UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BADGER HELICOPTERS, INC., *et al.,*

Petitioners,

v.

U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, *et al.*,

Respondents,

and

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,

and

THE COALITION TO PROTECT AMERICA'S NATIONAL PARKS,

Respondent-Intervenors.

CIVIL ACTION NO. 24-1065
24-1066
(consolidated)

PETITIONERS' REPLY TO RESPONDENT-INTERVENORS' RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR A STAY

Petitioners Badger Helicopters Inc., Black Hills Aerial Adventures Inc., and Rushmore Helicopters Inc. (collectively, "Petitioners"), hereby reply to Respondent-Intervenors Public Employees for Environmental Responsibility's ("PEER") and The Coalition to Protect America's National Parks' (collectively, the "Intervenors") Response in Opposition to Petitioners' Motion for Stay (the "Response"). [5397911]

[24-1065].

The Intervenors first argue that the Federal Respondents, the Federal Aviation Administration and the National Park Service (collectively, the "Agencies"), had plenty of time to complete the Mount Rushmore National Memorial and Badlands National Park Air Tour Management Plans (the "ATMPs") and were not rushed because the Agencies initially delayed in carrying out the duties under the National Parks Air Tours Management Act ("NPATMA") and subsequently the Agencies submitted the proposed deadline in *In Re Public Employees for Environmental Responsibility*, 957 F.3d 267 (D.D.C. 2020). *See* Response, [5397911], at 3-5 The Intervenors argued that Petitioners' President's affidavit is obviously biased and should be ignored. *Id.* at 5. However, as the lead Intervenor, PEER, is one of the petitioners in the D.C. Circuit case, the Intervenors here are also obviously biased to argue the absence of a compressed timeline. The three and half years that the Intervenors argued that the Agencies had, were not just for the two ATMPs challenged here, but also for developing an ATMP or voluntary agreement for another twenty-one parks. *Id.* at 275-76.

Further, the Declarations submitted by Intervenors are self-serving and improper declarations, short on facts, riddled with arguments, and should be ignored

pursuant to Federal Rules of Appellate Procedure Rule 27(a)(2)(B)(ii). Rule 27(A)(2)(B)(ii) mandates that any affidavit in support of a motion or a response must contain only factual information, not legal argument. FRAP 27(a)(2)(B)(ii). The Declaration of Paula Dinerstein contains legal argument responding to Petitioner's Stay Motion (*see i.e.* Decl. Dinerstein, ¶¶ 4, 5, 10, and 11) and legal analysis of the effect of courts' decisions (*see i.e.* Decl. ¶¶ 6-9), and thus should be disregarded. Unlike Intervenors' Declarations, Petitioners' Declaration is composed of facts, and not of arguments about the meaning of possible facts, or arguments about the application of law—which is reserved to the Court. *See generally,* Stay Motion, Ex. A, Decl. of Schlaefli.

I. Petitioners Have Demonstrated a Likelihood of Success on Merits.

A. Intervenors' proposed support does not respond to Petitioners' Stay Motion.

The Intervenors cite 49 U.S.C. § 46110(c) and *Consolo v. Fed. Mar. Com.*, 86 S. Ct. 1018, 1026 (1966) to argue that the "substantive evidence" standard should apply in evaluating the likelihood of success on merits. Response, [5397911], at 5-7. In *Consolo*, the Supreme Court first set out that under the Administrative Procedure Act ("APA"), a reviewing court has the authority to set aside agency

action, findings, and conclusions found to be (1) arbitrary, capricious, (2) an abuse of discretion…or (5) unsupported by substantial evidence. *Id.* at 1026. The Court then defined the "substantive evidence" standard referred to under subsection (5). *Id.* However, Petitioners' Stay Motion argues that the ATMPs are arbitrary and capricious, rather than unsupported by substantial evidence. *See* Section I of the Stay Motion.

Further, in accordance with Section 46110(c), Petitioners have cited the Agencies' administrative records as evidence to support their substantive challenges. *See generally* Stay Motion. Judicial review under the APA is limited to the administrative records before the agency when it made its decision, absent limited and extraordinary circumstances. *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 75, 766 (8th Cir. 2004). When arguing the likelihood of success on the merits, Petitioners cite administrative records to support their arguments that the ATMPs are arbitrary and capricious. *See* Section I of the Stay Motion. In evaluating the likelihood of success on merits, the petitioners need not establish an absolute certainty of success. *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 423 (8th Cir. 1996).

B. Petitioners' challenges the ATMPs' outright ban of the air tours over the Parks as the pre-determined and preferred method.

The Intervenors mischaracterize Petitioners' challenge to the Agencies' consideration for the non-selected alternatives. Response, at 7-10. In the Stay Motion, Petitioners challenge the Agencies' failure to explain the outright ban is the preferred action while the noise analysis on the other two alternatives reducing air tours also would not result in substantial impairment to the impact categories, rather than a Finding of No Significant Impacts should be issued for each of the non-selected alternatives. *See* Stay Motion, at 13-14.

C. Intervenors' offer of expert declaration is inappropriate, and thus should be stricken or ignored.

The Intervenors claim that Petitioners did not offer any expert affidavit to support the inadequacy of the Agencies' noise analysis and offer an expert declaration agreeing with the Agencies' use of data and the noise analysis, and thus assert that Petitioners would not succeed on the merit. *See* Response, at 10-11. However, consideration of an expert declaration on the Agencies' methods that is not part of the administrative records in determining the merits of Petitioners' argument is not appropriate, and Intervenors fail to allege any extraordinary exceptions apply here. *See Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 766

(8th Cir. 2004); *Environmental Defense Fund, Inc., v. Costle*, 657 F. 2d 275, 284-85 (D.D.C. 1981).

It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made. *Norton*, 381 F.3d at 766. The focal point for judicial review should be the administrative record already in existence, not some new record completed initially in the reviewing court. *Camp v. Pitts*, 93 S. Ct. 1241, 1244 (1973).

> If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merit of the agency action only for background information, …, or for the limited purpose of ascertaining whether the agency considered all relevant factors or fully explicated its course of conduct or grounds for decision. … Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted…

Asarco, Inc. v. U.S.E.P.A., 616 F.2d 1153, 1160 (9th Cir. 1980) (internal citation omitted). The D.C. Circuit has also declined to create an exception to allow submission of affidavits addressing the merits and appropriateness of the agency action. *Costle*, 657 F. 2d at 286. Therefore, the Declaration of Kurt M. Fristrup must be rejected and excluded from consideration.

Here, the Court has not determined whether the challenged ATMPs are inadequate as to require the review of documents outside of the administrative

records. Furthermore, the purported expert declaration here does not offer any additional background information on any technical terms of the Agencies' noise analysis. *See generally* Fristrup Declaration. Instead, it merely affirming the NPS' management policies (*see* Fristrup Decl. ¶¶ 6, 7, and 9), restating the figures and methodology already explained in the administrative records (*see id* at ¶ 9), conclusively agreeing with the Agencies' choice of data and explanations offered by the Agencies in their administrative denial decisions to Petitioners' request for a stay (*see id* at ¶¶ 5-9), which again is provided subsequent to the issuance of the ATMPs without any evidence that Fristrup has been involved in or even has actual knowledge of the Agencies considerations, decision making or explanations relative to the two ATMPs challenged by Petitioners.

Therefore, the expert declaration should not be considered in determining Petitioners' likelihood of success on the merits because the declaration was prepared after the issuance of the ATMPs and is not part of the administrative records and it fails to satisfy any extraordinary circumstances to allow such consideration. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.D.C. 2008) (affirming the denial of motion to supplement with two letters from scientists because the letters were not part of the administrative records and merely disagreed with the agency's

interpretation of the data on several counts and believed that the current policy did not represent the best available scientific information).

D. NEPA requires the analysis of safety and in this case, aviation safety including indirect future flight safety.

The Intervenors first argue that the risks of future flights outside of the Parks do not constitute "reasonably foreseeable" effects of the ATMPs that required analysis under NEPA, because the aviation risk does not have a sufficient close connection to the ATMPs and the physical environment. Response, at 11-14. This argument entirely ignores the purpose of the agency action – the ATMPs – is to *regulate the air tour flights* over the national parks under the NPATMA and also ignores the role of the Federal Aviation Administration ("FAA") as the leading agency, whose primary purpose is to regulate aviation and promote safety, for the NEPA process under the NPATMA. 49 U.S. Code §§ 40128 (b)(2) and (4). Intervenors argument is baseless because there is no support for their interpretation of NPATMA and because it completely ignores the leading role of the FAA.

First, independent from the NPATMA, 40 C.F.R § 1501.3 determines the appropriate level of NEPA review. 40 C.F.R § 1501.3. This section specifically requires an agency to consider the degree of effects of the agency's action on public health and *safety*. *Id.* at § 1501.3(b)(2)(iii).

Further, the Intervenors rely on *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983) to argue that the aviation risks are speculative and would not result from changes in the environment and the element of risk lengthens the causal chain beyond the reach of NEPA. Response, at 13-14. In *Metro*, the agency action under challenge was permitting renewed operation of a nuclear reactor which would cause a direct effect on environment due to release of radiation and a risk of a nuclear accident. 460 U.S. at 775. The Court found that the agencies considered these effects. *Id.* However, when addressing the assertion relating to the psychological health damages that flow directly from the risk of a nuclear accident, the Court found that the risk of nuclear accident was the middle link connecting the causal chain from the agency action of renewed operation to such psychological health damages, and thus such risk lengthens the causal chain beyond reach of NEPA. *Id.* In contrast to *Metro*, here, Petitioners challenge the Agencies' failure to consider the elevated aviation risks, including the mid-air collisions reported internally by the FAA, when establishing the total ban of the air tours within the Parks, and there is no such "risk" as the middle link. *See* Section I(B) of the Stay Motion.

Therefore, the Agencies should have considered but failed to consider the

elevated aviation risks created by a total ban and the exclusion of flight to the park perimeter during the ATMPs process.

II. Petitioners Did Not Unreasonably Delay Seeking a Stay and Have Suffered Irreparable Harm in the Form of Economic Injury That is Unrecoverable Against the Agency.

Without citing any authorities, the Intervenors argue that Petitioners have not shown irreparable harm because they delayed seeking a Stay and that flights have continued outside of the Parks since May 13, 2024 and Petitioners' claim of total economic loss is not warranted. Response, at 14-16. The Intervenors' arguments are similar to that of the Agencies. Petitioners incorporate herein Section II of their Reply to the Agencies' Opposition to Petitioners' Motion for Stay Pending Review. Here, Petitioners timely filed their petitions for review of the ATMPs pursuant to 49 U.S.C. § 46110 (allowing 60 days after the issuance of ATMPs to file a petition for review). Petitioners sought relief for a stay as soon as it became apparent that after the Agencies' second request for extension to file administrative records, the judicial review and any subsequent remedial actions would not be completed before the final effective date of the ATMPs and before a substantive ruling by the Court.

Therefore, Petitioners did not unreasonably delay seeking a stay and have suffered irreparable harm in the form of economic injury that is unrecoverable

against the Agencies. *See Iowa Utilities Bd. v. F.C.C.*, 109 F. 3d 418, 426 (8th Cir. 1996).

III. Balancing the Harms and Weighing the Public Interest Supports a Stay

The Intervenors argue that the balance of harm and public interest elements should not be merged and considered together because the government is not the sole party here. Response, at 16-17. However, the case relied upon by Intervenors does not support their point. Even if the elements should not be considered together, Petitioners have demonstrated that the public interest in having governmental agencies adhere to federal laws and the irreparable harms to the Petitioners outweigh the claimed and unsubstantiated environmental injuries in this case. *See* Section III of Petitioners' Memorandum in Support of Motion for Stay which sets for the controlling law which contradicts Intervenors' unsupported position.

Even with the Declarations from the Intervenors in support of their Response, the harms to the environment continue to be unsubstantiated and subjective compared to the well-established public interest in having governmental agencies adhere to federals laws and the irreparable harms to the Petitioners. First, both Declarations are from Michael Pflaum and Cheryl Schreier, members of the Intervenor Coalition rather than any general Park visitors, and thus are obviously

biased declarants and should be ignored based on the Intervenors' proposition. *See* Response, at 5. Second, both Declarations contained boilerplate and conclusory statements that do not substantiate any harm suffered by them in terms of overflights that had been in place years prior to May 13, 2024. Both declarants assert only that "[the noise caused by the frequent overflights] formerly disturbed park visitors, local residents, and may have also disturbed wildlife. They may have negatively impacted important Native American cultural sites. It is my opinion that public support in the area exists for the elimination of those impact." Response, Decl. of Cheryl Schreier, ¶ 3 and Decl. of Michael Pfaume, ¶ 3. However, those are unsubstantiated and general conclusory statements from the Intervenors, rather than factual support required under FRAP 27(a)(2)(B)(ii), and cannot overcome the Agencies non-compliance with the APA. No facts of real complaint from the park visitors or residents about the alleged disturbance are shown, and the alleged disturbance only "may" have disturbed wildlife and Native American cultural sites.

Therefore, the balance of the parties' interests against the speculative and unsubstantiated harm supports a stay and Intervenors also support the public interest that requires governmental agencies adhere to federal laws.

For the foregoing reasons, Petitioners respectfully request that the Court grant

Petitioners' Stay Motion.

Respectfully submitted,

/s/ Yucheng Wang

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CERTIFICATION OF COMPLIANCE

I, Yucheng Wang, hereby certify that this reply complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(g). This motion was prepared using 14-point, proportionally spaced Times New Roman Font, and contains 2401 words.

Respectfully submitted,

/s/ Yucheng Wang
Yucheng Wang

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Yucheng Wang
Yucheng Wang