UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.* Derek Schmidt, Attorney General; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SUMNER, KS; CITY OF MULVANE, KANSAS; SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA; and IOWA TRIBE OF KANSAS AND NEBRASKA,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:20-cv-02386
SCOTT de la VEGA, in his official capacity as Acting Secretary of the United States Department of the Interior; and TARA SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs of the U.S. Department of the Interior, Bureau of Indian Affairs	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR EXPEDITED BRIEFING ON MOTION TO STRIKE EXTRA-RECORD MATERIAL AND PORTIONS OF BRIEF THAT RELY UPON EXTRA-RECORD MATERIAL AND MOTION TO STAY DEFENDANTS' RESPONSE BRIEF PENDING RESOLUTION OF THE MOTION TO STRIKE

COME NOW Plaintiffs, by and through their respective counsel, and set forth the following arguments and authorities for their response to Defendants' Motion for Expedited Briefing on Motion to Strike Extra-Record Material and Portions of Brief that Rely Upon Extra-Record Material and Motion to Stay Defendants' Response Brief Pending Resolution of the Motion to Strike ("Motion to Strike").

INTRODUCTION

In their Motion to Strike, Defendants move for an order striking what is referred to as the

"Gottlieb Affidavit" and two pages[1] where it is referred to in Plaintiffs' Opening Brief in Support of Reversal of Agency Action of May 20, 2020 ("Opening Brief"). While Defendants repeatedly refer to the Gottlieb Affidavit as "extra-record material," curiously they do not discuss the contents of the affidavit at any point in their Motion to Strike. Contrary to Defendants' assertion, the Gottlieb Affidavit is not "extra-record material." It is based entirely on what is already in the administrative record in this case. The Gottlieb Affidavit includes two exhibits that each contain calculations that are derived completely from what is in the administrative record. (Doc. 34, Ex. L and Exhibits (1) and (2).) The calculations help the Court to understand a record that involves technical and complex accounting data that are derived from ten years of audited financial statements and ten years of investment account statements. The data that provides the foundation for the mathematical calculations come from the administrative record. The method that Gottlieb used for the calculations is exactly what was utilized in the accounting reports that are in the administrative record.

In addition to providing calculations based on the technical and complex accounting data in the administrative record, the Gottlieb Affidavit and Exhibits aid the Court in determining whether the Department considered all relevant factors, including evidence contrary to the Department's analysis and conclusion.

As for Defendants' desire to expedite the briefing on the Motion to Strike, Plaintiffs are fully on board, and have filed this response within two business days of the filing of Defendants' motion. Given this response, Plaintiffs submit that there is no need for the Court to stay the Defendants' deadline for their response brief on the merits of the case.

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[1] Defendants state that those two pages are pp. 50-51. In the body of Plaintiff's Opening Brief, they are pp. 45-46. Reference in this Response to page numbers from the Opening Brief will be to the page numbers in the body of the Brief itself.

I. THE ACCOUNTING ISSUES

A. Accounting Issues Addressed in July 2014 Decision Resulting in Denial of the Park City Trust Application under PL 602

In 1996, the Wyandotte Nation ("Wyandotte") had land it purchased in Kansas City, Kansas, accepted into trust by the Secretary of the Department of the Interior (the "Department") pursuant to the mandatory trust acquisition provision of Pub. L. No. 98-602 ("PL 602".) (Doc. 34, p. 13-14.) Plaintiffs have discussed in its Opening Brief the origins of PL 602, the distribution of funds under that statute to the Wyandotte and the mandatory trust provision contained therein that was invoked when the $100,000 set aside in PL 602 for the purchase of land was used to acquire land (the "$100,000 set-aside funds" or "set-aside funds"). (Doc. 34, pp. 8-9, 29-32.) It has long been held that the mandatory trust acquisition provision of PL 602 can only be invoked if the land to be acquired in trust was purchased with ***only*** the $100,000 set-aside funds. (Doc. 34. pp. 17, 44; AR 3957, n. 6, 3958, n. 11.)

After PL 602 was enacted, the funds were distributed to the Wyandotte, including the $100,000 set-aside funds earmarked for the purchase of land to be accepted into trust. (Doc. 34, pp. 8-9.) In 1986, the Wyandotte used the $100,000 set-aside funds to purchase mortgage obligation bonds instead of land. Those bonds were deposited into an investment account that was separate from the investment account that held the balance of the PL 602 funds distributed to the Wyandotte (the "Segregated Account".) (Doc. 34, p. 9.) In December 1991, the Segregated Account was closed and the assets in that account (the bonds purchased with the $100,000 set-aside funds and $529 of cash in the account at that time) were transferred and commingled into the investment account that held the balance of the funds distributed to the Wyandotte under PL 602 (the "Commingled Account".) (Doc. 34, p. 9.)

In November 1992, the Wyandotte purchased the Park City land that is the subject of this

litigation, with $25,000 acquired from a margin loan from the Commingled Account. (Doc. 34, p. 10.)

In July 1996, the Wyandotte acquired $180,000 from a margin loan from the Commingled Account, and purchased land in Kansas City, Kansas, referred to as the "Shriner Tract." The Shriner Tract was acquired in trust in July 1996 under the mandatory provision of PL 602 after the Department determined that the Shriner Tract had been acquired with all of the $100,000 set-aside funds, plus earnings on the investment of those funds. (Doc. 34, pp. 11-14; AR 3958.) That trust acquisition resulted in litigation and further administrative proceedings before the Department that included inquiries into whether the Shriner Tract was in fact purchased with only the set-aside funds. (Doc. 34, pp 17-19.) Ultimately, the Department concluded that the Wyandotte had purchased the Shriner Tract with only set-aside funds, and upheld the trust acquisition under PL 602. (Doc. 34, p. 19.) This conclusion was based, at least in part, on a financial analysis that KPMG performed on the Segregated and Commingled Accounts that was presented to the Department by the Wyandotte. (AR 3959-60.)

In April 2006, the Wyandotte applied to have the Park City land acquired in trust under the Secretary's discretionary trust authority. (Doc. 34, p. 20.) Two years later, the Wyandotte changed course and asserted to the Department that the Park City land, like the Shriner Tract, was purchased with only PL 602 set-aside funds and was subject to the mandatory trust acquisition provisions of PL 602. (AR 3956.) In doing so, it relied on the same KPMG accounting analysis that had been submitted to support the Shriner Tract trust acquisition. (AR 3958-60; 3963-65.)

KPMG purported to track the value of the earnings on the investments acquired with the $100,000 set-aside funds while they were in the Segregated Account. However, as the Department noted, once that account was closed in November 1991 and the commingling occurred, KPMG

could no longer directly track the value of the 602 Funds. Instead, for the post-commingling period, "KPMG determined the amount of interest earned by the account overall, and then attributed a pro-rated portion of that interest to the 602 Funds." (AR 3959-60.)

In the course of its deliberations on the 2006 Park City trust application, the Department noted that the amount of earnings generated in the Commingled Account between 1991 and July 1996 were, at least in part, generated by assets acquired through margin loans acquired from the Commingled Account. These margin loans carried interest charges that were deducted monthly from the Commingled Account and that reduced the amount of the overall earnings accordingly. (AR 3962-63.) The KPMG analysis failed to take those interest charges into account. (AR 3963.)

Kansas opposed the Department's mandatory acquisition of the Park City land under PL 602. In the course of the Department's deliberations on the matter, Kansas presented an accounting report prepared by Jerry Gottlieb ("Gottlieb Report"). (AR 3962-63.) The Gottlieb Report demonstrated that the KPMG accounting analysis overstated the earnings on the PL set-aside 602 funds by failing to factor in deductions from the Commingled Account for margin loan interest for loans used to purchase securities and bonds. (AR 3962.) Once those deductions were factored in, the Gottlieb Report concluded that there were not sufficient PL 602 set-aside funds to purchase both the Shriner Tract and the Park City land. (AR 3962-63.)

The Department agreed. The accountants in the Department concurred that these deductions should have been taken into account to proportionately reduce the earnings on the $100,000 set-aside funds, once the commingling occurred. (AR 3963.) The Department concluded "that these deductions did reduce the amount of interest earned by the account…and that [the Wyandotte's accounting] overstated the amount of interest earned by the 602 Funds." (AR 3962-63.) In light of the previous determination that the Shriner Tract was purchased for

$180,000 in July 1996 with only the set-aside funds, the Department ultimately agreed with the Gottlieb Report and concluded that "the Nation could not have used the 602 funds exclusively to purchase Park City Parcel." (AR 3965.) The application to acquire the Park City land in trust under PL 602 was rejected on July 3, 2014. (AR 3956-65.)

B. 2017 Application and Accounting Issues

1. RSM assumption

In 2015, the Wyandotte submitted a new application for the Park City land to be acquired in trust under the mandatory provision of PL 602. (Doc. 34, p. 21.) This application was withdrawn in August 2017, and a new application was submitted in October 2017. (Doc. 34, pp. 21-22.) In connection with this 2017 application, the Wyandotte abandoned the KPMG analysis and submitted a new financial analysis of the purported earnings on the $100,000 set-aside funds. This analysis was performed by RSM US LLP ("2017 RSM Report"). (Doc. 34, p. 24.) Along with the 2017 RSM Report, the Wyandotte provided, for the first time, "Claim Money Fund Audit" reports (or compilations in two instances) prepared by Roy A. Ober, Inc., an accounting firm from Miami, Oklahoma (the "Ober Audits"). (Doc. 34, pp. 22-24.) These Ober Audits spanned the time frame from 1986 to year-ending September 1996.[2] The Ober Audits were represented to be audits (or compilations) of all of the funds distributed to the Wyandotte by PL 602 without differentiating between the $100,000 set-aside funds and the balance of the PL 602 funds that had been distributed. (Doc. 34, p. 22.) In other words, the Ober Audits reported the activity on the Claims Money Fund as one single, combined fund. (Doc. 34, p. 22.)

The documents that RSM relied upon in its 2017 RSM Report consisted of the 10 years of the Ober Audits and the ten (10) years of the Segregated and Commingled Account statements.

[2] No report was provided for 1988. (AR 4024.)

(AR 4027.) To arrive at the pro-rated value of the earnings on the investment of the $100,000 set-aside funds, RSM considered what it described as "relevant" entries on the Balance Sheet and Income Statements of the Ober Audits. (AR 4024-28.) RSM utilized those entries to determine the annual net value of the overall Claims Money Fund account ("relevant" assets less margin debt) and the amount of annual net earnings (interest and dividend interest less margin interest charges) generated by the Claims Money Fund account, and then attributed a pro-rated portion of that net account value and earnings to the $100,000 set-aside funds on an annual basis. (AR 4024-25; 4028-29.) It then annually charted the pro-rated "value" of the set aside funds and earnings from 1986 through year-ending September 1996 to conclude that there were enough funds to accomplish the purchase of the Shriner Tract in July 1996 for $180,000 and the earlier November 1992 Park City purchase for $25,000 using only the set-aside funds (the $100,000 plus earnings). (AR 4026, 4028-29.)

RSM's analysis was driven by an assumption that in course of the Shriner Tract administrative proceedings and litigation, the Department and the courts, respectively, had determined that the earnings on the investment of the $100,000 set-aside funds were "restricted" and could not be used for anything other than the purchase of land that was to be acquired in trust. (Doc. 34, pp. 24-26; AR 4023-24.) This assumption allowed RSM to ignore the fact that between 1986 and the end of November 1991, the Wyandotte had spent all of the earnings from the investment of the $100,000 set-aside funds, except for approximately $529.00. (Doc. 34, pp. 25-26.) This assumption also allowed RSM to ignore that the Ober Audits contained no such "restriction" and did not account for any such "restriction". (AR 4617-73.)

As a result of its adherence to this assumption, RSM reported higher dollar values for the earnings on the investment of the $100,000 set-aside funds between 1986 and the end of November

1991 than was actually reflected in the account statements for the Segregated Account during that same time period. RSM used those higher dollar values to chart the growth of the earnings on the $100,000 set-aside funds to reach its overall conclusions. (Doc. 34, p. 25, 46; AR 2843-3033; 4028-29.) Plaintiffs have claimed that adherence to this assumption was not warranted by previous court decisions or Department determinations and resulted in overstating the value of the earnings on the $100,000 set-aside funds. (Doc. 34, pp. 24-26.)

2. RSM ignores the Veres International investment, and the resulting loss, in the Ober Audits of the Claims Money Fund

The Ober Audits reflect that in fiscal year August 31, 1990, the Wyandotte used funds from a margin loan from the Commingled Account to make an investment in an amount in excess of $160,000 in a company by the name of Veres International. (Doc. 34, pp. 23, 27.) By the next fiscal year, $153,849.23 of that Veres International investment was booked as a loss, thus reducing the entire Claims Money Fund by that amount, according to the Ober Audits. The Ober Audits allocated the loss across the entirety of the Claims Money Fund-not just one part of it. (Doc. 34, p. 23.)

Without explanation, RSM chose to ignore the Veres International Investment and allocated no portion of any earnings from the investment (if any), and no portion of the loss, to the $100,000 set-aside funds. (Doc. 34, pp. 27-28.) RSM chose this approach to the Veres International investment despite the fact that:

a. The investment was acquired with a margin loan just the same as other investments in the Claims Money Fund which RSM took into account in its analysis (Doc. 34, p. 27);

b. The interest charged for the Veres International investment margin loan, as with all of the margin loan interest, was allocated by RSM on a pro-rata basis to the $100,000 set-aside funds. (Doc. 34, p. 27);

c. The Wyandotte purchased a zero coupon bond to help offset the loss from the Veres International investment, which kicked off earnings that RSM allocated on a pro-rata basis to the $100,000 set-aside funds. (Doc. 34, p. 27.); and

d. The effect of the reduction of the overall Claims Money Fund on the Ober Audits by the loss booked for the Veres International loss (a number used by RSM), with no pro-rata reduction of the $100,000 set-aside funds, created a greater pro-rata value of the set-aside funds to the overall Claims Money Fund thereafter. (Doc. 34, p. 27, n. 7.)

Plaintiffs have claimed that the approach RSM took with regard to the Veres International investment and the resulting loss is internally inconsistent with RSM's own methodologies, and is also inconsistent with what was reported in the Ober Audits. (Doc. 34, p. 27.) Once again, the result is that it overstates the value of the earnings on the $100,000 set-aside funds. (Doc. 34, p 46.)

3. Department accepts 2017 RSM Report

The Department's Office of Financial Management reviewed the 2017 RSM Report and concluded that its methodology, calculations, and assumptions were consistent with industry standards and the conclusions were reliable under the consistency principle of GAAP. (Doc. 34, pp. 24, 26.) This review did not mention the matters set forth above, nor other matters raised by Plaintiffs in their Opening Brief. (Doc. 34, p. 47; AR 3932-34.) The conclusions from the 2017 RSM Report formed the basis for the Department determining that the Park City land was purchased with only the $100,000 set aside funds, and qualified for a mandatory trust acquisition under PL 602. (Doc. AR 4482-4493.)

This time around, Kansas was denied any opportunity to review or comment on the 2017 RSM Report as it was systematically excluded from the Department's deliberative process that

took place from and after 2015 through May 20, 2020, when the final agency decision at issue was rendered. This exclusion occurred despite Kansas' prior involvement and the fact that the Department specifically noted, on several occasions, that Kansas remained an interested party who was strongly opposed to the mandatory trust acquisition of the Park City land under PL 602. (Doc. 34, p 21-22.)

C. Plaintiffs' Accounting Challenge-Gottlieb Affidavit and Exhibits

1. Challenge to RSM 2017 Report's assumption-calculations based on actual account statement values

Plaintiffs have challenged the underlying assumption that governed the RSM Report. Plaintiffs have demonstrated that the courts and the Department did not previously determine that the earnings on the investment of the $100,000 set-aside funds were "restricted" to only the purchase of trust land, such that all other uses of those funds should be ignored. (Doc. 34, p. 24-25.)[3]

Plaintiffs have demonstrated that the Segregated Account statements in the administrative record revealed that by the end of November 1991, all but $529 of the earnings on the $100,000 set-aside funds had been spent by the Wyandotte. (Doc. 34, pp. 25-26.) This means that the values reported by RSM for the $100,000 set aside funds, which ignored these expenditures, were overstated. (AR 2844-3033; 4028-29.) In order to illustrate the impact of this overstatement on the conclusions reached by RSM and the Department, Mr. Gottlieb performed the calculations that are reflected in Exhibit 1 to his Affidavit. (Doc. 34, pp. 45-46, Exhibit L, ¶ 9 and Exhibit 1 thereto.) Mr. Gottlieb performed the same pro-rata calculations as RSM, by utilizing the same data that

[3] This challenge to the assumption made by RSM is supported in part by the Department's July 3, 2014 decision because that decision recognized that the earnings on the investment of the $100,000 set aside funds was subject to reduction by its pro-rata share of the margin interest charges imposed on the overall Commingled Account. (AR p. 3963)

RSM used from the Ober Audits. The only difference is that Gottlieb used the actual account balance reflected in the Segregated Account for August 31, 1991, as opposed to the higher, RSM assumption-driven balance. (*Id.*) (Doc. 34, p. 46.) Gottlieb selected the August 31, 1991 year-ending date to easily track with the annual dates used in the RSM report. (*Id.*) The actual account balance for August 31, 1991, that Gottlieb used came from the administrative record. (AR 3229-30.)

The calculations in Gottlieb's Exhibit 1 to his Affidavit illustrate that if the actual account balance on August 31, 1991 (for the $100,000 set-aside funds, plus earnings actually in existence in the account at the time), is used, and the rest of the calculations are otherwise performed as RSM performed them by using the same data, the Shriner Tract and the Park City land could not have both been purchased with only the $100,000 set-aside funds plus earnings. (Doc. 34, p. 46.)

Everything contained in the calculations in Exhibit 1 to Gottlieb's Affidavit came from the administrative record. The calculations are offered to the Court help understand mathematically the impact of the assumption applied in the 2017 RSM Report, which resulted in overstating the amount of the earnings on $100,000 set-aside funds. Gottlieb's Affidavit and Exhibit 1 do not contain any evidence outside the administrative record. The evidence was there all along, if the Department had chosen to consider it.

2. Challenge to RSM 2017 Report ignoring the Veres International investment and the loss booked for same in the Ober Audits

Plaintiffs have challenged the Department's conclusions that RSM's methodologies are consistent with industry standards and reliable under the consistency principle of GAAP. (Doc. 34, pp. 26-8.) One challenge in this regard is that RSM's treatment of the Veres International investment loss is inconsistent with its own methodologies and is inconsistent with what is reported in the Ober Audits. (Doc. 34, pp. 27-28.)

To illustrate the effect of RSM's inconsistent and arbitrary treatment of the Veres International investment, Mr. Gottlieb performed the calculations reflected in Exhibit 2 to his Affidavit. (Doc. 34, Exhibit L. ¶ 10 and Exhibit 2 thereto.) These calculations show what the outcome would have been had RSM allocated the Veres International investment on a pro-rata basis to the earnings on the PL 602 set-aside funds (as was done with the other investments acquired in the Claims Money Fund from margin loans), and likewise allocated the loss booked for that investment in the same manner. (*Id.*) This calculation otherwise uses all of the same data used by RSM, including the higher account values for the $100,000 set-aside funds in the Segregated Account. (*Id.*) The result is that there would not have been enough money for both the Shriner Tract and the Park City land to have been purchased with only the $100,000 set-aside funds. (Doc. 34, p. 46.)

Everything contained in the calculations in Exhibit 2 to Gottlieb's Affidavit came from the administrative record. Once again, these calculations are offered to the Court as a mathematical aid to illustrate the impact of RSM's arbitrary decision to ignore the Veres International investment in its calculations. No non-record evidence is offered through Gottlieb's Affidavit or his Exhibit 2. The information has been there all along, if the Department had chosen to consider it.

The balance of the Gottlieb Affidavit simply sets forth who he is and that everything he reviewed was from the administrative record in this case. (Doc. 34, Ex. L, ¶¶ 1-4(a)-(f).) The statements contained in paragraphs 5-8 of his Affidavit are all independently supported by specific references from the administrative record in this case. (Doc. 34, Ex. L. ¶¶ 5-8.)

II. ARGUMENT AND AUTHORITY

In their Motion to Strike, Defendants assert that Plaintiffs have allegedly asked the court to consider "extra-record material" in the Opening Brief. As this Response demonstrated above,

that is simply not the case. For this reason alone, the motion should be denied.

Nevertheless, even if the Gottlieb Affidavit and Exhibits could be construed to be "extra-record material," the Tenth Circuit has recognized exceptions to the general rule that review of an administrative decision is limited to the administrative record:

> A reviewing court may go outside of the administrative record only for limited purposes. For example: Where the administrative record fails to disclose the factors considered by the agency, a reviewing court may require additional findings or testimony from agency officials to determine if the action was justified, *Overton,* 401 U.S. at 420, 91 S.Ct. at 825; or where necessary for background information or for determining whether the agency considered all relevant factors including evidence contrary to the agency's position, *Thompson v. United States Dept. of Labor,* 885 F.2d 551, 555 (9th Cir. 1989); or where necessary to explain technical terms or complex subject matter involved in the action, *Animal Defense Council v. Hodel,* 867 F.2d 1244, 1244 (9th Cir. 1989), and *Animal Defense Council v. Hodel,* 840 F. 2d 1432, 1436 (9th Cir. 1988).

State of Kansas ex rel. Sec'y of Soc. & Rehab. Servs. v. Shalala, 859 F. Supp. 484, 488 (D. Kan. 1994) (quoting *Franklin Sav. Ass'n. v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1137–38 (10th Cir. 1991)).

Subsequent to *Franklin Sav. Ass'n,* the Tenth Circuit has continued to recognize other possible justifications as: (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong. *Custer Cty. Action Ass'n v. Garvey,* 256 F. 3d 1024, 1027 n.1 (10th Cir. 2001) (citing *American Mining Cong. v. Thomas,* 772 F. 2d 617, 626 (10th Cir. 1985)).

In Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1161–62 (9th Cir. 2006), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008),

the court allowed the declaration of an expert for the purposes of examining whether the agency had considered all relevant factors and explained its decision as follows:

> Earth Island contends that the findings contained in the draft Hood Study, as well as in other studies, have substantially different percentage estimates of tree mortality from the percentages contained in Table 3–6. Earth Island relies upon the declaration of Dr. Edwin B. Royce in support of its contention. Royce has a Ph.D. in Botany with a specialization in Forest Plant Ecology from the University of California at Davis, and a Ph.D. in Applied Physics from Harvard University. Royce has had twelve years of experience in the characterization of forest vegetation.
>
> The USFS challenges the admissibility of Royce's declaration, as well as other expert declarations offered by Earth Island, because they were not before the agency during the administrative review process. We allow extra-record materials if necessary to "determine whether the agency has considered all relevant factors and has explained its decision." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996). Because Earth Island's expert declarations are offered for this purpose, they were properly before the district court and are properly before this court on review.

The three cases discussed below are analogous to the issues raised in the Motion to Strike in that the Gottlieb Affidavit and the calculations in his two exhibits do not introduce facts outside the administrative record, do not substitute Mr. Gottlieb's judgment for the Departments but do allow the Court to better examine in depth information that is already in the administrative record.

In *Laboratory Corporation of America Holdings v. United States*, 116 Fed. Cl. 386, 389 (2014), the court made the point:

> It is well established that the focal point for judicial review should be the administrative record already in existence. *See, e.g., Fla. Power Light v. Lorion*, 470 U.S. 729, 743–44, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). The admission of the Collis declaration into the Court's record will not shift the focal point of the judicial review. On the contrary, the Collis declaration will allow the Court to examine in depth the information already in the administrative record. The Collis declaration does not substitute Mr. Collis' judgment for the agency's judgment. Nor does the declaration introduce facts outside the administrative record. Rather, the declaration provides calculations based on data already contained in the administrative record, so that the Court can better understand the record.

In *Firstline Transp. Sec., Inc. v. United States,* 116 Fed. Cl. 324, 327 (2014), an expert declaration was allowed because:

> …The admission of the Jackson declaration into the Court's record will not shift the focal point of judicial review. On the contrary, the Jackson Declaration will allow the Court to take a deeper dive into information that is already in the administrative record. The Jackson declaration does not substitute Mr. Jackson's judgment for the agency's judgment. Nor does the declaration introduce facts outside the administrative record. Rather, the declaration makes calculations based on data already contained in the administrative record, so that the Court can better understand the record.

In *Colorado Wild v. Vilsack,* 713 F. Supp. 2d 1235, 1241-1242 (D. Colo. 2010), the court denied a motion to strike an expert declaration, finding that the declaration could be considered to show that "either the agency's analysis was clearly inadequate or that the agency improperly failed to set forth opposing views widely shared in the relevant scientific process."

The Gottlieb Affidavit, and the calculations in his two Exhibits, do not shift the focal point of judicial review in this case. Rather, they will allow the Court to better understand information that is already in the administrative record and illustrate the arguments Plaintiffs are making from the administrative record. The calculations are based on data that are already in the administrative record. The calculations follow the same methodology as the accounting reports in the administrative record. The calculations help explain that the Department failed to consider all of the relevant factors in making the determinations it made in its final agency action.

For all of the above and foregoing reasons, it is respectfully submitted that the Gottlieb Affidavit and the two Exhibits attached to the same are properly before the Court.[4]

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[4] Based on the above and foregoing authority, Plaintiffs were under the belief that a Motion to Supplement the Administrative Record was not required for consideration by the Court of the Gottlieb Affidavit and the two Exhibits attached to it. However, if it is determined that a formal motion is required, then it is respectfully requested that this response be considered a request on behalf of Plaintiffs that the Gottlieb Affidavit and the two Exhibits attached to it be considered by the Court in this case for the purposes for which it is has been presented as set forth herein.

Finally, in the penultimate paragraph of their Motion, Defendants mention an e-mail discussion between the parties about the length of Plaintiffs' Opening Brief. While Defendants do not appear to be seeking any affirmative relief regarding this issue, Plaintiffs pointed out several things to Defendants as to why they were not willing to file an amended brief. First, the argument and authority section of Plaintiffs' Opening Brief is 27 ½ pages long which complies with Local Rule 7.1(e). The other aspects of the required contents of briefs per Local Rule 7.6(a)(1)-(3) are not subject to the 30 page limit. The Opening Brief includes an introduction and summary of the case which were intended to serve as a description of the very complex nature of the matter before the court, a statement of the questions presented and a statement of the facts. This brief was filed on behalf of five (5) parties without any effort to file separate briefs that could have expanded the page limitations. In any event, it is respectfully submitted that Plaintiffs are in compliance with both Local Rule Nos. 7.1 and 7.6.

CONCLUSION

Plaintiffs respectfully submit that Defendants' Motion to Strike Extra-Record Material and Portions of Brief should be denied, that the request for expedited briefing is moot given the filing of this Response (other than that Defendants should be required to file any Reply forthwith), and that the balance of Defendant's Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2021, I electronically filed the foregoing with the clerk of the court by using the CM/ECF management system which will send notice of electronic filing to the counsel of record.

/s/ Mark S. Gunnison
Mark S. Gunnison