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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

WESTERN WATERSHEDS PROJECT and	)	3:11-cv-00053-HDM-VPC
CENTER FOR BIOLOGICAL DIVERSITY,	)	
	)	
Plaintiffs,	)	
	)	ORDER
vs.	)	
	)	
BUREAU OF LAND MANAGEMENT,	)	
	)	
Defendant, and	)	
	)	
SPRING VALLEY WIND LLC,	)	
	)	
Defendant-Intervenor.	)	
	)	

This action is an appeal from the Bureau of Land Management's administrative decision approving construction of a wind energy facility in Spring Valley, Nevada. On July 26, 2011, defendant BLM lodged the Administrative Record, which includes 1,139 non-privileged documents. (Docket No. 92) On September 30, 2011, plaintiffs Western Watersheds Project and Center for Biological Diversity moved to supplement the administrative record with the Power Purchase Agreement (PPA), Texas Wind Data, and two declarations (Docket Nos. 30, 58) by Dr. Tuttle. (Docket No. 95)

1 On October 4, 2011, the BLM filed a Notice of Lodging of the  
2 Amended Administrative Record. (Docket No. 96) The Amended  
3 Administrative Record includes 1,227 non-privileged documents, but  
4 not those plaintiffs seek to have the court review. The BLM and  
5 intervening defendant Spring Valley Wind (SVW) opposed plaintiffs'  
6 motion to supplement the record on October 17, 2011. (Docket Nos.  
7 99, 97 respectively). Plaintiffs replied on October 27, 2011.  
8 (Docket No. 100)

9

## 10 **I. Legal Standard**

11 The general rule is that courts reviewing an agency decision  
12 are limited to the administrative record. *Fla. Power & Light Co. v.*  
13 *Lorion*, 470 U.S. 729, 743-44 (1985). That is "the administrative  
14 record in existence at the time of the [agency] decision and [not  
15 some new] record that is made initially in the reviewing court."  
16 *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)  
17 (quoting *Southwest Ctr. for Biological Diversity v. United States*  
18 *Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).). The  
19 administrative record "consists of all documents and materials  
20 directly or indirectly considered by agency decisionmakers and  
21 includes evidence contrary to the agency's position." *Exxon Corp.*  
22 *v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981); *Nat'l*  
23 *Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1457 (D. Mont. 1985);  
24 *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

25 Documents and materials indirectly considered by agency  
26 decision-makers are those that may not have literally passed before  
27 the eyes of the decision-makers, but were "so heavily relied on in  
28 the recommendation that the decision maker constructively

1 considered" them. *Ctr. for Native Ecosystems v. Salazar*, 711 F.  
2 Supp. 2d 1267, 1275-76 (D. Co. 2010). For example, "[i]f the  
3 agency decision maker based his decision on the work and  
4 recommendations of subordinates, those materials should be included  
5 in the record." *Id.* In addition, if a certain study cited in a  
6 subordinate's recommendation is shown by clear evidence to have  
7 been heavily relied upon in the agency's final decision, then the  
8 study should be included in the administrative record even if the  
9 final decision-makers did not actually read the study. *Id.* The  
10 touchstone is the decision-makers' actual consideration. *Id.* at  
11 1276. However, merely arguing "consideration through citation"<sup>1</sup>  
12 will not suffice because that "argument stretches the chain of  
13 indirect causation to its breaking point" and it fails to give  
14 appropriate deference to the agency's designation of the record.  
15 *Id.* at 1277; *Wildearth Guardians v. U.S. Forest Service*, 713 F.  
16 Supp. 2d 1243, 1255 (D. Co. 2010); *Wildearth Guardians v. Salazar*,  
17 2009 WL 4270039, \*4 (D. Ariz. Nov. 25, 2009).

18 There are four exceptions to this general rule excluding  
19 extra-record evidence. Extra-record evidence may be admitted if:  
20 (1) admission is necessary to determine "whether the agency has  
21 considered all relevant factors and has explained its decision,"  
22 (2) "the agency has relied on documents not in the record," (3)  
23 "supplementing the record is necessary to explain technical terms  
24

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25 <sup>1</sup> "Consideration through citation" is when a document considered  
26 by the agency decision-makers contains references to other documents  
27 and it is argued that the cited documents should be included in the  
28 record because they were "indirectly" considered by the agency.

1 or complex subject matter," or (4) "plaintiffs make a showing of  
2 agency bad faith." *Lands Council*, 395 F.3d at 1030 (quoting  
3 *Southwest Ctr.*, 100 F.3d at 1450 (internal citation and quotation  
4 marks omitted)).

5       These exceptions should be narrowly construed and applied  
6 because there is a strong "presumption of regularity" toward the  
7 agency designated record. *Ctr. for Native Ecosystems*, 711 F. Supp.  
8 2d at 1274; *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Lands*  
9 *Council*, 395 F.3d at 1030 ("Were the federal courts routinely or  
10 liberally to admit new evidence when reviewing agency decisions, it  
11 would be obvious that the federal courts would be proceeding, in  
12 effect, de novo rather than with the proper deference to agency  
13 processes, expertise, and decision-making."). The burden to rebut  
14 the presumption or regularity lies with the party seeking to  
15 supplement the record. That party "must show by clear evidence  
16 that the record fails to include documents or materials considered  
17 by the [agency] in reaching the challenged decision" and that the  
18 record as presented is insufficient to allow "substantial and  
19 meaningful [judicial] review." *Ctr. for Native Ecosystems*, 711 F.  
20 Supp. 2d at 1275; *Franklin Sav. Ass'n v. Director, Office of Thrift*  
21 *Supervision*, 934 F.2d 1127, 1138-39 (10th Cir. 1991).

## 22

## 23 **II. Analysis**

### 24 A. Power Purchase Agreement

25       The PPA is a contract between SVW and NV Energy that predates  
26 the BLM's final decision. (Mot. to Supp. 4) Plaintiffs argue the  
27 PPA should be included in the Administrative Record because the BLM  
28 considered the energy requirements stated in the PPA in "developing

1 the [Spring Valley Wind] Project's purpose and need statement and  
2 alternatives." (Reply 2) Defendants oppose including the PPA in the  
3 Administrative Record because, although it was aware of the  
4 agreement, it "ha[d] never seen the Agreement," and it did not rely  
5 on the agreement in analyzing the environmental impacts of the  
6 Project and reaching its final decision. (BLM Opp'n 6; SVW Opp'n 2-  
7 3) In addition, the BLM argues that the PPA is a confidential  
8 document that "likely incorporates pervasive trade secret  
9 information" and would need to be heavily redacted if added to the  
10 Administrative Record. (BLM Opp'n 8, fn. 3)

11 The Environmental Assessment (EA) contains several references  
12 to an additional purpose of the Project being the production of  
13 149.1 MW as required under the PPA.<sup>2</sup> (Mot. to Supp. Ex. 1)  
14 Although the PPA may not have literally passed before the eyes of  
15 the agency decision-makers in this case, it was "relied on in the  
16 [agency's] recommendation" to such an extent that the court finds

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17  
18 <sup>2</sup> The EA on page 5 states: "As part of meeting the Nevada RPS,  
19 NV Energy has entered into a Power Purchase Agreement (PPA) with SVW  
20 to purchase 149.1 MW of wind energy produced from the SVWEF if it is  
21 constructed. Therefore, an additional purpose of this project is to  
22 meet the need to fulfill the production of 149.1 MW as required under  
23 the PPA." (Mot. to Supp. Ex. 1) Page 7 of the EA states: "Each  
24 alternative meets the purpose and need for the project and includes  
25 75 WTGs in order to achieve the 149.1 MW required by the PPA with NV  
26 Energy." *Id.* Page 11 states: "no matter which turbine is selected,  
27 no more than the maximum 149.1 MW agreed to under the PPA would be  
28 output into the system." *Id.*

1 the BLM "constructively considered" it in making its decision. *Ctr.*  
2 *for Native Ecosystems*, 711 F. Supp. 2d at 1275-76. However, the  
3 court also agrees with the BLM that some portions of the PPA may  
4 contain confidential information. Accordingly, the court will  
5 grant plaintiffs' motion to supplement the record with those  
6 portions of the PPA that support the information provided to the  
7 BLM regarding the Project's need to produce 149.1 MW of wind  
8 energy. All other portions of the PPA shall be redacted.

9 B. Texas Wind Data

10 The Texas Wind Data comes from a bat and bird mortality study  
11 conducted at the Texas Gulf Wind Facility in Kenedy County, Texas.  
12 The study focused on the efficacy of DeTect, Inc.'s MERLIN radar  
13 monitoring system in reducing mortality rates at wind turbine  
14 sites. (Brandt-Erichsen Decl. (Docket No. 98) Ex. A) The final  
15 report on this data was issued on January 1, 2011, after the BLM  
16 issued its final decision in this case. *Id.* At the hearing on  
17 plaintiffs' motion for a preliminary injunction on March 24, 2011,  
18 the court advised plaintiffs to follow agency procedure and request  
19 that the BLM consider the Texas Wind Data as an additional  
20 mortality study. (See Mar. 28, 2011 Order 16, fn. 15) The BLM has  
21 received plaintiffs' request, but has not issued a "final analysis  
22 on any impact from the Texas Wind Study on the Project." (BLM Opp'n  
23 12, fn. 5)

24 Plaintiffs argue the Texas data should be included in the  
25 Administrative Record because the EA references the study. (Mot. to  
26 Supp. 6, Reply 4) In support of this argument, plaintiffs cite to  
27 vague references to "radar systems" in the EA, and a general  
28 statement about the Texas Gulf Wind Facility in the Avian and Bat

1 Protection Plan. (See Mot. to Supp. Ex. 1, pp. 90, 97; Ex.2, p.  
2 15) In opposition, the defendants argue the Texas data was not  
3 before the BLM during the decision-making process and the data is  
4 irrelevant to the Spring Valley Wind Project. (BLM Opp'n 8-10; SVW  
5 Opp'n 3-7) Therefore, it was not considered by agency decision-  
6 makers in reaching the final decision. *Id.*

7 Plaintiffs must show by "clear evidence that the record fails  
8 to include documents or materials [directly or indirectly]  
9 considered by the [agency] in reaching the challenged decision" in  
10 order to rebut the presumption of regularity. *Ctr. for Native*  
11 *Ecosystems*, 711 F. Supp. 2d at 1275; *Franklin Sav. Ass'n*, 934 F.2d  
12 at 1138-39. Plaintiffs' have failed to meet this burden. A broad  
13 discussion of the effectiveness of radar systems that happens to  
14 include a general statement about the assumed effectiveness of the  
15 Texas Gulf Wind's radar system is not sufficient to prove the BLM  
16 directly or indirectly considered the Texas data in reaching its  
17 final decision. As with "consideration through citation," this  
18 argument stretches the chain of indirect causation too far and  
19 fails to give appropriate deference to the agency's designation of  
20 the record. *Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1277.

21 At the preliminary injunction hearing, the court advised  
22 plaintiffs to apply directly to the BLM and request that it  
23 consider the data. (Mar. 28, 2011 Order 16, fn. 15 ("[T]he court,  
24 during the hearing on the plaintiffs' application for the  
25 injunction, urged the BLM, upon appropriate application by the  
26 plaintiffs, to consider the impact ... the Texas Gulf Wind study  
27 might have, if any, on the mitigation measures set forth in the  
28 EA.")) It appears plaintiffs have complied and the BLM is in the

1 process of evaluating the potential impact of the data on the  
2 Spring Valley Wind Project. (BLM Opp'n 12, fn. 5) Accordingly, the  
3 court will deny without prejudice plaintiffs' motion to supplement  
4 the record with the Texas Wind Data.

5 C. Tuttle Declarations

6 Plaintiffs argue the Tuttle Declarations (Docket Nos. 30, 58)  
7 should be included in the Administrative Record because they fit  
8 within an exception to the general rule on considering extra-record  
9 evidence. Specifically, they argue the evidence in both  
10 declarations is necessary to determine "whether the agency has  
11 considered all relevant factors and has explained its decision" and  
12 the evidence in the first declaration "is appropriately considered  
13 because it concerns a topic for which 'the agency has relied on  
14 documents not in the record,'" to wit, the "characterization of the  
15 effectiveness of its Texas radar system." (Mot. to Supp. 11) The  
16 defendants oppose supplementing the record with these declarations  
17 because they were not before the BLM when it made its decision,  
18 they do not fall within any of the exceptions to this rule, and  
19 their consideration would be contrary to the law of the case. (BLM  
20 Opp'n 10-15; SVW Opp'n 8-10)

21 The court finds the Tuttle Declarations should not be added to  
22 the Administrative Record because they contain extra-record  
23 evidence that was not before the BLM at the time it made its final  
24 decision, they do not fall within the four exceptions, and the  
25 court previously struck the first Tuttle Declaration (Docket No.  
26 30) from the record. *Exxon Corp.*, 91 F.R.D. at 33.

27 On March 28, 2011, this court granted defendant SVW's Motion  
28



1 to Strike the first Tuttle Declaration<sup>3</sup> (Docket No. 50), finding  
2 that the first Tuttle declaration was an eleventh hour submission  
3 that did not fall within any of the four exceptions that would  
4 permit consideration of extra-record evidence in this case. (Order  
5 on Mot. to Strike (Docket No. 61)) Therefore, it is the law of the  
6 case that the first Tuttle Declaration is not before the court and  
7 should not be added to the Administrative Record. *Christianson v.*  
8 *Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (“the  
9 doctrine of the law of the case posits that when a court decides  
10 upon a rule of law, that decision should continue to govern the  
11 same issues in subsequent stages in the same case”). The court may  
12 “depart from a prior holding [only] if [it is] convinced that it is  
13 clearly erroneous and would work a manifest injustice.” *Arizona v.*  
14 *California*, 460 U.S. 605, 618 (1983).

15 There is no basis for the court to reconsider its order  
16 striking the first Tuttle Declaration. First, the first Tuttle  
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18 <sup>3</sup> The motion was titled “Motion to Strike Extra-Record  
19 Declaration, or in the Alternative, to Supplement the Record.” It is  
20 referred to in this order as the “Motion to Strike the first Tuttle  
21 Declaration” for clarity as to which document SVW sought to strike.  
22 SVW submitted a rebuttal declaration of Wallace Erickson (Docket No.  
23 50-1) in support of its motion to strike, in the event the court chose  
24 not to strike the first Tuttle Declaration and, instead, chose to  
25 supplement the record. Plaintiffs submitted the second Tuttle  
26 Declaration (Docket No. 58) to rebut the Erickson Declaration. Because  
27 the court struck the first Tuttle Declaration, it did not consider the  
28 Erickson Declaration or the second Tuttle Declaration.

1 Declaration has not been amended or modified to add new data or  
2 conclusions that would warrant the court reconsidering its earlier  
3 decision striking the declaration. For reasons already set forth  
4 in the court's March 28, 2011 order on the motion to strike (Docket  
5 No. 61), this unchanged evidence does not demonstrate that the BLM  
6 failed to consider all relevant factors in its decision.

7       Second, the court's holding that the BLM had not relied on  
8 documents outside the record in reaching its decision that would  
9 warrant admission of the first Tuttle Declaration is not "clearly  
10 erroneous and would [not] work a manifest injustice." *Arizona*, 460  
11 U.S. at 618. A vague characterization of the effectiveness of the  
12 Texas Gulf Wind radar system in the Avian and Bat Protection Plan's  
13 (ABPP) discussion of radar monitoring is not enough to convince the  
14 court that its earlier decision was clearly erroneous. The  
15 reference to the Texas radar system in the EA was by example. (See  
16 Mot. to Supp. Ex.2, pp. 15) Moreover, the Texas data was not  
17 complete or fully available to the BLM when it made its final  
18 decision. Lastly, the BLM considered extensively other bat-related  
19 studies in drafting and designing the Avian and Bat Protection  
20 Plan, including some with adverse statistical data, such as the  
21 Judith Gap Study. (EA, App. F, ABPP 24; Not. of Am. Admin. R. Ex.  
22 2) Therefore, disallowing the admission of Dr. Tuttle's opinion of  
23 the Texas radar system's effectiveness would not work a manifest  
24 injustice.

25       The second Tuttle Declaration (Docket No.58) was filed to  
26 rebut the Declaration of Wallace Erickson (Docket No. 50-1), which  
27 was submitted by SVW with its Motion to Strike the first Tuttle  
28 Declaration (Docket No. 50) to rebut the first Tuttle Declaration.

1 The Erickson Declaration was never considered by the court because  
2 the court elected to strike the first Tuttle Declaration.  
3 Consequently, consideration of the second Tuttle Declaration, the  
4 sole purpose of which was to rebut the Erickson Declaration, is a  
5 moot issue.

6 In addition, the evidence contained in the second Tuttle  
7 Declaration, which includes Dr. Tuttle's opinions on the population  
8 status of free-tailed bats and the adequacy of the ABPP, does not  
9 fall within any of the four exceptions that would permit the court  
10 to consider extra-record evidence. As with the first Tuttle  
11 declaration, the admission of this extra-record evidence is not  
12 necessary to determine "whether the agency has considered all  
13 relevant factors and has explained its decision" in this case.  
14 *Lands Council*, 395 F.3d at 1030 The administrative record  
15 indicates that the BLM reviewed data concerning the bat population  
16 and the impact the Spring Valley Wind Project could have on local  
17 bat populations. Specifically, the BLM considered 11 wind projects  
18 in the western United States with habitats similar to Spring Valley  
19 and three published bat studies on bat mortality risks. The full  
20 Administrative Record contains additional studies. The court will  
21 defer to the agency's expertise in evaluating this data. *Lands*  
22 *Council*, 395 F.3d at 1030. Second, it is clear from the record  
23 before the court that the BLM has not relied on documents not in  
24 the record, to wit, the Erickson Declaration, in reaching its  
25 decision in this case that would warrant supplementing the record  
26 with the second Tuttle Declaration. *Lands Council*, 395 F.3d at  
27 1030. The Erickson Declaration was submitted by SVW for the sole  
28 purpose of rebutting the first Tuttle Declaration. There is no

1 evidence that indicates the Erickson Declaration was considered by  
2 the BLM in reaching its final decision. Consequently, there is no  
3 need for the agency to have considered the second Tuttle  
4 Declaration. Third, the evidence in the second Tuttle Declaration  
5 is not necessary to explain technical terms or complex subject  
6 matter. It is not being offered to explain Erickson's statistical  
7 analysis of the bat population. Instead, it is being offered to  
8 rebut his conclusions. It represents a difference in expert  
9 opinion. This is not enough to warrant its addition to the  
10 Administrative Record. See *Airport Cmty's Coal v. Graves*, 280 F.  
11 Supp. 2d 1207, 1213 (W.D. Wash. 2003) (varying expert opinions do  
12 not warrant improper de novo review by court of agency decision).  
13 Finally, there has been no showing of agency bad faith.

14 For the foregoing reasons, the court will deny plaintiffs'  
15 motion to supplement the record with the Tuttle Declarations.

16  
17 **III. Conclusion**

18 Plaintiffs' Motion to Supplement the Administrative Record  
19 (Docket No. 95) is GRANTED in part and DENIED in part. It is  
20 hereby ordered that:

- 21 1. Plaintiffs' request to supplement the Administrative  
22 Record with the Power Purchase Agreement is GRANTED in  
23 part. Defendants shall supplement the record with a  
24 redacted version of the Power Purchase Agreement  
25 containing the portions of the PPA that support the  
26 information provided to the BLM regarding the project's  
27 need to produce 149.1 MW of wind energy. Such  
28 supplementation shall be made within thirty (30) days.

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2. Plaintiffs' request to supplement the Administrative Record with the Texas Wind Data is DENIED without prejudice. Plaintiffs may renew their motion to supplement the record with the Texas Wind Data after the BLM has had an opportunity to issue a final analysis of the impact of the Texas data on the Spring Valley Wind Project.

3. Plaintiffs's request to supplement the Administrative Record with the Tuttle Declarations (Docket Nos. 30, 58) is DENIED.

**IT IS SO ORDERED.**

DATED: This 4th day of January, 2012.



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UNITED STATES DISTRICT JUDGE