**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| WILLIAM C. TUTTLE | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. |
| v. | ) | 1:13-cv-00365-RMC |
| | ) | |
| S.M.R. JEWELL, Secretary, United States Department of the Interior; KEVIN WASHBURN, Assistant Secretary –Indian Affairs, United States Department of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS'MOTION TO STRIKE DECLARATION OF WILLIAM C. TUTTLE AND ALL SUPPORTING DOCUMENTS**

Defendants, S.M.R. Jewell, Secretary, United States Department of the Interior, Kevin Washburn, Assistant Secretary – Indian Affairs, United States Department of the Interior, and the United States Department of the Interior (collectively, "Defendants"), respectfully move this Court to strike as extra-record materials the Declaration of Plaintiff, William C. Tuttle ("Plaintiff") and all documents appended thereto as Exhibit 1 (ECF No. 24-2). These documents are not part of the administrative record in this case and reliance upon them is inappropriate in a case challenging agency action brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

## BACKGROUND

This case involves a dispute concerning the terms of Lease No. B-509-CR ("the Lease"), which is a Business Lease entered into by and between the plaintiff, William C. Tuttle ("Plaintiff" or "Mr. Tuttle") and his brother, Robert E. Tuttle, and the Colorado River Indian

Tribes ("CRIT" or "Tribes") in 1977. The Bureau of Indian Affairs ("BIA") holds title to the land in trust for the Tribes, and it approved the Lease pursuant to the Indian Long-Term Leasing Act, 25 U.S.C. § 415 and the corresponding regulations. In September 2009, the Superintendent of the Tribes' Colorado River Agency and the Tribes jointly issued a Notice of Default to Plaintiff based on his continuing default under three covenants of the Lease. Five months later in March 2010, when Plaintiff had not cured the defaults, the Superintendent issued a Notice of Cancellation.

Plaintiff challenges the Agency Superintendent's decision to issue the Notice of Default and the Notice of Cancellation, and the subsequent affirmances of that decision by the Acting Regional Director and the Interior Board of Indian Appeals, as arbitrary and capricious in violation of the APA. In this guise, however, Plaintiff also seeks to relitigate questions concerning the United States' ownership of the land and alleged coercion by the federal government, both of which have long since been resolved in administrative litigation and in federal court. In support of this misplaced effort, Plaintiff has attached a lengthy, forty-paragraph declaration in support of his motion for summary judgment together with an exhibit, which consists of an unauthenticated opinion letter and supporting title documents. The letter purports to contain "exhaustive title information" concerning the chain of title to the leased premises and concludes that the land is not held in trust by the United States.

## ARGUMENT

Defendants move to strike Plaintiff's declaration, the supporting exhibit, and all references to the declaration or the any portion of the exhibit in Plaintiff's brief on two grounds. First, neither the declaration nor the documents that comprise the exhibit are part of the administrative record and therefore, they cannot play any role in the Court's resolution of the

parties' cross-motions for summary judgment. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.") Second, the opinion letter included in Exhibit 1 is not relevant evidence in this action as defined by Federal Rule of Evidence 401 in that it is introduced to address title issues that are "not of consequence" in determining the validity under the APA of the agency actions that Plaintiff challenges here, and it is also inadmissible hearsay under the Federal Rule of Evidence 802.

**A. Evidence Not Included in the Administrative Record Should Be Stricken**.

The introduction of extra-record evidence in cases challenging final agency actions is severely limited by the scope of judicial review of agency action under the APA. The APA provides that an agency action may only be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 & n.21 (1989); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 & n.30 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

The Supreme Court has repeatedly emphasized the strict limitations that the APA imposes on judicial review:

> We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the [agency] decision must be vacated and the matter remanded to [the agency] for further consideration."

*Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)). Both the Supreme Court and the D.C. 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. at 142; *see also Fla. Power & Light Co.*, 470 U.S. at 743-44; *Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, No.: 13–1501 (RC), 2014 WL 2171089, at *4 n.6 (D.D.C. May 23, 2014) (quoting *Hill Dermaceuticals, Inc., v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013)) ("[I]t is black-letter administrative law that in an APA case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision."'); *Ctr. for Auto Safety v. Fed. Highway Admin., 956 F.2d 309, 314* (D.C. Cir. 1992); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987). Accordingly, the D.C. Circuit has explained that "[t]he 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." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623-24 (D.C. Cir. 1997) (citing *Fla. Power & Light Co.*, 470 U.S.at 743-44.

Consistent with these strictures of judicial review, courts have generally allowed extra-record review of a challenge to an agency action in only a handful of narrow circumstances. *See, e,g, Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (identifying exceptions); *Deukmejian v. NRC*, 751 F.2d 1287, 1326-29 (D.C. Cir. 1984), *aff'd sub nom., San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26 (D.C. Cir. 1986) (en banc). 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 narrow exceptions, review is properly limited to the record. *Am. Wildlands*, 530 F.3d at 1002 ("We do not allow

parties to supplement the record 'unless they can demonstrate unusual circumstances justifying a departure from this general rule.'") (quoting *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991)); *Deukmejian*, 751 F.2d at 1288-89. In any case, consideration of extra-record evidence "to determine the correctness or wisdom of the agency's decision is not permitted . . . " *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (emphasis added). This prohibition against extra-record evidence similarly applies to review of a preliminary injunction regarding violations of the APA. *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001).

It is important to keep in mind, however, that these narrow exceptions to APA record review are just that – exceptions. *See Deukmejian*, 751 F.2d at 1324 (practice of discovery and supplementing the record for judicial review "decidedly is the exception, not the rule"). Accordingly, the courts have insisted that a party seeking to avail itself of one of the exceptions must make an initial showing that the administrative record presented is inadequate to allow for effective judicial review, that one of the exceptions arguably applies, and that discovery is needed. *Am. Wildlands*, 530 F.3d at 1002; *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 33 (D.D.C. 2008). Additionally, the party challenging the adequacy of the administrative record has the burden of showing that supplementation is warranted. *Sara Lee Corp.*, 252 F.R.D. at 33.

In this case, Plaintiff has offered no showing that any of the narrow exceptions to the general prohibition against extra-record review applies to his declaration in support of his motion for summary judgment or the documents attached thereto. Instead, Plaintiff has simply put these documents before the Court, presumably with the intention of circumventing the proper judicial process for review of agency actions. Accordingly, Plaintiff's declaration and Exhibit 1 thereto should be stricken from the record, and all references to these extra-record materials in Plaintiff's

summary judgment brief should also be stricken. *See Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 66 (D.D.C. 2002) (striking extra-record materials in brief); *Corel Corp. v. United States*, 165 F. Supp. 2d 12, 30 -31 (D.D.C. 2001) (same).

**B. Exhibit 1 to Plaintiff's Declaration Should Be Stricken Because It Is Inadmissible Under the Federal Rules of Evidence.**

Additionally, the opinion letter from Steven Andrews, an alleged "Real Estate Title Specialist" and supporting title documents, which comprise Exhibit 1 to Plaintiff's Declaration should be stricken on the independent ground that they are not evidence that is relevant to the Court's review under the APA of the agency actions that Plaintiff challenges in this case. Plaintiff offers the opinion letter in support of his arguments on summary judgment that the Lease that is the subject of the agency actions he challenges in this case was the sole consideration offered him for allegedly giving up his fee title to the leased premises. As an initial matter, however, the question of ownership status of the leased premises was conclusively resolved by another federal court thirty-seven years ago. *See United States v. Brigham Young Univ.*, No. CV 72-3058-DW (C.D. Cal 1977) Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008) (finding, inter alia, that the United States was the owner in trust for CRIT of the subject property; that the possession by Plaintiff and his brother of a portion of the property was "without any right, title, or interest therein"; and that they had wrongfully occupied the property). Thus, title to the leased premises is and long-settled question and not an issue to be decided in this lawsuit, nor is it relevant to the question before the Court, which is simply whether the agency's actions in cancelling Plaintiff's lease were reasonable and based on all relevant factors and thus in compliance with the requirements of the APA. The opinion letter authored purportedly authored by Steven Andrews is irrelevant because it does not offer any fact

that "is of consequence" in reviewing this question, Fed. R. Evid. 401, and accordingly, it should be stricken.

Finally, the opinion letter should be stricken on the additional ground that it is hearsay evidence that is inadmissible under Federal Rule of Evidence 802. The letter is an out-of-court declaration that Plaintiff offers for the truth of the matter asserted, i.e., that the Lease that is the subject of the agency actions he challenges in this case was the sole consideration offered him for allegedly giving up fee title to the leased premises, and the letter satisfies none of the exceptions to the inadmissibility of hearsay evidence set forth in Federal Rule of Evidence 803. Moreover, Plaintiff characterizes Mr. Andrews as a "Real Estate Specialist", but he offers no evidence of Mr. Andrews' qualifications, nor does he even provide an address or contact information for Mr. Andrews. The unsigned opinion letter is not addressed to Plaintiff but rather to the Assessor's Office for the County of Riverside California, and Plaintiff offers no information about the circumstances under which it was produced apart from the fact that Plaintiff claims to have retained Mr. Andrews to examine title to the property. As such the letter has no indicia of reliability and it should be stricken and not considered by the Court.

## CONCLUSION

For the foregoing reasons, the Declaration of William C. Tuttle and Exhibit 1 thereto (ECF No. 24-2) should be stricken and not considered by this Court in deciding Plaintiff's Motion for Summary Judgment.

Dated: July 29, 2014

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General
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/s/ *Barbara M.R. Marvin*
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2014, I electronically filed the foregoing Defendants' Defendants' Motion to Strike Declaration of William C. Tuttle and All Supporting Documents with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

*/s/ Barbara M.R. Marvin*
Barbara Marvin