NO. 13-16554

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRESIDIO HISTORICAL ASSOCIATION and SIERRA CLUB,

Plaintiffs-Appellants,

v.

PRESIDIO TRUST,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA (3:12-cv-11522-LB)

OPPOSITION TO APPELLANTS' REQUEST FOR JUDICIAL NOTICE AND MOTION TO STRIKE PORTIONS OF REPLY BRIEF

Defendant-Appellee Presidio Trust, a federal agency, opposes the motion of Plaintiffs-Appellants Presidio Historical Association and Sierra Club for judicial notice of four extra-record documents that they filed simultaneously with their reply brief. The Presidio Trust additionally moves to strike the portion of Plaintiffs' reply brief relying on those documents. As Plaintiffs are well aware, this Court's review of the Presidio Trust's February 2011 decision at issue here is limited to the administrative record, and the documents for which they seek judicial notice – issued in 2013 and

2014 – post-date and are not part of that record. *See* Aplts' Opening Br. 31; Aplts' Request for Judicial Notice at 1 (document dates). Indeed, in the district court, the parties agreed in their Joint Case Management Statement that judicial review of Plaintiffs' claims would be based on the administrative record produced by the Presidio Trust and lodged with the court. See D. Ct. ECF No. 15. As such, it is indisputable that the four extra-record documents may not be noticed or considered in this action by this Court.

It is firmly established that "in cases where Congress has simply provided for review [of agency action], * * * [judicial] consideration is to be confined to the administrative record and * * * no *de novo* proceedings may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (citations omitted). The "focal point for judicial review [of an agency decision] 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) The "arbitrary and capricious" standard of review required by the Administrative Procedure Act (APA) does not allow a court to overturn an agency action because it disagrees with the agency's decision. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978). Rather, "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citations omitted); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (quoting same). In conformance with these

principles, this Court routinely refuses to consider extra-record material in reviewing agency action under the APA. *See, e.g., Nw. Envtl. Advocates v. NMFS*, 460 F.3d 1125, 1144-45 (9th Cir. 2006); *Sw. Ctr. for Biological Diversity v. USFS*, 100 F.3d 1443, 1450-1451 (9th Cir. 1996); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

While there are narrowly circumscribed exceptions to the record-review principles, Plaintiffs have not argued, let alone shown, that the proffered documents fit within any of these exceptions. *See Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450 (a court may consider extra-record materials if: (1) necessary to determine if the agency considered all relevant factors and explained its decision; (2) the agency relied on documents not in the record; (3) the materials are necessary to explain technical or complex subject matter; or (4) plaintiff makes a showing of agency bad faith); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (these "limited" exceptions are "narrowly construed and applied"). In any event, these exceptions are primarily designed to allow the *agency* to provide further explanation for its decision, not for the plaintiff to introduce post hoc evidence for the purpose of attacking the agency decision in hindsight. *See Asarco, Inc*, 616 F.2d at 1159.[1]

[1] Plaintiffs' reliance (Mot. 4) on *Gafoor v. I.N.S.*, 231 F.3d 645, 655 (9th Cir. 2000), is unavailing because that case applies an exception that is unique to review of decisions by the Board of Immigration Appeals and applies only "where (1) the BIA considers the evidence; or (2) the BIA abuses its discretion by failing to consider such evidence upon the motion of the applicant."

The Presidio Trust's decision at issue in this case was finalized on February 23, 2011; thus the administrative record, as certified by the agency in this case, consists solely of documents dated on or before that date. The documents for which Plaintiffs seek judicial notice are dated well after that time: between July and November 2014. They pertain to events that similarly occurred well after the agency decision on review in this case. As such, they do not assist in understanding or assessing the merits of the Presidio Trust's 2011 decision.

Plaintiffs' cause is not helped by their attempt to rely on evidentiary rules of judicial notice. As this Court recognizes, judicial notice does not allow a party to circumvent administrative record review principles. *See Great Basin Mine Watch v.* Hankins, 456 F.3d 955, 975-976 (9th Cir. 2006) (affirming denial of judicial notice where no record review exception applied); *Rybachek v. U.S. EPA,* 904 F.2d 1276, 1296 n. 25 (9th Cir. 1990) (denying judicial notice on the ground that it is " not 'appropriate * * * for either party to use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision"') (quoting *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980)). We note, however, that three of the four documents for which Plaintiffs seek judicial notice are newspaper articles, on which Plaintiffs inappropriately rely for the content therein. *See* Reply Br. 28. Newspapers, however, may be judicially noticed only to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th

Cir. 2010) (internal quotations omitted). Therefore, even if Plaintiffs could somehow overcome the administrative record review principles that bar consideration of these extra-record documents, the newspaper articles also fail to satisfy the judicial notice requirements.

Finally, Plaintiffs' motion should be denied because they submit the documents to support argument made for the first time in their reply brief, and arguments made for the first time in a reply brief are waived. *Zadrozny v. Bank of New York Mellon*, 720 F.3d 1163, 1173 (9th Cir. 2013). One of the principles underlying this rule is fairness, "because the [opposing] "party would have no chance to respond to contentions raised initially in a reply." *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1015 n.6 (9th Cir. 1994). That is the situation here, where Plaintiffs' timing leaves the Presidio Trust no opportunity to respond to the new documents or the argument set forth in the reply brief. Thus, while it is patently clear that Plaintiffs' motion must be denied and the relevant portion of their brief struck, the Trust respectfully requests that, if this Court grants Plaintiffs' motion, the Court afford the Presidio Trust the opportunity to file a response to Plaintiffs' new arguments and to submit its own extra-record documents in support of that response. *Id.*

For the reasons set forth above, the Court should deny the motion for judicial notice and strike the portion of Appellants' reply brief that rely on the documents for which notice is sought. In the alternative, the Court should allow the Presidio Trust to file a response to Appellants' argument in its reply brief based on those documents

and allow the Trust to submit extra-record documents as necessary to support that response.

Respectfully submitted

s/Katherine J. Barton

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Katherine J. Barton