THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. TUTTLE Plaintiff, v. SALLY JEWELL, et al., Defendants.	)	Civil Action No. 1:13-cv-00365-RMC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE
DECLARATION OF WILLIAM C. TUTTLE AND ALL SUPPORTING DOCUMENTS

Defendants seek to strike Plaintiff William Tuttle's Declaration and supporting materials as "extra-record material" and hearsay, a motion which, if granted, would exclude materials providing critical context for this Court's ability to fully determine the extent to which Defendants' actions were arbitrary, capricious or not in accordance with law. (Docket # 29).

Defendants' Motion to Strike follows their preparation of an Administrative Record ("AR") that, upon Plaintiff's motion, this court rejected as "incomplete inasmuch as it lacks any records concerning communications between Defendants and Mr. Tuttle and/or his wife, communications between Defendants and the Colorado River Indian Tribes, or intra-agency communications that occurred after the termination decision was reached." *Order*, Docket # 19. Finding that "[t]he existence of such records is not mere speculation," this Court ordered Defendants to supplement the AR. *Id*. Defendants filed the Supplemental AR ("AR SUPP") on May 5, 2014 (Docket. # 21). Plaintiff filed his Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Declaration and supporting materials on June 27, 2014 (Docket # 24).

For the reasons explained *infra*, Plaintiff opposes the Motion to Strike.

ARGUMENT

1. Effective Judicial Review of Procedural Defects Often Requires Consideration of Materials Not Part of the Administrative Record.

Defendants concede that there are situations for which it is appropriate for the Courts to look beyond the Administrative Record. And they also concede that it is appropriate for the Court to do so when there is a "strong showing" that such review is necessary. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). To this point, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has expressly recognized that effective judicial review of agency action may require such materials to address gaps in the AR − a record which, by definition, is compiled by government defendants in their own defense. *Esch v. Yeutter,* 876 F.2d 976 (D.C. Cir. 1989).

Tuttle's Declaration and supporting materials were filed with this court to fill exactly such a gap.

This Court has consistently recognized this fact in applying the *Esch* principle that effective judicial review must at times go beyond the AR prepared by the government defendants. *See, e.g., Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005); *Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1 (D.D.C. 2006). This case presents appropriate justification for doing so.

The D.C. Circuit has made clear that the general proposition that judicial review should be confined to the AR is weakest when − as here − an agency action is challenged for procedural error. Indeed, the Court wrote in *Esch v. Yeutter*, *supra*:

> That principle [that judicial review of agency action is normally to be confined to the administrative record] exerts its maximum force when the substantive soundness of the agency's decision is under scrutiny; in the present case, the procedural validity of the Department's action also remains in serious question. Particularly in the latter context, it may sometimes be appropriate to resort to

> extra-record information to enable judicial review to become effective.

876 F.2d 976, 991 (D.C. Cir. 1989) (emphasis added).

In this case, Tuttle challenged the procedure by which the Defendants approved the Lease Cancellation: specifically, that the Defendants (1) surrendered their approval role to the Colorado River Indian Tribes ("Tribe") and (2) in the process violated the specific termination provisions of the Lease itself. [1] It is axiomatic that such procedural errors do not tend to be memorialized in the AR, and their exposure will be aggressively opposed by the Defendants' attorneys−as has happened here.

Consequently, the absence of evidence in the AR that this Court needs to determine whether the Defendants' actions were "arbitrary, capricious or not in accordance with the law" necessitates the submission of Tuttle's Declaration and appropriate supporting documents.

In *American Wildlands v. Kempthorne*, 530 F.3d 991 (D.C. Cir. 2008), the D.C. Circuit ruled that review may extend beyond the AR in three instances: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information was needed "to determine whether the agency considered all the relevant factors," or (3) if the "agency failed to explain administrative action so as to frustrate judicial review," *Id*. at 1002.

Despite Defendants' assertion that record supplementation in judicial review is essentially *a bird rarer than the black swan*, in fact, *American Wildlands* only restated and clarified the D.C. Circuit's earlier list in *Esch v. Yeutter* of eight reasons to expand the record before the Court beyond the AR:

[1] Compl. ¶ 53 ("In purporting to terminate the Lease, the Secretary, the Acting Regional Director and the Agency Superintendent all failed to comply with the requirements of either Addendum ARTICLE 17(A) or ARTICLE 17(B), a fatal flaw in the process they followed in a rush to terminate the Lease ….").

(1) when agency action is not adequately explained in the record before the court;

(2) when the agency failed to consider factors which are relevant to its final decision;

(3) when an agency considered evidence which it failed to include in the record;

(4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;

(5) in cases where evidence arising after the agency action shows whether the decision was correct or not;

(6) in cases where agencies are sued for a failure to take action;

(7) in cases arising under the National Environmental Policy Act; and

(8) in cases where relief is at issue, especially at the preliminary injunction stage. *Esch*, 876 F.2d at 976. *Esch* continues to be good law cited by the D.C. Circuit. *See, e.g., Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44 (D.C. Cir. 2013).

As explained below, each of the three factors identified by the D.C. Circuit in *American Wildlands* describes some aspect of the matter before the Court.

2. Defendants Excluded Adverse Documents That May Have Been Adverse To the Termination Decision.

The original AR submitted by Defendants was demonstrably incomplete, requiring an order from this Court that Defendants supplement the record. (Docket #19). In issuing its Order, this Court noted that Tuttle met his burden of demonstrating the AR was incomplete, noting that "[t]he existence of such records is not mere speculation. For instance, Mr. Tuttle recalls 'extensive' communications with Defendants regarding the leasehold." *Order to Supplement A.R.*, *Id* (emphasis added).

When Defendants finally provided a more complete AR under this Court's order, the Supplemental AR ("AR SUPP") revealed records of the *existence* of such communications with

Plaintiff, but only partially recorded the *contents* of those communications through summarized notes. As to the central issue of the Lease Cancellation, those records leave this Court with little more contextual information than it had before it ordered the AR to be supplemented. The Defendants had no incentive to disclose–and in fact had every incentive not to disclose–adverse information damaging to their defense that would eventually become part of the AR.[2] For the same reason, in compiling their original AR, the Defendants omitted communications demonstrating that they rubber-stamped the decisions formulated and written by the Tribe with no evidence of independent analysis or deliberation by any federal official.

Tuttle's Declaration and the Exhibit materials help to complete the picture only partially revealed by the AR and AR SUPP by demonstrating his efforts to comply with the lease terms and cure deficiencies when identified, despite his life-threatening health problems and Defendants' unwillingness to compromise.

3. The AR Lacks Background Information Necessary to Determine Whether the Agency Independently Considered All Factors Relevant to the Termination Decision.

The terms of the Lease and the Lease Modification describe Tuttle's obligations under the Lease. Lease Addendum ARTICLE 17 governs the Lease termination procedure, and the Defendants' own regulations similarly govern the procedure in approving any termination. The factors relevant to effective judicial review of the termination include (1) whether Tuttle breached the Lease provisions and, if so, whether his efforts to cure were insufficient; (2) whether the Defendants followed the Lease termination provisions, and (3) whether the government followed its own procedure. "Consideration of all relevant factors includes at least an effort to get both sides of the story." *Esch*, 876 F.2d at 993.

[2] This follows the pattern in preparation of the original AR and it is noted that both the AR and AR SUPP were prepared by the same federal employee: Stan Webb. *See Decl. of Stan Webb Certifying Supplement to Administrative Record*, Docket. # 21-2.

The AR does not tell both sides of the story; rather, it is the Defendants' version of events. Tuttle's Declaration and Exhibit 1 complete the picture in order to assist this Court in reaching an informed conclusion.

4. Defendants' Failure to Explain Their Actions Frustrates Judicial Review and Necessitates This Court's Consideration of the Tuttle Declaration and Exhibit 1.

The absence of any record in the AR of a deliberative process is due to the Defendants' failure to maintain an arm's length relationship with the Tribe−and the resulting abdication of Defendants' approval role to the Tribe. The AR SUPP details the preparation of the Notice of Default and the Notice of Cancellation by the Tribe and subsequent virtual verbatim issuance by the Defendants. *See* AR SUPP 221-236, 263, 273, 370. It is settled law that third-party decisions must be independently and extensively reviewed before a federal agency may lend the decision its *imprimatur*. *Assocs. Working for Aurora's Res. Env't v. Colo. Dept. of Transp*., 153 F.3d 1122 (10th Cir.1998). There is no record of Defendants' conducting an "independent" and "extensive" review of the Tribe's written decision. Rather, they rotely substituted the Tribe's decision-making for their own and served the Tribe's decision on Tuttle.

5. Defendants' Assertion That the Tuttle Materials Violate the Federal Rules of Evidence Is Inapposite.

It is worth noting at the outset that the Federal Rules of Evidence do not apply to administrative hearings such as that conducted by the Interior Board of Indian Appeals ("IBIA") in this matter. RULES OF PRACTICE FOR ADMINISTRATIVE LAW JUDGE PROCEEDINGS, 20 CFR 655.425(b). Instead, "principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence" in the IBIA. *Id*. Accordingly, the "relevant and probative" standard should apply to this Court's admission of Plaintiff's Declaration, which is introduced in response to materials which should have been produced by Defendants for, and

considered by, the IBIA but were not. Defendants have now introduced additional evidence via the AR SUPP−materials not considered by the IBIA−and Plaintiff must be accorded the same opportunity. Tuttle's Declaration and the supporting materials are both relevant and probative to this adjudication because they complete gaps in the AR and AR SUPP which demonstrate Defendants' intransigence in allowing Tuttle to cure alleged Lease violations, as is his right pursuant to both (1) the Lease and (2) the Defendants' own regulations. That evidence goes directly to Plaintiff's claim that Defendants' approval of the Lease Termination was arbitrary, capricious and not in accordance with the law.

Notwithstanding the foregoing, Defendants assert that Exhibit 1 to the Tuttle declaration, a title report for the leased property, violates Federal Rule of Evidence 401. That rule states simply:

> Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

Defendants claim that, through this document alone, Tuttle somehow seeks to "relitigate" the ownership status of the property, but even cursory review of his Complaint reveals that this claim cannot be reconciled with reality. Nowhere in the Complaint or plea for relief does he ask that this Court reinstate the clear fee simple title to the property that he once held.

Tuttle wrote his Declaration and introduced the title report not to ask that the Lease be nullified and his land be returned, but instead to demonstrate his understanding that he held title to the property in fee simple status prior to being forced to accept the 1977 stipulated judgment, in exchange for the Lease as the sole consideration for his surrendering his title.[3] The title report

[3] Defendants characterized the 1977 Judgment in the unreported case of *United States v. Brigham Young Univ*., No. CV-72-3058-DW (C.D. Cal. 1977) (*See* AR0000363) as containing "findings" of law. In fact, that judgment memorialized a stipulation, drafted by Defendants and conceded by Plaintiff and numerous other property owners under legal and financial pressure by Defendants, rather than a judicial determination.

shows that Tuttle purchased the land in fee simple status on January 27, 1949, and held it in that status for 28 years before surrendering it under financial and legal pressure as sole consideration for a leasehold. Decl. of William C. Tuttle at ¶¶1-6 (Docket # 24-2). The Declaration and title report demonstrate the persistence of Defendants' attack on Tuttle's property interest and inexplicable determination to remove him from the Property and transfer his interest to the Tribe.

The Declaration also describes Tuttle's frustrations in dealing with the Tribe and the Defendants in order to reach a compromise through interactions that are not described in the AR. The Defendants could have, and should have, balanced those competing interests in accepting the Tribe's Termination documents. They did not. The title report and declaration constitute evidence this Court requires to effectively conduct judicial review of Tuttle's efforts to cure deficiencies, especially in light of Defendants' surrender of their responsibility to manage any Lease termination.

Defendants argue that the Exhibit 1 title report is hearsay and therefore inadmissible pursuant to Federal Rule of Evidence 802. Rule 801 defines hearsay as an out of court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement." Exhibit 1 validates Tuttle's understanding that he owned fee simple title to the property prior to the Government's forced divestment of it. As noted above, Tuttle does not seek the reversal of the 1977 stipulated judgment in this litigation. To this point, Plaintiff concedes that the ownership status of the land is not at issue and does not offer Exhibit 1 to prove that it is. Instead, Exhibit 1 is offered as evidence of Tuttle's ties to, and investment in, the property−ties which would be severed and forfeited for *de minimus* alleged violations related to (1) an insurance policy and (2) sublessee rent calculations that did not meet the Tribe's and Defendants' arbitrary standards. Exhibit 1 is offered to contextualize the Defendants' latest action and show that it is in fact the

final blow in their long history of seeking to divest Tuttle of all property interests by any and all available means. Because it is offered to demonstrate that pattern, it is not hearsay.

Finally, Exhibit 1 is comprised of various publicly available title and deed documents and a summary of their contents. Rule 803(14) ("Records of Documents That Affect an Interest in Property") excepts such public records from the rule against hearsay, as such documents are non-controversial and available to all parties, and, accordingly, this Court should deny Defendants' motion to exclude Exhibit 1.

CONCLUSION

For the foregoing reasons, Plaintiff William C. Tuttle respectfully asks that the Defendants' Motion to Strike Declaration of William C. Tuttle and All Supporting Documents be denied.

Dated: August 19, 2014

Respectfully Submitted,

s/Dennis J. Whittlesey

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