant submitted his "interpretation, opinion and argument of what

ultimate conclusions the Record can and cannot support. This material falls outside the record and must be stricken." Id.

Plaintiffs' Scientific Declarations do the same thing that the court rejected in Alsea. For instance, in Alsea, the declarant (Lannan) stated, "I find no evidence in the administrative record that indicates that Oregon coastal hatchery populations of coho salmon are reproductively isolated from naturally spawning populations and [sic] strong inference that they are not." Id. at 1216-17. The court properly determined that such statements were the declarant's "scientific and expert opinion of the record, not an explanation of technical or complex material contained in the record." Id. at 1217.

Plaintiffs' Scientific Declarations contain similar allegations regarding the scientific adequacy of the agency's decision. See Odion Decl. ¶ 3 ("Within my area of expertise, there are two main flaws to the Environmental Assessment"); id. ¶ 11 (concluding, in his opinion, that project would not meet the requirements of the QLG Act); id. ¶ 15 (alleging that the "contention of the EA that [proposed DFPZs] provide suitable places for fire fighters to operate is spurious"); Bond Decl. ¶ 15 (arguing that statements from the Meadow Valley Decision Notice "lack a scientific or rational basis and should not be relied upon"); id. ¶ 23 (arguing that the discussion on owl foraging habitat and prey abundance is "conclusory" and that "a more thorough analysis of potential impacts is necessary"); Blakesley Decl. ¶ 5 (expressing her opinion that the Forest Service's analysis is inadequate); ¶ 15 (expressing opinion that cumulative effects analysis is inadequate). As such, Plaintiffs' Scientific Declarations cannot be justified on the grounds that they explain complex terms.

This is hardly a case where the Forest Service has decided "to hide behind its experts' conclusions in an effort to support a decision that is arbitrary and capricious," as Plaintiffs argue. Pls.' Opp. at 13. The Forest Service biologist's conclusion why effects to owls would not be significant was supported by numerous, reasonable bases. As explained in Federal Defendants' opening summary judgment brief:

> First, there would not be any project activity in any PACs or [spotted owl habitat areas, or "SOHAs"]. See 13 AR 4824 ("100% of PACs and SOHAs would be avoided"); see also 12 AR 4428 (no PACs or SOHAs would be entered), 4455

> (relying on PAC avoidance). Second, the vast majority of existing foraging habitat (87%) and nesting habitat (95%) would be retained within the analysis area. 13 AR 4824; see also 12 AR 4455. Third, "96% of the combined acreage of PACs and HRCAs would not be treated." Id.; see also 12 AR 4430 (approximately 95.8% of all PAC/HRCA combined acres would not be treated under the action alternatives), 4455 (same). Fourth, of the 30 HRCAs within the analysis area, 16 would be reduced only by an average of 7-8% (50-63 acres of their average size of 750 acres). 13 AR 4824. This led the Forest Service to conclude that owl occupancy should not be reduced in the PAC/HRCAs. Id.; see also 12 AR 4433 (anticipating that owl occupancy of each established PAC should remain the same as pre-treatment); 12 AR 4455 (same). Fifth, the three PAC/HRCAs where suitable habitat reduction would be greatest have not been occupied by owls in the last two years. 13 AR 4824; see also 12 AR 4433; 12 AR 4455.

Fed. Defs.' Summ. J. Mem. (Doc. No. 49) at 19; see also Fed. Defs.' Summ. J. Reply Mem. (Doc. No. 77) at 11-12.

Federal Defendants have also demonstrated that they considered effects related to owl competition, owl reproduction, habitat fragmentation and connectivity, and owl prey raised by Plaintiffs. Having considered the factors that Plaintiffs claim were ignored, the agency's opinion is entitled to deference. See Alaska Ctr. for Env't v. U.S. Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999) ("Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference."). While Plaintiffs' own scientists may disagree with the agency's conclusions, that is not adequate grounds for supplementing the administrative record. See Asarco, 616 F.2d at 1160 ("Consideration of the evidence to determine the correctness or wisdom of the agency's decision is *not* permitted.") (emphasis added); accord, Ctr. for Biological Diversity, 290 F. Supp. 2d at 1200-1201; Dombeck, 161 F. Supp. 2d at 1062-63; Airport Cmty. Coalition, 280 F. Supp.2d at 1213.

Finally, Plaintiffs' Scientific Declarations cannot be justified as falling within what Plaintiffs describe as the "second exception," i.e., for the purposes of determining whether the agency has "considered all relevant factors or has explained its course of conduct or grounds of decision." Pls.' Opp. at 7. As explained supra, the Forest Service has demonstrated in its summary judgment briefs that it adequately considered the relevant factors related to the owl. Although the Ninth Circuit has recognized an exception where it is necessary to determine

whether the agency has considered all relevant factors, that exception cannot be used to simply present disagreements with the conclusions reached by the agency. See Asarco, 616 F.2d at 1160 ("Consideration of the evidence to determine the correctness or wisdom of the agency's decision is *not* permitted"). Plaintiffs' Scientific Declarations therefore should be struck.

C. Attachments 4 through 9 to Plaintiffs' Torgun Declaration Do Not Fit Any Exception to the General Rule that Review is Based on the Record And Therefore Should Not Be Considered

Federal Defendants also moved to strike Attachments 4 through 9 of the Torgun Declaration, which consist of various documents drawn from the administrative records of other projects not being challenged in this case. Contrary to Plaintiffs' argument, Federal Defendants' objections to these documents do not support the merits of Plaintiffs' claim that the cumulative effects analysis to owls was required to consider the Basin project. Pls.' Opp. at 14-15. As Federal Defendants have explained elsewhere, the Basin project was outside the analysis area boundary that was reasonably drawn based on spotted owl habitat--specifically, one home range core area ("HRCA") beyond each HRCA where any timber harvest would occur. See Fed. Defs.' Summ. J. Mem. at 12-13; Fed. Defs.' Summ. J. Reply Mem. at 8, 10; 12 AR 4467, 4489.

Federal Defendants' objection is more fundamentally about the role that the agency plays in determining what constitutes the administrative record. A record may not be supplemented with documents simply because Plaintiffs believe they ought to have been included. If that were the case, courts would always be engaged in disputes over what documents were considered by the decisionmaker. That is why the agency's designation of the administrative record is afforded a presumption of regularity. See Bar MK Ranches v. Yuetter, 994 F.2d 735, 739-40 (10th Cir. 1993); Fund for Animals v. Williams, 245 F. Supp. 2d 49, 55 (D.D.C. 2003) (courts presume an agency has "properly designated the administrative record absent *clear evidence* to the contrary.") (emphasis added); Amfac Resorts, L.L.C. v. U.S. Dep't of Interior, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("standard presumption" is that agency properly designated the record). As the District Court for the District of Columbia has explained:

> The question left for the court is straightforward: who determines what constitutes the "full" administrative record that was "before" the agency? *Common sense and precedent dictate that at the outset, the answer must be the*

> *agency*. It is the agency that did the "considering," and that therefore is in a position to indicate initially which of the materials were "before" it--namely, were "directly or indirectly considered." If it were otherwise, non-agency parties would be free to define the administrative record based on the materials they believe the agency must (or should) have considered, leaving to the court the unenviable task of sorting through a tangle of competing "records" in an attempt to divine which materials were considered. Judges are not historians charged with isolating the "true" basis for an agency's decision when its ostensible justification proves unconvincing. *Hence the presumption that the agency properly designated the administrative record*.

Id. at 56-57 (internal citations and quotations omitted) (emphasis added).

Plaintiffs here confuse the standard for review of the agency's decision with the standard that applies in determining whether the administrative record may be supplemented. See Pls.' Opp. at 15 (arguing that the court must consider Attachments 4 through 9 of the Torgun Declaration because "Defendants *arbitrarily* failed to submit these documents as part of the record . . . .") (emphasis added). The standard of review that applies to the former is found in the Administrative Procedure Act, 5 U.S.C. § 706, which requires a plaintiff to demonstrate that the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). By contrast, to supplement an administrative record, a plaintiff must--by "clear evidence"--overcome the presumption that the record has been properly designated by the agency. Fund for Animals, 245 F. Supp. 2d at 55; see Bar MK Ranches, 994 F.2d at 739-40. Although Plaintiffs argue that Attachments 4 through 9 of the Torgun Declaration ought to have been considered and are relevant to determining whether the cumulative effects analysis was adequate, they have not and cannot establish by "clear evidence" that the agency improperly designated the record. Id. at 55. The Court should therefore grant Defendants' motion to strike Attachments 4 through 9 to the Torgun Declaration.

II. PLAINTIFFS SHOULD NOT BE ALLOWED TO SUPPLEMENT THE RECORD WITH ADDITIONAL EXTRA-RECORD DECLARATIONS OR PROJECT DOCUMENTS FROM ADMINISTRATIVE RECORDS IN OTHER CASES

Plaintiffs have also moved to supplement the administrative record with several additional declarations and other documents, including two exhibits from the administrative record for a separately challenged forest management project decision, the Basin Project (Fazio Decl. Attachs. 3, 4). Plaintiffs rely upon the same flawed arguments used to oppose Defendants'

motion to strike--namely, they overstate the scope of exceptions to the administrative record, urge the court to recognize a "NEPA exception," and attempt to characterize their declarants' scientific opinions of the merits of the agency's decision as providing an explanation of complex subject matter. As explained below, Plaintiffs' motion to supplement the record with the Second Odion Declaration, the Erman Declaration, and the two exhibits from the Basin administrative record (Fazio Decl. Attachs. 3, 4), should be denied.

A. Plaintiffs' Second Odion Declaration Does Not Fit Any Exception to the General Rule that Review is Based on the Record And Therefore Should Not Be Considered

Plaintiffs attempt to justify the Second Odion Declaration by arguing that it explains complex subject matter and technical terms, pertains to factors allegedly not discussed in the Meadow Valley documents, and fits a "NEPA exception." Pls.' Opp. at 17. None of these arguments justifies the Court's considering the declaration. While the Second Odion Declaration may discuss complex scientific concepts, it goes well beyond simply explaining or defining technical terms and simply presents an opinion that criticizes and disagrees with the Forest Service's decision.

For example, Odion alleges that the Meadow Valley project documents "cite relatively little primary literature," most of which is allegedly from "relatively obscure forestry journals," and that the agency relies "to a large degree on gray literature . . . rather than existing mainstream science." Id. ¶ 3. The declaration disagrees with the Forest Service's interpretation of a scientific paper, argues that fire resiliency in the project area would be reduced, and criticizes the Forest Service's decision to conduct some group selection treatments in areas where other types of thinning have previously occurred. See id. ¶¶ 4, 6, 7, 9, 14; see also id. ¶¶ 10, 11 12 (criticizing Forest Service reliance upon its own studies at Black's Mountain Experimental Forest). Such criticisms go well beyond the type of background information allowed under the Ninth Circuit's limited exception. See Asarco, 616 F.2d at 1161 (courts may not consider "technical testimony . . . elicited for the purpose of determining the scientific merit of the [agency's] decision"); see also Dombeck, 161 F. Supp. 2d at 1062-63 ("Consideration of evidence outside the administrative record to determine correctness or wisdom of an agency's

decision is not permitted, even if the court has also examined the administrative record"); Alsea Valley, 143 F. Supp. 2d at 1216-17.

B. Plaintiffs' Erman Declaration Does Not Fit Any Exception to the General Rule that Review is Based on the Record And Therefore Should Not Be Considered

Plaintiffs attempt to justify the Erman Declaration by arguing that it is submitted in response to arguments that the Sierra Nevada Ecosystem Project ("SNEP") Report and a scientific article by Weatherspoon support the Meadow Valley decision, and that it would assist the court in determining whether the agency considered the relevant factors. See Pls.' Opp. at 17-18. Federal Defendants submitted the Weatherspoon (1996) article to rebut arguments raised initially by Plaintiffs through their extra-record Odion Declaration. See Fed. Defs.' Mem. in Supp. of Mot. to Strike at 12 n.9 (noting that Skinner Decl. was submitted to rebut Odion Decl.); Skinner Decl., Attach. 2 (Weatherspoon (1996) article). The fact that Federal Defendants had to respond to Plaintiffs' extra-record filings with their own, however, does not justify the submission of further declarations from Plaintiffs. See, e.g., Tri-Valley Cares v. U.S. Dep't of Energy, No. C 03-3926-SBA, 2004 WL 2043034, at *3 (N.D. Cal. Sept. 10, 2004).

In Tri-Valley Cares, the court permitted some of plaintiffs' declarations under the limited exceptions to the administrative record rule and also allowed the United States to file declarations in response. When plaintiffs then sought to file declarations which replied to the United States' rebuttal declarations, the court refused to allow them, explaining as follows:

> Plaintiffs' purported "reply" declarations are nothing more than a perpetual battle of the experts, a battle in which this Court will not participate. See Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989). As such, they are not appropriate for the Court's consideration. The motion for leave to file reply declarations is DENIED.

Id. Likewise, the Court here should reject the invitation to engage in further argument on whether there are "factual or scientific inaccuracies" in the Forest Service's decision, Pls.' Opp. at 17. The "standard for agency action is not one of perfection, but whether the agency acted arbitrarily and capriciously." Central S. Dakota Co-op. Grazing Dist. v. Sec'y of Agric., 266 F.3d 889, 901(8th Cir. 2001). The Court should therefore decline to allow Plaintiffs to supplement the administrative record with the Erman Declaration.

C. The Basin Wildlife Map and Environmental Assessment Excerpt Do Not Fit Any Exception to the General Rule that Review is Based on the Record And Therefore Should Not Be Considered

The Court should also reject Plaintiffs' request to supplement the record with documents related to the Basin Project. Pls.' Opp. at 15-16. Plaintiffs have submitted a wildlife map depicting proposed timber harvest in the Basin Project area, which is also located on the Plumas National Forest, as well an excerpt from the Environmental Assessment ("EA") for the Basin Project, and argue that these documents fit a "NEPA exception" to the rule of record review and that they are necessary to determine whether the agency considered all relevant factors. See Pls.' Opp. at 16. As explained supra, however, these exceptions are not among those recently enumerated by the Ninth Circuit in Lands Council. Recognizing them here would construe the exceptions to the administrative record so broadly as to completely swallow the rule itself. See Lands Council, 395 F.3d at 1030. Additionally, the same reasoning applies to these documents that applies regarding Attachments 4 through 9 to the Torgun Declaration, namely that the agency's designation of the record is afforded a presumption of regularity, and Plaintiffs have not shown by clear evidence that the documents were withheld from the record in bad faith or that they were actually considered by the decisionmaker. As such, Plaintiffs' motion to supplement the record with them should be denied.

Plaintiffs have also moved to supplement the administrative record with an unpublished decision, Center for Sierra Nevada Conservation v. Berry, No. Civ. S-02-325 LKK/JFM, slip op. at 39 (E.D. Cal. Feb. 15, 2005) (Pls.' Fazio Decl., Attach. 5). Federal Defendants do not believe that it is necessary or appropriate to supplement an administrative record with court decisions. However, they do not object to the Court's considering the opinion in Berry, as this District Court clearly has the discretion to take judicial notice of such decisions pursuant to Rule 201 of the Federal Rules of Evidence. Nor do Federal Defendants object to the excerpts of the SNEP Report and California Spotted Owl Technical Report ("CASPO Report") (Pls.' Fazio Decl., Attachs. 1, 2), provided that the Court also consider the pages of the SNEP Report which Federal

Defendants provided as a rebuttal exhibit attached to their summary judgment reply brief.[6]/ See Fed. Defs.' Summ. J. Reply Mem., Ex. F.

CONCLUSION

For the foregoing reasons, the Court should grant Federal Defendants' Motion to Strike Plaintiffs' extra-record submissions. Furthermore, the Court should deny Plaintiffs' Motion to Supplement the administrative record with additional declarations and with documents from the administrative record for the separately challenged Basin Project.

Respectfully submitted this 28th day of March 2005.

McGREGOR W. SCOTT
United States Attorney
EDMUND F. BRENNAN
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2766

THOMAS L. SANSONETTI
Assistant Attorney General

/s/ Brian C. Toth
BRIAN C. TOTH
RACHEL DOUGAN
Trial Attorneys
General Litigation Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0639
Facsimile: (202) 305-0506

Of counsel:

JAMIE ROSEN
U.S. Department of Agriculture
Office of General Counsel
33 New Montgomery Street, 17th Floor
San Francisco, CA 94105-1924

[6]/ Defendants included excerpts of the CASPO Report in the administrative record, but only those pages directly or indirectly relied upon by the decisionmaker. See 10 AR 3688-3690. While the administrative record may not be supplemented simply because Plaintiffs allege that the documents at issue "should have been included," Pls.' Mot. to Supp. Admin. R. (Doc. No. 62) at 2, Federal Defendants do not object to the Court's consideration of additional pages from the CASPO Report and SNEP Report here.

Telephone: (415) 744-2743
Facsimile: (415) 744-3170

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2005, I electronically filed the foregoing Federal Defendants' COMBINED REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND RESPONSE TO PLAINTIFFS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Rachel M. Fazio
rfazio@nccn.net

Michael R. Sherwood
msherwood@earthjustice.org

Michael B. Jackson
mjatty@sbcglobal.net

/s/ Brian C. Toth
Attorney for Federal Defendants