JOHN C. CRUDEN, Assistant Attorney General
Environment & Natural Resources Division
SETH M. BARSKY, Chief
S. JAY GOVINDAN, Assistant Chief
ROBERT P. WILLIAMS, Sr. Trial Attorney
COBY HOWELL, Sr. Trial Attorney
KAITLYN POIRIER, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel: 202-307-6623; Fax: 202-305-0275
Email: robert.p.williams@usdoj.gov
Email: coby.howell@usdoj.gov
Email: kaitlyn.poirier@usdoj.gov

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HOOPA VALLEY TRIBE, Plaintiff, v. U.S. BUREAU OF RECLAMATION, et al., Defendants, and KLAMATH WATER USERS ASSOCIATION, et al., Defendant-Intervenors.	Case No. 3:16-cv-04294-WHO **FEDERAL DEFENDANTS' MOTION TO LIMIT REVIEW TO THE ADMINISTRATIVE RECORD AND TO STRIKE PLAINTIFF'S EXTRA-RECORD EVIDENCE** **Date:** January 27, 2017 **Time:** 9:00 a.m. **Judge:** Honorable William H. Orrick **Location:** Courtroom 2, 17th Floor

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NOTICE OF MOTION AND MOTION TO STRIKE

PLEASE TAKE NOTICE that on January 27, 2017, at 9:00 a.m., or as soon thereafter as the parties may be heard, in the courtroom of the Honorable William H. Orrick, located in the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Federal Defendants the United States Bureau of Reclamation ("Reclamation") and National Marine Fisheries Service ("NMFS") will move to limit review to the excerpts of the administrative records and strike the declarations and exhibits attached to Plaintiff's motion for partial summary judgment, ECF Nos. 70-71. Federal Defendants will also move to strike in full Plaintiff's motion for partial summary judgment, ECF No. 69, or in the alternative, the portions of Plaintiff's motion for partial summary judgment which cite to or improperly rely upon the extra-record evidence.

INTRODUCTION

On December 1, 2016, Plaintiff filed a motion for partial summary judgment on its first claim for relief. ECF No. 69. Plaintiff attached to its motion the Declaration of Joshua Strange, ECF No. 70, and the Declaration of Sean Ledwin, ECF No. 71, accompanied by five corresponding exhibits.[1] Because review of this claim is limited to the agencies' administrative record and Plaintiff has made no showing that this extra-record evidence fits within the Ninth Circuit's limited exceptions to administrative record review, the Court should strike the

[1] Federal Defendants are cognizant that the Court may accept evidence in a remedy proceeding, but this typically occurs after liability has been established, or in an effort to establish harm for purposes of an injunction. Because Plaintiff has not bifurcated liability from remedy nor properly moved for an injunction, and offered extra-record evidence throughout its brief, Plaintiff has proffered evidence that has never been before the agencies and therefore the Court should strike the Declarations of Joshua Strange and Sean Ledwin, ECF Nos. 70, 71, as well as the supporting exhibits. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("When a reviewing court considers evidence that was not before the agency, it *inevitably* leads the reviewing court to substitute its judgment for that of the agency.") (emphasis added); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604 (9th Cir. 2014) ("*Jewell*"); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d. 971, 993 (9th Cir. 2014) ("*Locke*") (reversing a district court for allowing extra-record evidence to inform its decision).

declarations, attached exhibits, and improper references to extra-record evidence in Plaintiff's motion for partial summary judgment.

Reclamation and NMFS have not yet filed the administrative record in this case.[2] To facilitate the Court's recent order, ECF No. 82, Reclamation and NMFS will be filing certified excerpts of their administrative records for the first claim for relief in Plaintiff's amended complaint on or before January 6, 2016.

Despite the pending motion to dismiss and the absence of an administrative record, Plaintiff filed a motion for partial summary judgment asserting that Reclamation and NMFS failed to reinitiate formal consultation on the impact of Klamath Project operations on the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of coho salmon, a species listed as threatened under the Endangered Species Act ("ESA"). ECF No. 69. Plaintiff suggests that Reclamation's failure to reinitiate violated the ESA and NMFS's failure to reinitiate consultation violated the Administrative Procedure Act ("APA"). ECF No. 69 at 9.

For the reasons explained below, Plaintiff's submission of declarations and exhibits prior to the filing of the administrative record defies the established standard in record review cases. Claims asserted directly under the APA are bound by the APA's requirement that review of agency action be based upon "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Likewise, as explained below, claims raised under the ESA's citizen-suit provision are governed by the same APA standards and must be reviewed upon the administrative record. Thus, irrespective of whether a claim is brought under the ESA or the APA, Plaintiff may not

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[2] Plaintiff asserts that the deadline for filing the administrative record pursuant to Local Rule 16-5 has passed. However, Federal Defendants' filing of the motion to dismiss or, in the alternative, to stay, ECF No. 33, rendered the administrative record unnecessary for this stage of the proceedings. The parties would have agreed to a schedule for filing the administrative record at the case management conference, but instead agreed to continue the case management conference until the resolution of the motion to dismiss. The parties acknowledged in their stipulation that "Federal Defendants' motion, if granted, could narrow the existing dispute, if not eliminate it altogether." ECF No. 40, at 2. Thus, the stipulation implicitly stayed the administrative record deadline. The Court granted the stipulated continuance of the case management conference. ECF No. 42.

submit extra-record evidence unless it falls within certain narrow exceptions. Moreover, Plaintiff has made no showing that the extra-record evidence falls within any of the Ninth Circuit's recognized exceptions to record review.

Therefore, Federal Defendants move this Court to limit its review to the excerpts of the administrative record and strike Plaintiff's extra-record evidence. Additionally, Federal Defendants move the Court to strike Plaintiff's motion for partial summary judgment—which relies repeatedly on this extra-record evidence—or, in the alternative, to strike any portion of the motion which cites to or relies upon the extra-record evidence.

ARGUMENT

I. When A Citizen-Suit Provision Provides No Internal Standard And Scope Of Review, APA Record Review Principles Apply And The Court's Review Is Confined To The Administrative Record.

More than fifty years ago, in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963), the Supreme Court confirmed that unless a statute specifies otherwise, a court's review of federal agencies' administrative actions is limited to the "arbitrary and capricious" standard of review provided by the APA and is based on the administrative record.

"[I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held." 373 U.S. at 715. The Ninth Circuit follows this fundamental precept, holding that APA review standards apply unless a statute "expressly" indicates a contrary intent. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193–94 (9th Cir. 2000) (citing *Dickinson v. Zurko,* 527 U.S. 150 (1999) and *Chandler v. Roudebush*, 425 U.S. 840, 861–62 (1976) for the proposition that the APA, and not *de novo* review, is the "default judicial review standard" for agency action).

II. The ESA Citizen-Suit Provision Contains No Internal Standard Of Review, So Judicial Review Is Governed By The APA And Limited To The Administrative Record.

Because the ESA citizen-suit provision, 16 U.S.C. § 1540(g)(1)(A), contains no internal scope or standard of review, the Court's review of "an agency's compliance with the ESA is reviewed under the Administrative Procedure Act." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc), *cert. denied sub nom. New 49'ers v. Karuk Tribe*, 133 S. Ct. 1579 (2013); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011) (same).

This has been the settled standard for more than thirty years, as the Ninth Circuit has consistently reviewed ESA citizen-suit cases in accordance with APA record review principles, and continues to do so today. *See Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984) ("Because [the] ESA contains no internal standard of review, section 706 of the [APA], 5 U.S.C. § 706, governs review."); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205–06 (9th Cir. 2004); *Greater Yellowstone Coal.*, 665 F.3d at 1023; *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601–02 (9th Cir. 2014) (applying APA "standards" to ESA claims and limiting review to the administrative record).[3]

To that end, APA Section 706 articulates the standard and interrelated scope of review that governs this Court's review of the agencies' compliance with the ESA:

> [STANDARD OF REVIEW:] [T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .
>
> [SCOPE OF REVIEW:] *In making the foregoing determinations,* the court shall review the whole record or those parts of it cited by a party . . . .

5 U.S.C. § 706 (emphasis added). This plain language confirms that the APA's standard and scope of review are indivisible: the Court's task is "to determine whether the [agency] has considered

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[3] Other Circuits are in accord: *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 685–86 (D.C. Cir. 1982); *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 467–68 (4th Cir. 2013); *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998); *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002).

the relevant factors and articulated a rational connection between the facts found and the choice made," *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983); and, in making these specific determinations, the Court must review the "whole record," meaning the Court's determinations are "to be based on the full administrative record that was before the [agency decision-makers] at the time [they] made [their] decision," *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). Indeed, the Supreme Court has recognized that limiting judicial review to the administrative record is necessary to prevent courts from exercising sweeping *de novo* review of agency action. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549 (1978). The Ninth Circuit has likewise confirmed that in order to maintain the proper deference to agency decision-making, the governing standard of review must not be severed from the scope of review:

> Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise, and decision-making.

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005); *see also Wilson v. Comm'r of Internal Revenue*, 705 F.3d 980, 997 (9th Cir. 2013) ("Unless the special statutory review provided for in the . . . act specifies a different scope of review, § 706 of the APA supplies both the scope of review and the standard of review."). Thus, the "focal point for judicial review [of agency action] 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); *Jewell*, 747 F.3d at 602 ("Our review is limited to the administrative record already in existence.").

III. Neither *Washington Toxics* Nor Any Other Precedent Silently Overruled This Unbroken Line Of Controlling Precedent.

For extra-record evidence to be considered here, this well-established order must have been overturned. In recent years, some litigants, including Plaintiff, have cited *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), and one paragraph from *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011), to insist that this overthrow has occurred. But the notion that *Washington Toxics* or *Kraayenbrink* overruled decades of unbroken

Ninth Circuit precedent, created a new Circuit split, and contravened the Supreme Court—all without any discussion whatsoever—is not possible. *See In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) ("[A] panel of this court may not overrule a decision of a previous panel; only a court *in banc* has such authority."). Rather, *stare decisis* requires the Court to read these cases against: (i) bedrock Supreme Court precedent that confines judicial review to the administrative record where a citizen-suit provision does not set forth specific standards to be used; and (ii) thirty years of case law confining review of ESA citizen-suit claims to the record. *See, e.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012) (explaining that *stare decisis* has special force in cases of statutory interpretation).

When viewed in this proper light, it is clear that *Washington Toxics* and *Kraayenbrink* are "limited in scope" to established principles of administrative law, not radical departures from them. *Sierra Club v. McLerran*, No. C11-1759RSL, 2012 WL 5449681, at *2 (W.D. Wash. Nov. 6, 2012). In fact, in both cases the Ninth Circuit merely "ratified the district courts' use of discretion . . . to supplement the record" under the pre-existing narrow exceptions to record review, a "far cry" from authorizing district courts to "engage in *de novo* review," or rendering "the APA's standards an inapt guideline." *Id.*; *see also WildEarth Guardians v. U.S. Forest Serv.*, No. CV-10-385-TUC-DCB, 2011 WL 11717437, at *1 (D. Ariz. Apr. 26, 2011) (rejecting plaintiff's effort to introduce extra-record evidence and conduct discovery under ESA citizen-suit provision based on supposed "new standard announced in *Kraayenbrink*").[4] In other words, these cases did not announce the wholesale (and unexplained) abandonment of administrative review principles for ESA citizen-suit claims.

[4] Indeed, *Washington Toxics* never held that APA Section 706 is inapplicable in an ESA citizen-suit claim, nor did it overrule decades of consistent Ninth Circuit precedent that apply Section 706 to ESA citizen-suit claims. Instead, *Washington Toxics* only held that it was unnecessary to challenge "final" agency action in accordance with 5 U.S.C. § 704 in order to plead an ESA citizen-suit claim. 413 F.3d at 1034. Similarly, *Kraayenbrink* expressly stated that Section 706 governed review of the ESA claim, and merely found that the district court did not err in allowing supplementation of the agency's administrative record. 632 F.3d at 481, 497.

This conclusion—that judicial review is limited to the record—is further compelled by the fact that Ninth Circuit decisions after *Washington Toxics* and *Kraayenbrink* continue to apply record review standards to ESA cases. In *Karuk Tribe*, the *en banc* Ninth Circuit held that a failure to consult claim under the ESA "is reviewed under the Administrative Procedure Act" and "is a record review case." 681 F.3d at 1017. The Court evaluated the parties' summary judgment motions "based upon [its] review of the administrative record." *Id.* To the extent that *Washington Toxics* or *Kraayenbrink* are inconsistent with *Karuk Tribe*, the *en banc* decision clearly controls. *In re Osborne*, 76 F.3d at 309.

Indeed, in a subsequent decision the Ninth Circuit again confirmed that ESA claims are reviewed under the APA standard and that such review "is limited to the administrative record already in existence, not some new record made initially in the reviewing court." *Jewell*, 747 F.3d at 602 (internal quotation marks omitted). *Jewell* also warned that "[t]here is a danger when a reviewing court goes beyond the record" in an ESA case and reiterated that considering extra-record evidence "inevitably leads the reviewing court to substitute its judgment for that of the agency." *Id.* at 602. In addition, this Court and numerous other district courts in this Circuit have re-affirmed that APA record review principles govern ESA citizen-suit cases. *See, e.g.*, *Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, No. 16-CV-01993-LHK, 2016 WL 4382604, at *8 (N.D. Cal. Aug. 17, 2016) ("The general review provisions of the APA apply in cases asserting violations of the ESA" and APA review "generally is restricted to the administrative record."); *Shearwater v. Ashe*, No. 14–CV–02830–LHK, 2015 WL 4747881, at *10 (N.D. Cal. Aug. 11, 2015) (holding that an ESA failure to consult claim is reviewed under the APA standards and limited to the administrative record); *Pac. Rivers Council v. Shepard*, No. 3:11-cv-442-HU, 2012 WL 950032, at *3 (D. Or. Mar. 20, 2012) ("[T]he APA standard of review governs a plaintiff's citizen suit for failure to consult under ESA § 7."); *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1301 (D. Or. 2011) (granting motion to strike in ESA case because: "The Declaration is plainly extra-record scientific opinion and argument submitted to undermine [the agency's] analyses and conclusions").

In short, neither *Washington Toxics* nor *Kraayenbrink* have toppled well-established APA record review principles that have applied to ESA cases for decades.

IV. Review Of ESA Citizen-suit Claims Is Limited To The Administrative Record Regardless Of Whether Plaintiff Challenges Agency Action Or Inaction.

ESA cases are limited to the administrative record regardless of whether the plaintiff challenges agency action or an agency's failure to act. The scope of review prescribed by Section 706 of the APA applies both to claims under Section 706(1), challenges to agency inaction, and 706(2), challenges to agency action. 5 U.S.C. § 706. Likewise, there is no distinction between agency action and inaction when this standard applies to ESA citizen-suit cases. *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, 984 F. Supp. 2d 1048, 1056 (E.D. Cal. 2013) ("The record review limitations of the APA apply to claims challenging agency inaction as well as to claims challenging agency action."). Accordingly, the *en banc* Ninth Circuit in *Karuk Tribe* applied the APA scope of review to an ESA case asserting that an agency failed to take a required action. *See Karuk Tribe*, 681 F.3d at 1017 (stating that the "agency's compliance with the ESA is reviewed under the [APA]" and the Court must adjudicate the merits of the claim "based upon our review of the administrative record"); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1384, 1386–87 (9th Cir. 1987) (reviewing an ESA citizen-suit claim for failure to reinitiate consultation under Section 706 of the APA); *Shearwater*, 2015 WL 4747881, at *10 (holding that an ESA failure to consult claim is reviewed based upon the administrative record).

Plaintiff also cites *San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002) in an effort to support its argument that failure to act cases are "not based on an administrative record," regardless of whether those claims arise under the APA or the ESA. ECF No. 81 at 4. This assertion directly contradicts both the language of the APA[5] and *San Francisco BayKeeper*

[5] As explained above, the APA does not distinguish between cases in which the court "compel[s] agency action unlawfully withheld or unreasonably delayed" and those in which the court "hold[s] unlawful and set[s] aside agency action" in assigning the scope of review. 5 U.S.C. § 706. Both determinations must be based upon the court's "review [of] the whole record or those parts of it cited by a party." *Id.*

itself. In *San Francisco BayKeeper*, the agency submitted an administrative record, which formed the basis for the Ninth Circuit's review. 297 F.3d at 886. The Court did not hold that the administrative record was irrelevant or unnecessary in a failure to act case or that the plaintiffs could submit extra-record evidence for the Court's review. Instead, the Court merely held that if there is no clear endpoint of decision-making in a failure to act case, the case may require an "open" record that the agency—and only the agency—may supplement as appropriate. *Id.* (allowing the agency to supplement the administrative record with a later-created document because there was "no final agency action that close[d] the administrative record").

Nor is there any reason to conclude that the federal agencies would be unable to compile an administrative record in this case, if given sufficient time. In fact, the federal agencies will be filing excerpts of their administrative record for Plaintiff's first claim for relief prior to January 11, 2017, so the Court may review a record when adjudicating this claim. With adequate time, Federal Defendants will be able to complete the administrative record for this Court's review. As the weight of the above precedent confirms, Section 706 of the APA—both its standard and inextricably interrelated scope of review—requires that Federal Defendants be given this opportunity. Accordingly, the Court may not consider any extra-record evidence unless it fits within one of the recognized, narrow exceptions to the record review rules. *Lands Council*, 395 F.3d at 1029–30.

V. The Evidence Submitted by Plaintiff Does Not Fall Within the Recognized Exceptions to Record Review

In ESA citizen suit cases, "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); *Jewell*, 747 F.3d at 602–03. The Ninth Circuit, however, has crafted certain "narrow exceptions to this general rule." *Lands Council*, 395 F.3d at 1030. Courts may

> allow expansion of the administrative record in four narrowly construed circumstances: (1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical

> terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency.

Fence Creek Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010).

Where the exceptions do apply, the Ninth Circuit has emphasized that the exceptions should be approached "with caution, lest 'the exception . . . undermine the general rule." *Jewell*, 747 F.3d at 603 (quoting *Lands Council*, 395 F.3d at 1030). "Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Lands Council*, 395 F.3d at 1030. The Ninth Circuit sets a high bar for the introduction of extra-record evidence to provide sufficient insurance against district courts impermissibly or inadvertently "questioning the agency's scientific analyses or conclusions." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("When a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency."). Thus, these four exceptions are "narrowly construed" and "constrained" in their application. *Lands Council*, 395 F.3d at 1030.

Importantly, these narrow exceptions only come into play *after* the agency record is filed with the court. *See Fence Creek*, 602 F.3d at 1131 (identifying the four exceptions for the "expansion" or "supplementation" of the existing administrative record). The exceptions "operate to identify and plug holes in the administrative record," not to supplant or preempt the creation of that record. *Lands Council*, 395 F.3d at 1030.

This timing is essential because "before admitting documents under any exception to the general rule against extra-record evidence, a court should require that a plaintiff make an initial showing that the existing record is insufficient." *Nat. Res. Def. Council v. Kempthorne,* 506 F. Supp. 2d 322, 345 (E.D. Cal. 2007); *see also Fence Creek*, 602 F.3d at 1131 (requiring plaintiffs to "show" the "gaps or holes" in the administrative record); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988) ("The [plaintiff] makes no showing that the district court needed to go outside the administrative record to determine whether the [agency] ignored information.").

Once a plaintiff establishes that the record is insufficient, it must prove that the extra-record documents fall into one of the recognized exceptions and warrant departing from typical record review principles. *Fence Creek*, 602 F.3d at 1131 (Plaintiffs bear a "heavy burden to show that the additional materials sought are necessary to adequately review the [agency's] decision."); *Pinnacle Armor v. United States*, 923 F. Supp. 2d 1226, 1243 (E.D. Cal. 2013) ("[I]t is *Plaintiff*'s burden to establish that the extra-record Documents qualify for consideration.").

Here, Plaintiff does not and cannot make a showing that the administrative record is insufficient because, as a threshold matter, Federal Defendants have not yet had the opportunity to compile and certify the record. Plaintiff has not proffered any reason that would indicate the record will be deficient. Until the administrative record has been completed and Plaintiff carries its burden of showing that the administrative record is insufficient, supplementation of the record is improper and impermissible.

Nor does Plaintiff argue, let alone demonstrate, that its extra-record documents fall into any of the four documented exceptions to record review. Because Plaintiff bears the burden of proving that its extra-record evidence falls into one of these exceptions, its silence on this matter ends the inquiry. *Pinnacle Armor*, 923 F. Supp. 2d at 1243. Nor would the Court be able to assess whether any of the exceptions apply without first evaluating the administrative record.[6]

Additionally, even if Plaintiff's extra-record evidence could be considered by this Court under one of the four exceptions, that evidence could not replace or negate the need for an administrative record. The Ninth Circuit has clearly established that "[e]ven if a reviewing court properly admits extra-record evidence under *Lands Council*, it may not use the admitted extra-record evidence 'to determine the correctness or wisdom of the agency's decision.' *Asarco*, 616 F.2d at 1160. Such use is never permitted." *Locke*, 776 F.3d at 993; *see also Defs. of Wildlife*, 2016 WL 4382604, at *9. Nor can the Court "look to this evidence as a basis for questioning the

[6] For instance, the Court could not assess whether additional documents are "needed to explain technical terms or complex subjects" without first determining whether the administrative record itself adequately explains those subjects. *Fence Creek*, 602 F.3d at 1131.

agency's scientific analyses or conclusions." *Locke*, 776 F.3d at 993. The exceptions allow documents to be considered for specific, limited purposes, and do not support replacing the administrative record with a set of documents of Plaintiff's choosing that do not accurately reflect the information before the agency when it made its decision.

In sum, Plaintiff's APA and ESA claims should be evaluated under APA standards and review should be limited to the administrative record. Plaintiff's attempt to introduce extensive extra-record evidence is contrary to long-standing Supreme Court and Ninth Circuit case law that emphasize the importance of reviewing federal agency actions based on the relevant record. Plaintiff also fails to carry its burden of establishing that these extra-record documents fall into one of the narrow exceptions to record review. Plaintiff's attempt to supplement the record before it has even been filed should be rejected.

VI. Plaintiff's Motion For Partial Summary Judgment And The Extra-Record Evidence Should Be Stricken

Where extra-record materials are improperly referenced in or attached to a brief, as is the case with Plaintiff's motion for partial summary judgment, it is well-established that the materials and references in the brief, and arguments based upon them, should be stricken. *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (granting motion to strike portions of petitioners' brief that includes and relies on extra-record material); *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 753 n.2 (3rd Cir. 1982). This relief is appropriate here, where the declarations are cited throughout the brief, and where the declarations essentially represent numerous pages of additional argument. Plaintiff is required to present its claims without reference to or reliance on extra-record materials.

If the Court elects not to strike Plaintiff's motion for partial judgment, Federal Defendants respectfully request that the Court strike any portions of the brief which improper rely upon the extra-record evidence. To the extent that any of the declarations are submitted for a permissible purpose—such as establishing standing, *see supra* note 1—the Court should consider the evidence solely for that limited purpose. However, the reviewing court may "never" use extra-record documents "to determine the correctness or wisdom of the agency's decision." *Locke*, 776 F.3d at 993.

CONCLUSION

Plaintiff's reliance on extra-record evidence for its ESA and APA claims defies precedent and cannot be permitted. Plaintiff's motion for partial summary judgment should be based upon the administrative record, which has not yet been filed, instead of an assortment of declarations and documents compiled by Plaintiff in disregard for the standards of the APA and Ninth Circuit case law.

Accordingly, Federal Defendants respectfully request that this Court strike the Declarations of Joshua Strange and Sean Ledwin, as well as the supporting exhibits, strike Plaintiff's motion for partial summary judgment in full, and order Plaintiff to re-file its motion without reference to or reliance on extra-record materials. *Rybachek*, 904 F.2d at 1296 n.25; *Desert Protective Council v. U.S. Dep't of the Interior*, No. 12cv1281-GPC(PCL), 2012 WL 6678056, at *3 (S.D. Cal. Dec. 21, 2012) (ordering plaintiffs to "re-file their opening brief . . . without reference to the declaration" stricken by the court). In the alternative, Federal Defendants move to strike the declarations and exhibits listed above and any portions of Plaintiff's motion for partial summary judgment that cite to or rely upon the extra-record evidence.

Dated: December 22, 2016

Respectfully submitted,

JOHN C. CRUDEN, Assistant Attorney General
SETH M. BARSKY, Chief
S. JAY GOVINDAN, Assistant Chief
ROBERT P. WILLIAMS, Sr. Trial Attorney

/s/Coby Howell
COBY HOWELL, Sr. Trial Attorney
KAITLYN POIRIER, Trial Attorney (TN Bar # 034394)
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
(202) 307-6623 (tel)

3:16-cv-04294-WHO

(202) 305-0275 (fax)
kaitlyn.poirier@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was electronically filed with the Clerk of Court using CM/ECF. Copies of this document will be served upon interested counsel via the Notices of Electronic Filing that are generated by CM/ECF.

/s/ Coby Howell

Attorney for Federal Defendants