

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

STATE OF KANSAS, <i>ex rel.</i>)	
Derek Schmidt, Attorney General;)	
BOARD OF COUNTY COMMISSIONERS)	
OF THE COUNTY OF SUMNER, KANSAS;)	
CITY OF MULVANE, KANSAS;)	
SAC AND FOX NATION OF MISSOURI)	
IN KANSAS AND NEBRASKA; and)	
IOWA TRIBE OF KANSAS)	
AND NEBRASKA,)	
)	
Plaintiffs,)	
v.)	Case No. 2:20-cv-2386-HLT-GEB
)	
SCOTT DE LA VEGA, in his official)	
capacity as Acting Secretary of the U.S.)	
Department of the Interior;)	
DARRYL LACOUNTE, in his official)	
capacity as Director of the U.S. Bureau of)	
Indian Affairs,)	
)	
Defendants.)	

**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**

Defendants Scott de la Vega, in his official capacity as Acting Secretary of the U.S. Department of the Interior, and Darryl LaCounte, in his official capacity as Director of the U.S. Bureau of Indian Affairs,¹ hereby move to strike Exhibit L to Plaintiffs’ Opening Brief in Support of Reversal of Agency Action of May 20, 2020 (“Opening Brief”), ECF No. 34-14, which consists of an extra-record Affidavit of Jerrod L. Gottlieb and two exhibits attached by Mr. Gottlieb (the affidavit and exhibits thereto are referred to collectively as “the Gottlieb

¹ In accordance with Federal Rule of Civil Procedure 25(d), current officers are substituted for their predecessors.

Affidavit”) prepared for the purpose of this litigation. Defendants further move to strike the portions of Plaintiffs’ Opening Brief that rely upon these extra-record materials.

Further, given (1) Plaintiffs offered extra-record material without an order from Court; (2) Plaintiffs inappropriately rely on such material in their Opening Brief; (3) Defendants’ response to the Opening Brief is due March 8, 2021; and (4) Defendants had no notice of Plaintiffs’ intent to offer and rely on the extra-record material until they filed the Gottlieb Affidavit with the Court, Defendants had no opportunity to object to the extra-record material until their 30 days began to run on their time to respond to Plaintiffs’ Opening Brief. As such, Defendants respectfully request the Court stay Defendants’ Response Brief deadline until two weeks after the Court issues an order resolving this matter.

The Court’s decision in this matter should be determined on the basis of the administrative record. Plaintiffs have not carried their burden of showing that such extra-record materials should be admitted. Plaintiffs have provided no facts or arguments to support the consideration of these extra-record materials. Instead, they simply attach the affidavit to their brief. Because the Gottlieb Affidavit is outside the administrative record, it is not properly before the Court. The grounds for this Motion are as follows.

MEMORANDUM

Plaintiffs have challenged the Defendants’ May 20, 2020 decision to acquire land known as the Park City Parcel into trust at the request of the Wyandotte Nation pursuant to the Administrative Procedure Act. In the Tenth Circuit, “[r]eviews of agency action in the district courts must be processed *as appeals*.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (emphasis in original). Consistent with such an approach, a court’s “review of agency action is normally restricted to the administrative record.” *Citizens for Alt. to*

Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1096 (10th Cir. 2008). This means that a court typically reviews only “the evidence and proceedings before the agency at the time it acted.” *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1028, n. 1 (10th Cir. 2001); *Audubon Soc'y of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593, 609 (10th Cir. 2018). Accordingly, unless one of the “extremely limited” exceptions apply, courts will not consider extra-record evidence. *Citizens For Alternatives To Radioactive Dumping*, 485 F.3d at 1096.

The Tenth Circuit has recognized that extra-record evidence is appropriate for consideration only “in ‘extremely limited’ circumstances, such as where the agency ignored relevant factors it should have considered or considered factors left out of the formal record.” *Lee v. U.S. Air Force*, 353 F.3d 1229, 1242 (10th Cir. 2004) (quoting *Am. Mining Cong.*, 772 F.2d at 626). The rationale behind the limitation on extra-record materials is that, where a court is called upon to review an administrative action, it must examine what the agency had before it. Because the extra-record material introduced by Plaintiffs was, by definition, not before the agency, the reviewing court’s role risks being changed from examining what the agency considered to conducting de novo review. *See Fla. Power & Light*, 470 U.S. at 743; *Asarco, Inc. v. U.S. Env'tl. Prot. Agency*, 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”). And, because judicial review of an administrative

action presupposes deference to agency expertise in evaluating what was before the administrative decision-maker, the reviewing court is deprived of that expertise. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376–77 (1989) (noting that courts will defer to agency’s analysis of “new” factual information).

Defendants lodged the administrative record initially on December 11, 2020 and transmitted electronic copies of the administrative record to the Court and parties. ECF Nos. 25, 26. After discussions with Plaintiffs, Defendants agreed to supplement the administrative record and sought leave to do so on January 15, 2021. ECF No. 15. Defendants also noted that one document, a letter from 2014, was considered by the agency when making the May 20, 2020 decision but the agency was unable to locate the document. *Id.* Defendants notified Plaintiffs that it did not oppose a request by Plaintiffs that the Court consider the document. *Id.* Plaintiffs made such a request to the Court on January 18, 2021. ECF No. 30. The Court granted both requests, ECF No 31, and the administrative record was supplemented by the parties accordingly. ECF Nos. 32-33. Plaintiffs, however, made no objections to the administrative record, as supplemented.

On February 5, 2021, Plaintiffs timely² filed their Opening Brief, along with twenty-one exhibits (Exhibits A-U). ECF No. 34. The Gottlieb Affidavit (Exhibit L, ECF No. 34-14), signed on February 3, 2021, post-dates the administrative record in this case and is beyond the proper scope of judicial review under the APA. In addition to not alleging any deficiencies in the administrative record, as lodged on December 11, 2021 and supplemented January 21, 2021, Plaintiffs have not even attempted to establish that any of the extremely limited exceptions permitting the Court’s consideration extra-record material are justified here. Indeed Plaintiffs

² Plaintiffs were granted an extension of time file their Opening Brief. ECF No. 28. Defendants’ response brief is due by March 8, 2021 per Local Rule 83.7.1(d).

acknowledge that the Gottlieb Affidavit was not before the agency yet make no attempt to invoke any of the limited exceptions. *See* Opening Brief at 51, n. 11.

Instead, Plaintiffs have simply appended the Gottlieb Affidavit to their Opening Brief without seeking a ruling from the Court that such extra-record material is warranted and without attempting to meet the standard for the Court’s consideration of extra-record material. *See Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999) (“[T]he fact that Appellants cite an expert who agrees with their position and alleges a lack of analysis is not dispositive. It merely reflects the crux of their complaint – they disagree with the [agency’s] decision.”). Plaintiffs would like the opinions of this declarant to supplant the expert opinions relied upon by Defendants in issuing the May 20, 2020, decision. It is well-settled, however, that “agencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious,” and that a disagreement about the reliability of a method or the application of that method “is an insufficient basis for admitting extra-record evidence” *Lee*, 354 F.3d at 1242-44 (internal quotation omitted). Indeed, permitting expert testimony to second-guess decisions of the agency would subvert the entire administrative review process.³

Pursuant to Local Rule 6.1(d)(1), responses to this Motion must be filed and served within 14 days from today and replies must be filed and served within 14 days of the service of the response. Therefore unless the Court orders otherwise, this Motion is unlikely to be fully briefed and resolved before the deadline for Defendants’ response brief to Plaintiffs’ Opening Brief on March 8, 2021. Accordingly Defendants respectfully request an expedited briefing schedule and ruling on this Motion. Further, Defendants request that the Court stay the deadline

³ Alternatively, if the Court denies our Motion, Defendants request the opportunity to file its own affidavit(s) to correct factual errors contained in the Gottlieb Affidavit and related portions of Plaintiffs’ brief.

for Defendants' filing and serving of its response to Plaintiffs' Opening Brief until two weeks from the date that the Court resolves this Motion.

While the Plaintiffs could—and should—have moved for inclusion of extra-record material between the time the administrative record was filed and the filing of their Opening Brief, if the Plaintiffs are inclined to make such a motion at this late stage, Defendants request that the Court stay merits briefing while Plaintiffs attempt to get this material admitted under a narrow exception to the general rule. However, Defendants note that the circumstances by which Plaintiffs offer the Gottlieb Affidavit—by simply appending it to their Opening Brief without an order from Court—is not appropriate. Defendants consulted with Plaintiffs and requested that Plaintiffs withdraw the Gottlieb Affidavit and the parts of Plaintiffs' Opening Brief relying thereon. Plaintiffs stated that they would not withdraw the Gottlieb Affidavit and did not provide a position on an expedited schedule or stay pending resolution of this Motion.

Defendants also consulted with Plaintiffs about the Opening Brief exceeding page limitations. Local Rule 7.1(e) requires that the “arguments and authorities section of briefs or memoranda must not exceed 30 pages absent a court order.” Plaintiffs' Opening Brief totals 63 pages, and the arguments sections of their Brief—that is all sections less the Statement of Facts—totals 37-38 pages. Having not sought leave of the Court to file a brief in excess of the pages limits as prescribed by the Rule, Defendants requested that Plaintiffs file an amended brief that complies with the page limits. Plaintiffs stated that they would not file an amended brief.

For these reasons, Defendants respectfully request that the Court strike the Gottlieb Affidavit and the portions of Plaintiffs' Opening Brief that rely upon those materials (i.e., parts

of pages 50-51).⁴ Defendants also request that their Response Brief deadline be stayed until two weeks after the Court issues an order resolving this matter.

Respectfully submitted this 19th day of February, 2021.

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⁴ Defendants refer to the page numbers assigned through the Court's CM/ECF management system.

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2021, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.