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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMY GRANAT, *et al.*,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Federal Defendants.

Case No. 2:15-CV-0605-MCE-EFB (TEMP)

Date: July 28, 2016
Time: 2:00 p.m.
Judge: Hon. Morrison C. England, Jr.
Place: 501 "I" Street
Courtroom: No. 7, 14th Floor
Sacramento, CA

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' EXTRA-RECORD DECLARATIONS

I. INTRODUCTION

Plaintiffs' claims are subject to review, if at all, pursuant to the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. With few exceptions not present here, judicial review of Plaintiffs' claims under the APA is limited to the administrative record on which the Forest Service relied in making the decision for the Plumas Motorized Travel Management Project.

Plaintiffs ignored these principles of judicial review and submitted four declarations in conjunction with their motion for summary judgment. *See* Declaration of John Michael Crump ("Crump Decl."), ECF No 31-3; Decl. of Amy Granat ("Granat Decl."), ECF No. 31-4; Decl. of Corky Lazzarino ("Lazzarino Decl."), ECF No. 31-5; Decl. of Robert Armand Perreault, Jr. ("Perreault Decl."). Although Plaintiffs claim in a footnote in one section of their brief that they offer the declarations solely for the purpose of standing, later in their brief they rely on portions of the declarations to advance their arguments on the merits. Memorandum and Points of Authorities in Support of Plaintiffs' Motion for Summary Judgment ("Pls.' Br.") 3 n.1, 21-22, 25-26, ECF No. 31. Specifically, Plaintiffs rely on the following paragraphs from the declarations to advance arguments on the merits: Crump Decl., ¶¶ 7-14, *see* Pls.' Br. 20-21; Granat Decl. ¶¶ 15-18, *see* Pls.' Br. 25; Lazzarino Decl., ¶ 3, *see* Pls.' Br. 25; and Perreault Decl. ¶¶ 4-10, 17, 22, *see* Pls.' Br. 21-22, 25-26.

Plaintiffs have not attempted to establish that the declarations fall within any of the exceptions to the rule limiting judicial review to the administrative record. Plaintiffs' bid to introduce new evidence that was not before the Forest Service at the time the Agency made its decision, in order to influence this Court's decision, is improper and should be rejected. Federal Defendants request that the Court strike the paragraphs identified above from Plaintiffs' declarations. References to these paragraphs in Plaintiffs' brief and any allegations unsupported by the Administrative Record should also be stricken. In the alternative, the Court should decline to consider the portions of Plaintiffs' brief that rely on the extra-record declarations.

II. LEGAL BACKGROUND

Judicial review of the adequacy of the Forest Service's analysis of the Plumas Motorized Travel Management Project Final Environmental Impact Statement ("FEIS") and Record of Decision is governed by the APA and is limited to the administrative record the Forest Service lodged with the Court. 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ."); *see also Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Interior*, 499 F.3d 1108, 1117 (9th Cir. 2007) ("Under the APA, courts must refrain from de novo review of the action itself and focus instead on the agency's decision-making process.") (citing *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1158 (9th Cir. 1980)). Both the Supreme Court and the Ninth Circuit have emphasized that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (citation omitted); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986) (quoting *Fla. Power & Light Co.*, 470 U.S. at 743–44). "[T]he designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (citation omitted).

The Ninth Circuit allows a reviewing court to consider extra-record materials in APA cases under four narrow exceptions to the record review rule:

> (1) if necessary to determine whether the agency has considered all relevant factors and has 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.

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006) (quoting *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450); *see also Ranchers Cattlemen*, 499 F.3d at 1114 ("With some narrow exceptions, neither we nor the district court may consider any other evidence."). Moreover, courts have recognized that strict interpretation of these limited

circumstances is important lest the exceptions swallow the rule. *See, e.g., Ctr. for Biological Diversity*, 450 F.3d at 943 ("We normally refuse to consider evidence that was not before the agency because it inevitably leads the reviewing court to substitute its judgment for that of the agency.") (internal quotation marks and citations omitted); *Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1213 (W.D. Wash. 2003) (noting that consideration of "new information represents 'Monday 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 bear the burden of demonstrating that their proposed extra-record submissions fit one of these four narrow exceptions. *See, e.g., Ctr. for Biological Diversity*, 450 F.3d at 943. Mere argument that the Court should look beyond the administrative record does not suffice. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988) (striking extra-record material because plaintiff failed to show how the material fit within the exceptions to record review).

III. ARGUMENT

A. Plaintiffs had the opportunity to seek to supplement the Administrative Record with related evidence.

In *Lands Council v. Powell*, the Ninth Circuit held that it would be less-inclined to admit extra-record materials when plaintiffs have had an opportunity to supplement the record. 395 F.3d 1019, 1030 (9th Cir. 2005). The Forest Service already considered many of the issues raised in Plaintiffs' declarations during the National Environmental Policy Act ("NEPA") process. Plaintiffs could have included this information when they moved to supplement the administrative record during this litigation. To the extent that Plaintiffs chose not to provide this information previously, they should not be allowed to do so now.

Initially, Plaintiffs could have provided the Forest Service with the additional information contained in the declarations during the NEPA process, which is the appropriate place to do so. *See* 40 C.F.R. § 1501.1(d) (requiring comments to "[i]dentify[] at an early stage the significant

environmental issues"); *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (holding a party must participate so as to alert the agency as to its position and contentions); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (the purpose of the public comment period is to ensure the agency is given an opportunity to resolve concerns). The purpose of the public comment processes is to give the agency an opportunity to consider and respond to the information in its decision-making process. *Pub. Citizen*, 541 U.S. at 764; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011). Here, Plaintiffs had the opportunity to provide comments to the Forest Service about the Project. *See e.g.*, PLU-B-001114 (Federal Register notice of intent to prepare environmental impact statement); PLU-D-008172 (Feather River Bulletin notice of opportunity to comment). The information in the four declarations was available to Plaintiffs during the course of the Project's development. *See, e.g.*, *Lands Council*, 395 F.3d at 1029 n.10 ("Normally, if an Agency's administrative record is incomplete, we would expect litigants to seek to supplement the record in the agency before seeking to expand the record before the district court."). Plaintiffs simply chose not to provide the additional information to the Forest Service at the appropriate time. *See e.g.*, PLU-D-007130-273, PLU-D-007773-74, PLU-D-007797, PLU-D-008101-10 (Plaintiff Sierra Access Coalition's comments on the draft EIS); PLU-D-007563-653 (Plaintiff California Off-Road Vehicle Association's comments on the draft EIS); PLU-A-000144-205 (appeals from Sierra Access Coalition and Amy Granat); PLU-A-000378-562 (appeal from Plaintiff California Off-Road Vehicle Association); PLU-A-000567-68 (appeal from Mike Crump).

Furthermore, Plaintiffs could have included the information in these paragraphs in its motion to supplement the Administrative Record during the course of this litigation. *See* Scheduling Order ¶ IV, ECF No. 20; Plaintiffs' Motion to Compel Inclusion of Certain Documents as Part of the Administrative Record, ECF No. 22. Yet Plaintiffs failed to do so. The time for comments has passed, and the time to seek supplementation has passed. The summary judgment stage is too late for Plaintiffs to seek to put this extra-record evidence before the Court, as the intent of the schedule before the Court was to get the scope of the

Administrative Record and materials properly before the Court settled prior to briefing the merits of the case on summary judgment. By failing to seek leave to have the Court consider these materials at the appropriate time on the Court's scheduling order, Plaintiffs have waived any opportunity to supplement the Administrative Record. The Court should therefore strike ¶¶ 7-14 of the Crump Declaration, ¶¶15-18 of the Granat Declaration, ¶ 3 of the Lazzarino Declaration, and ¶¶ 4-10, 17, 22 of the Perreault Declaration.

B. Plaintiffs fail to carry their burden to demonstrate that the declarations fall into any of the four exceptions to record review.

As noted above, the Ninth Circuit has articulated four narrow circumstances under which courts may consider materials outside of the administrative record. Plaintiffs bear the burden of demonstrating with particularity how their extra-record materials fall within one of these exceptions. *See, e.g.*, *Ctr. for Biological Diversity*, 450 F.3d at 943 (plaintiffs bear the burden of showing how their extra-record submissions fit within the exceptions); *Animal Def. Council*, 840 F.2d at 1438 (holding that "the district court properly limited review to the administrative record" because the plaintiff "has not demonstrated that it falls within any of the exceptions to the general rule that review of agency action is limited to the administrative record").

Here, Plaintiffs have made no attempt to demonstrate that the cited portions of the four declarations fit within any of the narrow exceptions. Plaintiffs simply included the paragraphs among the paragraphs in their standing declarations, and then improperly relied on these paragraphs in the merits portion of their brief. *See* Pls.' Br. 20-22, 25-26 (citing declarations in merits arguments on compliance with the National Environmental Policy Act and Travel Management Rule). On this basis alone, the Court should strike the offending paragraphs from the declarations. *See Animal Def. Council*, 840 F.2d at 1437 (rejecting plaintiff's extra-record materials because plaintiff made "no showing" that the court needed to go outside the administrative record).

C. The portions of the brief that rely on the declarations should likewise be struck.

In their brief in support of summary judgment, Plaintiffs rely on portions of the extra-record declarations that Federal Defendants move to strike here. Specifically, Plaintiffs cite to these declarations in their merits arguments about whether the Forest Service complied with NEPA and the Travel Management Rule when it coordinated with local governments (Pls.' Br. 20-24) and (2) complied with NEPA and took a "hard look" at its action on the human environment (Pls.' Br. 24-26). For the same reasons that certain paragraphs in the declarations should be struck, the Court should also strike the unsupported portions of Plaintiffs' brief that rely on the objectionable paragraphs from the declarations. In the alternative, the Court should decline to consider the portions of the brief that rely on the extra-record declarations.

IV. CONCLUSION

Plaintiffs have failed to show how ¶¶ 7-14 of the Crump Declaration, ¶¶15-18 of the Granat Declaration, ¶ 3 of the Lazzarino Declaration, and ¶¶ 4-10, 17, 22 of the Perreault Declaration fit into the narrow exceptions to record review. The Court should therefore strike these paragraphs in the declarations. The Court should also strike any references to or reliance on the declarations in the merits portion of Plaintiffs' memorandum in support of their motion for summary judgment.

Respectfully submitted on this 12th day of May, 2016.

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CERTIFICATE OF SERVICE

I, John P. Tustin, hereby certify that on May 12, 2016, I caused the foregoing to be served upon counsel of record through the Court's CM/ECF system.

/s/ John P. Tustin
John P. Tustin
Attorney for Federal Defendants