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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

WESTERN WATERSHEDS PROJECT, ) 3:14-cv-00134-HDM-VPC  
)  
Plaintiff, )  
) ORDER  
vs. )  
)  
AMY LUEDERS, BLM Nevada State )  
Director, BUREAU OF LAND )  
MANAGEMENT, an agency of the )  
United States, and U.S. )  
Department of Interior, an agency  
of the United States,  
Defendants.

Before the court is defendants' motion to strike the declaration of Kenneth Cole and memorandum in support (#53). Plaintiff responded (#58) and defendants replied (#62).

**Case Background**

Defendants approved the Cave Valley and Lake Valley Watershed Restoration Plan Environmental Assessment ("Restoration Plan") to address the risk of catastrophic wildfire and improve wildlife habitat. The Restoration Plan is intended to reduce fire risk by removing vegetation that is creating hazardous fuel loads for fires. The treatments are also meant to improve habitat for greater sage grouse by removing trees where they are encroaching on

1 sagebrush habitat, removing noxious weeds, and thinning overgrown  
2 sagebrush. The rangeland improvements are designed to better  
3 distribute livestock and improve rangeland health.

4 Plaintiff asserts defendants intend to mow, chop, burn, and  
5 poison over 146,000 acres of sagebrush habitat; and construct or  
6 reconstruct dozens of range developments (including over 400 miles  
7 of fences, pipelines, reservoirs, and wells) within vital habitat  
8 for the greater sage-grouse. Plaintiff contends the decisions of  
9 defendants violate the National Environmental Policy Act ("NEPA").

#### 10 **Motion Background**

11 Plaintiff filed a motion for partial summary judgment (#45)  
12 that references a simultaneously filed declaration by Kenneth Cole  
13 (#46). In his declaration, Cole states he is the NEPA coordinator  
14 for plaintiff and his duties include reviewing proposed decisions  
15 of the defendants and U.S. Forest Service and "submitting comments  
16 . . . and otherwise participating in the comment process for  
17 grazing allotments across Nevada and Idaho." (#46 at ¶ 2).

18 Defendants move to strike the declaration. They contend the  
19 case is brought pursuant to the Administrative Procedures Act  
20 ("APA") and therefore should be decided based on the administrative  
21 record submitted by the agency. They further aver the declaration  
22 and the accompanying exhibits were created after the administrative  
23 process and administrative appeals were completed in this case and  
24 therefore are not part of the administrative record. Plaintiff did  
25 not move to supplement the record with these materials, but instead  
26 submitted them for the first time when it filed its motion for  
27 partial summary judgment.

28 Plaintiff asserts the declaration was filed to fill in gaps in

1 the administrative record, particularly regarding defendants'  
2 failure to adequately relate their approved vegetation treatments  
3 to other landscape characteristics in the Cave and Lake valleys,  
4 including major vegetation communities, riparian areas, sage-grouse  
5 habitat, and the precipitation regime. Plaintiff contends  
6 supplementing the administrative record in this manner is  
7 appropriate to explain complex matters involved in the agency  
8 action. Additionally, plaintiff asserts supplementing defendants'  
9 administrative record to include the declaration is also  
10 appropriate because the declaration avoids advancing a new  
11 rationale attacking defendants' decision, and instead consists of  
12 background information explaining the original record.

13 **The Declaration**

14       There are three parts to the declaration. In part one, Cole  
15 describes twelve maps he created using information from public  
16 databases and from the administrative record (*Id.* at ¶¶ 5-20). In  
17 the second part, he describes photographs that he took at different  
18 times within or near the Cave valley treatment area in October 2009  
19 and one photograph taken in August 2011 while on a site visit that  
20 preceded defendants' release of the preliminary Restoration Plan  
21 Environmental Assessment ("EA") (*Id.* at ¶¶ 21-27). In the third  
22 part, he analyzes data regarding soil layers in the EA compared to  
23 information in the plan as to where certain treatments would be  
24 conducted, and concluded that defendants would use prescribed fire  
25 in eight locations that receive less than 12 inches of annual  
26 rainfall (*Id.* at ¶¶ 28-29). The plaintiff does not explain why  
27 Cole's declaration was first introduced in its motion for summary  
28 judgment.

1 **Legal Standard**

2 Judicial review under the APA is limited to the administrative  
3 record, which consists of those materials considered by the agency  
4 at the time it made the challenged decision. *Fla. Power & Light v.*  
5 *Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing  
6 court is to apply the appropriate APA standard of review, 5 U.S.C.  
7 § 706, to the agency decision based on the record the agency  
8 presents to the reviewing Court."). In an APA case, "the focal  
9 point for judicial review should be the administrative record  
10 already in existence, not some new record made initially in the  
11 reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); see also  
12 *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.* 450  
13 F.3d 930, 943 (9th Cir. 2006). The Ninth Circuit has stated, "We  
14 normally refuse to consider evidence that was not before the agency  
15 because 'it inevitably leads the reviewing court to substitute its  
16 judgment for that of the agency.'" *Ctr. for Biological Diversity*,  
17 450 F.3d at 943 (quoting *Asarco, Inc. v. Env'tl. Prot. Agency*, 616  
18 F.2d 1153, 1160 (9th Cir. 1980)).

19 However, in certain narrow circumstances, extra-record  
20 evidence may be considered in an APA case. See *Sw. Ctr. for*  
21 *Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th  
22 Cir. 1996). Extra-record documents may fit into one of these  
23 exceptions to record review:

- 24 (1) if admission is necessary to determine whether the  
25 agency has considered all relevant factors and has explained  
26 its decision, (2) if the agency has relied on documents not  
27 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.

28 *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America*

1 v. *U.S. Dep't of Agric.*, 499 F.3d 1108, 1117 (9th Cir. 2007)  
2 (citations omitted). These exceptions are to be construed narrowly  
3 "so that the exception does not undermine the general rule." *Land*  
4 *Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

5 **Part One: The Twelve Maps**

6 Exhibits 1-12 and ¶¶ 5-20 concern maps Cole created using  
7 information drawn from the administrative record. Plaintiff  
8 contends the series of maps "visually illustrat[es] [defendants']  
9 approved vegetation treatments relative to other natural resource  
10 considerations in the area." Response, p. 7. The maps are helpful,  
11 plaintiff argues, because they fill in gaps in the administrative  
12 record, which is permissible pursuant to *Lands Council*. ("These  
13 limited exceptions operate to identify and plug holes in the  
14 administrative record." *Lands Council*, 395 F.3d at 1030.) Plaintiff  
15 asserts the maps facilitate an understanding of the complex  
16 interrelation of the treatment areas.

17 Defendants contend the exhibits misconstrue the administrative  
18 record and present a misleading picture of the treatment plan.  
19 Preliminarily, defendants contend the maps are redundancies of the  
20 record. Information that can be extracted from the record is not  
21 necessary for a court's review. See *Sw. Ctr. For Biological*  
22 *Diversity*, 100 F.3d at 1451. The additional problem, defendants  
23 assert, is the maps presented in the declaration misrepresent the  
24 Restoration Plan: Cole gathers information from separate parts of  
25 the record and combines them without considering the plan's  
26 restrictions.

27 Exhibits 8 & 9 of the declaration demonstrate the issue. Cole  
28 took maps from the record based on information regarding riparian

1 areas (AR 6491-6492) and combined that information with the  
2 location of different types of treatments as represented by a  
3 different set of maps (AR 7638-7674). Combining these two maps led  
4 to Cole's conclusion that the BLM intends to apply Tebuthiuron  
5 directly over a riparian area.<sup>1</sup> Defendants assert this conclusion  
6 ignores the express language of the environmental assessment and  
7 restoration plan, which restricts BLM from applying Tebuthiuron "in  
8 areas that have soils with clay content greater than 30% or that  
9 have surface water or an elevated groundwater level." AR 7522.  
10 Additionally, the EA states that "a buffer zone of non-treatment  
11 would be included near riparian areas" and that the BLM would  
12 comply with all standard operating procedures in prior planning  
13 documents to "ensure no impacts to riparian and spring resources."  
14 AR 7594.

15 Cole constructed maps from the administrative record that make  
16 it appear the restoration plan violates some of its own  
17 restrictions. Defendants contend the restrictions should be applied  
18 independently of the maps in the record and that plaintiff has  
19 combined the maps in a way that inaccurately depicts the  
20 restoration plan. This is a factual question: either the BLM  
21 intends to violate the Tebuthiuron restriction because it doesn't  
22 recognize those zones as riparian areas, or Cole is incorrect  
23 because he fails to realize the maps he uses do not account for the  
24 restrictions BLM has every intention of recognizing. In either  
25 case, the court can consider the argument without the Cole

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<sup>1</sup> Tebuthiuron is a herbicide that inhibits photosynthesis. Application of Tebuthiuron over a riparian area is ill-advised. There is no dispute on this point.

1 declaration: the necessary information is in the record.

2 The only plausible exception to record review that could be  
3 applied to exhibits 1-12 would be that supplementing the record is  
4 necessary to explain technical terms or complex subject matter.  
5 This exception does not apply here as the court does not require  
6 the maps to consider the argument.

7 **Part Two: The Photographs**

8 Plaintiff has not specifically addressed defendants' motion to  
9 strike as it pertains to the photographs offered in ¶¶ 22-27 of the  
10 declaration.<sup>2</sup> Pictures in ¶¶ 22-26 depict an area adjacent to the  
11 Cave Valley treatment area. Plaintiff uses the pictures to  
12 demonstrate the BLM failed to abide by the terms of a different  
13 treatment plan project and, consequently, the area was reduced to  
14 disturbed soil. The picture in ¶ 27 depicts the Cave Valley  
15 treatment area in August 2011.

16 In applying the exceptions, the court concludes the agency did  
17 not rely upon the photographs; the photographs do not explain  
18 technical terms or complex subject matter; and plaintiff has not  
19 shown bad faith by the agency. Therefore, the only plausible  
20 exception that might be argued is that admission of the photographs  
21 is necessary to determine whether the agency has considered all  
22 relevant factors and explained its decision.

23 Such an explanation would not be compelling: the pictures have  
24 no information detailing exactly where they were taken. Further,  
25 four of the pictures were taken in October 2009, and the fifth was  
26 taken in August 2011. Defendants represent treatments were

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28 <sup>2</sup> There is no ¶ 25 in the declaration.

1 completed in those areas during the summer of 2009. Mot. at 6:21.  
2 Defendants' projects have long term objectives to be achieved over  
3 5-10 years. Pictures purporting to show the result of the  
4 treatments shortly after they were administered are not  
5 particularly helpful in demonstrating the success or failure of  
6 defendants in achieving their long term goals.

7 **Part Three: The Prescribed Fire Zones**

8 This section (§§ 28-29) suffers from the same shortcomings as  
9 Part One. The restoration plan states prescribed fire will not be  
10 used in less than 12-inch precipitation zones. AR 7512. Cole  
11 created maps that show prescribed fire will be used in eight  
12 different ecosites which receive less than 12 inches of annual  
13 precipitation (#46 at 12, § 29). Cole's assertion that those zones  
14 will be treated by prescribed fire is based on the maps provided in  
15 the record that do not account for the restriction disallowing  
16 prescribed fire in less than 12-inch precipitation zones.

17 Cole gathered data from the USGS Geospatial Data Gateway to  
18 determine which areas receive less than 12-inches of precipitation.  
19 While the amount of precipitation these zones receive may be  
20 disputed, the data in the AR for several of these zones indicates  
21 the average amount of annual precipitation varies from under 12-  
22 inches to over 12-inches.<sup>3</sup> This information is in the record, and  
23 plaintiff should be able to make their argument even without the  
24 declaration.

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28 <sup>3</sup> For example, site number 028AY043NV receives 10-14'' of annual precipitation. AR 8443.



1 **Conclusion**

2 For the foregoing reasons, the defendants' motion to strike  
3 the declaration of Kenneth Cole and memorandum in support (#53) is  
4 **GRANTED.**

5 IT IS SO ORDERED.

6 DATED: This 14th day of May, 2015.

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*Howard D McKibbin*

UNITED STATES DISTRICT JUDGE

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