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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

CASCADIA WILDLANDS PROJECT,  
LEAGUE OF WILDERNESS DEFENDERS -  
BLUE MOUNTAINS BIODIVERSITY  
PROJECT, OREGON CHAPTER OF THE  
SIERRA CLUB,

Plaintiffs,

vs.

WILLIAM ANTHONY, in his capacity as  
District Ranger of the Sisters Ranger District  
of the Deschutes National Forest; UNITED  
STATES FOREST SERVICE, an  
administrative agency of the United States  
Department of Agriculture,

Defendants.

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Civ. Case No. 07-6147-AA

MOTION TO STRIKE DECLARATIONS  
OF LAURI TURNER AND DENNIS  
DIETRICH

## **INTRODUCTION**

Plaintiffs in this action challenge the United States Forest Service's ("Forest Service") decision to move forward with the Black Crater post-fire logging project. That decision is recorded in a "Decision Memo."

Plaintiffs filed their Motion for Preliminary Injunction and opening brief on June 27, 2007. Defendants sought an extension on their filing deadline and the court granted the extension (dkt. #16), ordering Defendant to file their response brief on or before noon on July 10, 2007. Defendants filed their brief at 12:19 PM on July 10.

On July 11 at about 2 PM, Defendants filed two additional declarations, Declarations of Lauri Turner ("Turner Decl.") and Dennis Dietrich ("Dietrich Decl."). These two declarations were filed 26 hours after Defendants' extended deadline.

Plaintiffs respectfully request that this Court strike the declarations because they were not timely filed. The 26 hour delay by Defendants, after Defendant had already been given an extension on their filing deadline, resulted in the Court and Plaintiffs' not receiving the declarations until 2:00 in the afternoon on the day before oral argument.

This Court should also strike the declarations because they contain extra-record evidence that does not meet any of the exceptions to administrative record review. The Declarations are nothing short of an attempt to offer post-hoc rationalizations for Forest Service's decision. Plaintiffs have requested an expedited disposition, because the contents of their oral argument, set for July 12 at 1:30, depend upon the outcome of this motion.

## **ARGUMENT**

Judicial review of final agency actions "focuses on the administrative record in existence at the time of the decision \* \* \*." Southwest Ctr. for Biological Diversity v. U.S. Forest Service,

100 F.3d 1443, 1450 (9th Cir. 1996) (striking “post-decision information” because it “may not be advanced as a new rationalization either for sustaining or attacking on agency’s decision”). The Ninth Circuit recently expanded upon this holding and excluded post-decision evidence submitted by the agency, stating that such evidence would render the complex decision-making process “meaningless” and would allow the agency to produce “unsupported” decisions “knowing that it could search for evidentiary support if the [decision] was later challenged.” Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1245 (9th Cir. 2001). Defendants cannot use “post hoc rationalizations advanced to remedy inadequacies in the agency’s record.” Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988) (holding that post hoc rationalization is “advanced by an agency seeking to defend past agency action against attack”); City of Brookings Mun. Tel. Co. v. F.C.C., 822 F.2d 1152, 1165 (D.C. Cir. 1987); see also Camp v. Pitts, 411 U.S. 138 (1973) (holding that the agency’s decision must stand or fall on the record before the agency at the time of the decision).

Courts in the Ninth Circuits allow extra-record materials, “(1) if necessary to determine ‘whether the agency has considered all relevant factors and has explained its decision,’ (2) ‘when the agency has relied on documents not in the record,’ or (3) ‘when supplementing the record is necessary to explain technical terms or complex subject matter.’” Southwest Ctr., 100 F.3d at 1450 (quoting Inland Empire Public Lands Council v. Glickman, 88 F.3d 697 (9th Cir. 1996)). These exceptions, however, do not apply to the material in the Turner and Dietrich Declarations. The Turner and Dietrich Declarations must be stricken because they present unsubstantiated opinions and disclose information that was never disclosed to the public or included in the administrative record.

The agency may not simply rely upon the declaration of its experts without providing any supporting data or evidence. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). “Allowing the [agency] to rely on expert opinion without hard data either vitiates a plaintiff’s ability to challenge an agency action or results in the courts second guessing an agency’s scientific conclusions. As both of these results are unacceptable, we conclude that [NEPA] requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.” *Id.* at 1150.

The Dietrich Decl. contains opinion from a Forest Service employee without any supporting evidence or data in support of that opinion. For instance, Mr. Dietrich states in paragraph 8 that “[w]hen harvesting fire-killed trees, it is of the utmost important that it is done as rapidly as possible after they die.” Paragraphs 5-7 list reasons why it is important to log trees immediately after fire. The Oregon District Courts have ruled, however, that the environmental analysis must be in the administrative record. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1271. There is not a single citation to supporting data in the Dietrich Decl.. The Forest Service attempts to rely upon the opinion of its expert without any hard data in support.

The Forest Service has also attempted to stack the record in this case with evidence that was either not in the original administrative record or not even in existence at the time of the original decision. For example, in paragraphs 33 and 34 Ms. Turner explains that the Forest Service “unintentionally left out” a study by “Gaines et al.,” and then proceeds to explain why that study supports the Forest Service’s decision despite the fact that none of this material was included in the administrative record or provided to the public at the time Defendants made their original decision.

Ms. Turner also provides a detailed explanation in paragraph 35 why the Forest Service dismissed certain spotted owl studies that contradicted the agency's own findings. However, this is merely a "post hoc rationalization;" the Forest Service has never before given any such explanation as evidenced by the fact that Ms. Turned provides no citation to the administrative record. The law requires this information to be considered during the planning process.

#### CONCLUSION

Plaintiffs respectfully request that this court strike the Declarations of Lauri Turner and Dennis Dietrich because both declarations: 1) were filed late in violation of this Court's specific order 2) contain information outside of the administrative record and 3) are not supported by data or evidence in the administrative record.

Respectfully submitted this 11th day of July, 2007.

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