IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01342-RPM
ROCKY MOUNTAIN WILD; SAN LUIS VALLEY ECOSYSTEM COUNCIL; SAN JUAN CITIZENS ALLIANCE; WILDERNESS WORKSHOP,
Plaintiffs,
v.
DAN DALLAS, in his official capacity as Forest Supervisor; MARIBETH GUSTAFSON, in her official capacity as Deputy Regional Forester; UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency within the Department of the Interior,
Defendants,
v.
LEAVELL-McCOMBS JOINT VENTURE,
Intervenor.

INTERVENOR'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCLOSURE NECESSARY TO COMPLETE AND SUPPLEMENT DEFENDANTS' ADMINISTRATIVE RECORD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Intervenor Leavell-McCombs Joint Venture ("LMJV") files this Response ("Response") to Plaintiffs' Motion to Compel Disclosure Necessary to Complete and Supplement Defendants' Administrative Record ("Motion").

I.
INTRODUCTION

Judicial review of an agency's action is generally confined to the administrative record as designated by the agency. Because the agency is the principal decision maker in an administrative action, its designation of the record enjoys a strong presumption of regularity. Courts depart from this well-settled rule and allow plaintiffs to add to the record or obtain extra-record discovery only in very limited circumstances and upon very specific showings based on clear evidence. Plaintiffs' Motion asks the Court to order wholesale discovery of broad categories of extra-record materials, but the evidence presented falls short of the high burden required for extra-record discovery. The Court should therefore deny Plaintiffs' Motion.

II.
JUDICIAL REVIEW OF THE SUFFICIENCY OF THE ADMINISTRATIVE RECORD

A district court reviews a final agency action based on the "the full administrative record that was before all decision makers . . . at the time of the decision." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *see* 5 U.S.C § 706. The record that was before all decision makers "consists of all documents and materials directly or indirectly considered by the agency" in the decision making process.[1] *Bar MK Ranches*, 994 F.2d at 739.

The agency designates the documents and materials that constitute the administrative

[1] The suggestion in Plaintiffs' Motion that the "whole record" consists of the entire universe of documents associated with the challenged decision, whether considered by the agency decision makers or not, is inconsistent with the settled definition of the "whole record." *See Bar MK Ranches*, 994 F.2d at 739.

record.[2] *Id.*; *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The 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 reviewing court."). The agency's designation is entitled to a "presumption of administrative regularity," which means "[t]he court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary."[3] *Bar MK Ranches*, 994 F.2d at 740. The rationale for this presumption "is grounded in the need to afford adequate deference to agency expertise." *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1255 (D. Colo. 2010) (citing *Bar MK Ranches*, 994 F.2d at 739). Or, as the D.C. Circuit has explained, "judicial reliance on an agency's stated rationale and findings is central to a harmonious relationship between agency and court, one which recognizes that the agency and not the court is the principal decision-maker." *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325 (D.C. Cir. 1986) (en banc).

In light of the administrative presumption and deference owed to the agency, courts typically do not permit parties in APA suits to add materials to the record or take discovery—the

[2] Plaintiffs assert a right to evaluate which materials from the universe of documents should be included in the Record. Plts' Motion at 5 ("Before informed determinations can be made on Administrative Record completion and supplementation, all parties must have access to the 'whole record.'"). But, an administrative record is not designated by mutual agreement. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "If it were . . . , non-agency parties would be free to define the administrative record based on the materials they believe the agency must (or should) have considered, leaving to the court the unenviable task of sorting through a tangle of competing 'records' in an attempt to divine which materials were considered." *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003), *vacated sub nom. Fund for Animals, Inc. v. Hogan*, 428 F.3d 1059 (D.C. Cir. 2005). The case Plaintiffs rely on, *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788 (D.C. Cir. 1984), is a merits decision, and in any event it supports the settled definition of "whole record." In that case, the record had not been designated when the district court made its decision, so the appellate court remanded, ordering the lower court to base its decision on the record *the agency* eventually compiled. *Id.* at 792–93.

[3] Plaintiffs argue that the presumption of regularity does not apply to the Forest Service's designation because the record does not include the categories of documents their Motion addresses. Plts' Motion at 4–5. The law is the other way around: the record as designated is afforded the presumption, and the burden to rebut it rests with Plaintiffs. *Bar MK Ranches*, 994 F.2d at 740.

relief sought in Plaintiffs' Motion. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should . . . not [be] some new record made initially in the reviewing court."). Courts have expanded the scope of their review in exceptional cases, but in each case the plaintiff overcame its "sizeable burden . . . [in] convinc[ing] the court to forego the customary deference owed an agency's determination of what constitutes the record." *Wildearth Guardians*, 713 F. Supp. 2d at 1254.

A. The Standards For Adding To The Administrative Record Are High

Two mechanisms exist for adding documents and materials to the administrative record: completing the record and supplementing the record. *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1274 (D. Colo. 2010). The record may be *completed* upon a sufficient showing that "materials which were actually considered by the agency . . . [were] omitted from the administrative record." *Id.* at 1274. The record may be *supplemented* in limited circumstances upon a sufficient showing that "materials which were not considered by the agency . . . are necessary for the court to conduct a substantial inquiry." *Id.* As discussed below, Plaintiffs' Motion does not appear to ask the Court to complete or supplement the designated administrative record ("Administrative Record" or "Record") at this time. Instead, the Motion seeks discovery of documents outside the Record. The standard for obtaining extra-record discovery in a review of agency action is even more stringent than the standard for completing or supplementing the record.

1. Completing the Record

A plaintiff seeking to rebut the strong presumption of a complete record must show by clear evidence that the record fails to include specific documents or materials considered by the

agency in reaching its decision. *Bar MK Ranches*, 994 F.2d at 740. A plaintiff cannot "simply meet its burden by asserting, speculatively, that documents were relevant or before the agency at the time it made its decision." *Wildearth Guardians*, 713 F. Supp. at 1254 (citing *Pac. Shores Subdiv. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6–7 (D.D.C. 2006)). Nor can a plaintiff rebut the presumption of regularity by "merely proffering broad categories of documents . . . that are 'likely' to exist as a result of other documents that are included in the administrative record." *Comm. of 100 on the Fed. City v. Foxx*, 1:14-CV-01903 (CRC), 2015 WL 6406397, at *3 (D.D.C. Oct. 22, 2015) (internal quotations omitted) (quoting *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 17 (D.D.C. 2013)). Rather, the clear evidence burden requires parties to identify the materials allegedly omitted from the record with sufficient specificity and state facts that show "(1) when the documents were presented to the agency; (2) to whom; and (3) under what context." *Wildearth Guardians*, 713 F. Supp. at 1254.

Such clearly alleged facts are not, however, sufficient grounds in themselves for adding the proffered documents into the record. *Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1275. A party must also establish that the specific documents presented were directly or indirectly considered by the relevant agency decision makers. *Bar MK Ranches*, 994 F.2d at 739. "Determining whether and what documents and materials were directly considered . . . is ordinarily a straightforward proposition." *Wildearth Guardians*, 713 F. Supp. 2d at 1255 (citing *Bar MK Ranches*, 994 F.2d at 739–40). Directly considered documents must be included in the record "because they clearly underlie any rational basis for the decision." *Id.*

Because agency decision makers often base their decisions on the work and recommendations of support staff or other experts, the complete record also can include

documents and materials indirectly considered in the decision making process. *Id.* The District of Colorado has made clear, however, that "[t]he chain of indirect consideration cannot . . . reach *all* documents within the agency." *Id.* (emphasis in original). Although "a court may be tempted to allow inclusion in the record of any relevant document contained in the agency's file cabinet, reasoning that some agency staff considered these documents at some point[,] [s]uch a broad interpretation of 'indirectly considered[]' . . . fails to give appropriate deference to the agency's designation of the record." *Id.* In attempting to strike the appropriate balance, the District of Colorado has counseled that the "proper touchstone remains the decision makers' actual consideration, and a party moving to complete the record must show with clear evidence the context in which the materials were considered by decision makers in the relevant decision making process." *Id.* at 1256. For materials that the decision maker did not directly read or consider, the party must show that the materials were "so heavily relied on" in the subordinate's work or recommendations "that the decision maker constructively considered it." *Id.*

2. Supplementing the Record with "Extra-Record" Materials

Given the presumption of regularity, courts are generally reluctant to allow parties to supplement the record with evidence not considered by the agency in reaching its decision. *Ctr. For Native Ecosys.*, 711 F. Supp. 2d at 1278; *see also Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) ("[A]ny exception to this general rule against the use of extra-record materials must be extremely limited."). After all, "[w]ere the courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President." *Wildearth Guardians*, 713 F. Supp. 2d at 1255 n.10 (quoting *Deukmejian*, 751 F.2d

at 1325).

Nonetheless, "there are certain limited, and highly exceptional, circumstances when a court may review evidence beyond the administrative record." *The Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 115 (D.D.C. 2009). Plaintiffs' Motion makes numerous general references to the existence of these limited "extra-record exceptions," but it fails to specify any particular exception in requesting that the Administrative Record be supplemented.[4] *See, e.g.*, Plts' Motion at 6 ("Plaintiffs submit that all three categories of undisclosed documents . . . qualify under each of the extra-record exceptions."). Because Plaintiffs' Motion does not state which exceptions permit this Court to expand its review beyond the Record the U.S. Forest Service ("Forest Service" or "Agency") designated, the discussion in this Response concerning supplementing the record is correspondingly limited.

B. <u>The Standard For Conducting Extra-Record Discovery Is Even Higher</u>

Because the agency designates the record in cases reviewing administrative actions, discovery is generally not available. *See Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001). A party wishing to conduct discovery must first present clear evidence sufficient to overcome the strong presumption that the agency properly designated the record. *Bar MK Ranches*, 994 F.2d at 740. A party seeking discovery also must make a "significant showing—variously described as a strong, substantial, or prima facie showing—that

[4] Plaintiffs' Motion states that extra-record evidence is often considered in National Environmental Policy Act ("NEPA") cases. Plts' Motion at 5. The Tenth Circuit has recognized that extra-record materials are sometimes appropriate to explain technical information in the record, an exception that applies more frequently in the NEPA context because courts are often faced with an agency's technical or scientific analysis. *See Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004). But this exception is not relevant to the materials addressed in Plaintiffs' Motion. Plaintiffs do not seek to supplement the record with materials that will aid the Court in understanding technical information or that will fill alleged gaps in the NEPA analysis. Instead, Plaintiffs' Motion seeks discovery of documents meant to establish some perceived undue influence of LMJV over the Forest Service and the NEPA contractor.

it will find material in the agency's possession indicative of bad faith or an incomplete record." *Amfac Resorts*, 143 F. Supp. 2d at 12 (collecting cases); *see also La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 1:08-CV-487, 2015 WL 6605023, at *10 (S.D. Tex. Sept. 30, 2015) ("[A] party seeking extra-record discovery needs to make a probabilistic showing that discovery is sufficiently likely to unearth evidence relevant to deciding whether the record should be supplemented or added to.").

Discovery requests based on allegations of bad faith or undue influence are not granted absent "a strong showing of bad faith or improper behavior." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 719 (10th Cir. 2010). In practice, that showing is extremely difficult to make. *See, e.g.*, *Comm. of 100*, 2015 WL 6406397, at *6–*8 (declining to compel discovery of five broad categories of documents even though the proffered documents "raised a question as to the agency's good faith"); *Nat'l Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1457–58 (D. Mont. 1985), *aff'd*, 871 F.2d 849 (9th Cir. 1989) (concluding discovery was not permitted based on implicit allegations of improper influence); *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 663 (D.D.C. 1978) (denying request for extensive discovery despite submitted communications between agency and congressmen).

Even when the requisite strong showing is made, a party cannot then invoke all of the discovery benefits of the rules of civil procedure. *Envtl. Def. Fund*, 458 F. Supp. at 663; *cf. One Thousand Friends of Iowa v. Mineta*, 250 F. Supp. 2d 1075, 1079 (S.D. Iowa 2002) (declining to "allow plaintiffs to go on a 'fishing expedition' outside the scope of the administrative record"). That is, courts only permit very narrow relief. *Bar MK Ranches*, 994 F.2d at 740.

III.
ARGUMENT

A. The Evidence Does Not Constitute The Strong Showing Sufficient To Warrant Discovery Of Contractor Materials

In 2011, the Forest Service selected Western Ecological Resource, Inc. ("WER"), a third-party contractor, to prepare the Environmental Impact Statement ("EIS") analyzing the proposed Village at Wolf Creek Land Exchange. Exhibit 1 at W02229.[5] In the process of preparing the EIS, WER obtained the technical assistance of thirteen independent subcontractors. Exhibit 2 at W11192–93. Plaintiffs have suggested that all of the documents and records kept by WER and the 13 subcontractors relating to this matter should be included in the Administrative Record, and they have asked the Court for an order requiring the production of those records. Plts' Motion at 6. The Court should deny Plaintiffs' Motion because the contractor records that were considered by the Forest Service in reaching its decision have already been included in the Administrative Record, and the evidence does not show that discovery of the remaining records will unearth proof of bad faith or improper influence.

1. The Administrative Record Already Includes the Contractor Materials that Were Directly or Indirectly Considered by the Forest Service

In March 2011, the Forest Service and LMJV entered into a Memorandum of Understanding ("MOU") that required certain terms to be included in WER's employment agreement ("Employment Agreement"). Exhibit 3 at W02276–W02278. For example, the Employment Agreement obligated WER and its subcontractors to "document all of their work . . . that support[ed] the EIS." Exhibit 1 at W02230. In addition, WER agreed to "maintain a master index of all documents it receive[d] or generate[d] that [we]re directly or indirectly

[5] The Administrative Record documents cited throughout this Response are attached as Exhibits 1 through 21.

considered in the [Forest Service's] decision making process." [6] *Id.* This subset of contractor records was intended to "form the basis of the Administrative Record compiled and designated by the Forest Service." *Id.* It is LMJV's understanding that the contractor fulfilled its obligation to provide the Forest Service with all materials the Agency considered, and that the Forest Service in turn included those materials in the Administrative Record.[7] *See* Feb. 24 Conferral Letter at 3.[8]

Plaintiffs' Motion includes a partial quotation from the Employment Agreement that suggests *all* contractor records were required to be indexed and included in the record. *See* Plts' Motion at 7. In fact, the requirement extended only to the records "that are directly or indirectly considered in the decision making process or that demonstrate compliance with laws, regulations or policies." Exhibit 1 at W02230. Thus, WER's obligation mirrored the settled definition of the "whole record," under which it is not appropriate to include materials the agency did not consider. *See Bar MK Ranches*, 994 F.2d at 739 (holding that the complete administrative records consists of "nothing more and nothing less" than the documents and materials directly or indirectly considered by the agency in the decision making process).

Given that WER was required to index and provide only the documents that would form the basis of the "whole record," Plaintiffs' focus on the Forest Service's control over and ability

[6] Plaintiffs' Motion accuses the contractor of not creating this index. Plts' Motion at 10 ("Despite this requirement, a master index … was not created"). The index was created and is included in the Administrative Record at W11513. *See* Exhibit 4.

[7] The Employment Agreement contemplated that the index would be an appendix to the EIS. Exhibit 1 at W02230. The index ended up not being included as an appendix, but the contractor complied with all the material terms of the employment agreement, including the requirements to document its work and maintain a master index.

[8] The February 24, 2016 letter from Clay Samford to Plaintiffs' counsel regarding record conferral issues is attached to Plaintiffs' Motion at ECF 22-3.

to request all contractor records is misplaced. Plts' Motion at 10 ("The failure to request the documents . . . confirms the Administrative Record . . . was prepared outside of required procedures."). The Agency purposefully declined to request the contractor records in full because only materials created or received by the contractor that were *actually considered* by the Forest Service in the decision making process were included in the Administrative Record. Feb. 24 Conferral Letter at 3. This Court should not forego the customary deference owed an agency's determination of what constitutes the record just because the Forest Service *could have* requested contractor records that are not appropriate for inclusion in the Administrative Record in the first place. *See Wildearth Guardians*, 713 F. Supp. 2d at 1254.

Plaintiffs' Motion does not appear to ask the Court to complete or supplement the Administrative Record with all remaining contractor records at this time,[9] and in any event the evidence presented falls well short of making the requisite showing for that relief. That is, the Motion is unsupported by clear evidence that specific contractor records were directly considered by the Forest Service or so heavily relied upon in the recommendations to the decision maker that they were constructively considered. *Id.* at 1255. The Motion also fails to present the required clear evidence showing that a recognized exception to the record rule allows supplementation of the record. *See Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1278–79.

2. The Evidence Presented Does Not Warrant Additional Discovery

a. Plaintiffs are not entitled to discovery of the internal contractor records

Plaintiffs ask the Court for a discovery order requiring the production of all internal

[9] Plaintiffs state that their Motion "addresses production of documents" that may be needed to complete or supplement the Administrative Record, which they intend to address is future briefing. Plts' Motion at 6. LMJV reserves the right to present additional argument and evidence in the event Plaintiffs later move to supplement or complete the Record.

documents from WER and its 13 subcontractors. Plts' Motion at 11 ("An order compelling the Forest Service to collect and disclose … all 'documents' from WER and each sub-contractor would remedy Item 3."). The Motion fails to present the clear evidence necessary to overcome the presumption of administrative regularity, and it does not make the predicate strong showing that discovery of all contractor records will unearth evidence demonstrating bad faith or improper influence. *La Union del Pueblo Entero*, 2015 WL 6605023, at *10.

Plaintiffs speculate that the contractor records will reveal that LMJV exercised political pressure on the Forest Service, the contractor, and the subcontractors. Plts' Motion at 10–11. To support these allegations, they cite four Forest Service emails that allegedly prove undue influence was at play during the NEPA process.[10] *Id.* at 11. These emails do not demonstrate improper political pressure by LMJV, however, and they fall well short of the strong showing required for extra-record discovery.

The evidence in Plaintiffs' Motion does not indicate the presence of improper influence, especially given the timeline in this case. On July 16, 2010, LMJV submitted its land exchange proposal. Exhibit 5 at W01547. LMJV and the Forest Service agreed to an initial schedule under which the final Record of Decision would be issued in January 2010, with the entire NEPA process wrapping up by August 2012. Exhibit 21 at W02209–10. Yet, the Forest Service did not release the final Record of Decision until May 2015—nearly three years behind schedule. Exhibit 6 at W12650. Thus, in 2014, when all four emails cited in the Motion were sent, LMJV was understandably frustrated by the pace of the NEPA process. Exhibit 7 at C0021685 (March

[10] The Motion also references documents and findings from the previous NEPA process to support its request for discovery in this proceeding. Plts' Motion at 8–9. Events from the previous NEPA lawsuit are not probative in this case. Courts may forego the deference afforded an agency's record designation based clear evidence, but certainly not based on that agency's actions from a different decision making process.

2014); Exhibit 8 at C0025101 (October 2014); Exhibit 9 at CP002930 (October 2014); Exhibit 10 at CP003015 (October 2014). Actually, the very emails cited in the Motion demonstrate that LMJV was seeking to address the timing of the Forest Service's decision, though this context is left out. *See*, *e.g.*, Exhibit 8 at C0025101 ("[LMJV] is calling around looking for a date when the decision will be released"); Exhibit 9 at CP002930 ("[LMJV] ha[s] questions about 'Why is it taking so long?'"); Exhibit 10 at CP003015 ("… [LMJV] still do[es]n't understand why it takes so long … They said several times that Red was very frustrated").

To be clear, LMJV was not trying to influence the substance of the Forest Service's decision. Rather, it was urging the Forest Service to reach its decision as soon as possible. As the project proponent, LMJV had every right to contact representatives of the Forest Service on matters related to project timing. *See* Exhibit 3 at W02292 at ¶ 6 (Communications Protocol); Exhibit 11 at C0025107 ("McCombs is welcome to call anybody he wishes or follow any process he chooses on this matter [of timing] as always and as any citizen or proponent has a right to do."). Such calls had absolutely no bearing on the Forest Service's decision—or, as it turns out, even the timing.[11]

These emails do not provide the requisite strong showing that the requested contractor records will include evidence demonstrating bad faith. Plaintiffs' Motion basically concedes as much. Based on the four emails, the Motion states only that "[i]t is *reasonable* to *infer*" that improper influence "*may* be revealed" in the records of the contractor. Plts' Motion at 11 (emphases added). Inference does amount to a "strong showing" in any circumstance, but

[11] In October 2014, Dan Dallas addressed Red McCombs' frustrations by emailing [LMJV's] representatives to "remind [them] … that sort of response has not been helpful to furthering [Mr. McCombs'] perceived need for faster progress, or the ultimate outcome from the agency's perspective in the past, nor will it likely be should he choose to do it in the future." Exhibit 11 at C0025107.

particularly with respect to allegations of improper influence. *See Citizens to Pres. Overton Park*, 401 U.S. at 420 ("there must be a strong showing of bad faith or improper behavior"). Courts have recognized that "influence in the improper sense of the term is an easy charge to make; the mere making of that accusation though must not serve to allow [discovery]." *Envtl. Def. Fund*, 458 F. Supp. at 663 (D.D.C. 1978).

Accordingly, because even coupled with a reasonable inference, the four emails do not constitute a "strong showing" that evidence of improper influence is lurking in the contractor records the Agency never considered, this Court should reject Plaintiffs' request to engage in extensive discovery.

b. Plaintiffs are not entitled to discovery of the contractor budgets and billing statements, either

In addition to their request for discovery of all internal contractor records, Plaintiffs separately focus on WER's budgets, billing statements, and related communications. Plaintiffs again hope to uncover evidence that LMJV used its position to exert improper influence over the contractor—and the NEPA analysis by extension. Plts' Motion at 11–13. But here, too, the evidence is not sufficient to overcome the administrative presumption or constitute the strong showing that would justify extra-record discovery.

LMJV was solely responsible for paying all WER and subcontractor fees, costs, and expenses. Exhibit 1 at W02230. To that end, pursuant to the Employment Agreement, WER provided LMJV with consolidated monthly invoices for its work, which LMJV reviewed and paid. *Id.* at W02232. This compensation arrangement did not afford "LMJV oversight of WER and the sub-contractor's activities," as Plaintiffs' Motion alleges. Plts' Motion at 11. To the

contrary, the contractors worked "under the supervision of the *Forest Service*, and the *Forest Service* [made] the final determination[s] concerning the scope and content of [their] work." Exhibit 3 at W02282 (emphases added); *see also* Exhibit 3 at W02274 ("a third-party contractor will be chosen, supervised and directed by the Forest Service").

Plaintiffs argue that because LMJV allegedly exerted influence directly on the Forest Service, the "reasonable inference" is that LMJV "similarly used [budgets and billing] to bring political pressure to bear on WER and the sub-contractors." Plts' Motion at 12 (citing Exhibit 12 at C0021638, an internal LMJV email chain analyzing the MOU). Even putting aside the lack of evidence showing LMJV improperly influenced the Forest Service, discussed above, Plaintiffs' conclusion does not logically follow from its premise. That is, even if LMJV exerted influence on the Forest Service decision makers, speculating that LMJV therefore exerted influence on the contractors and subcontractors does not amount to the "strong showing" required for extra-record discovery. *Citizens to Pres. Overton Park*, 401 U.S. at 420; *Bar MK Ranches*, 994 F.2d at 740. Rather, as Plaintiffs' Motion concedes, it is nothing more than an inference.

Plaintiffs' Motion relies on four emails that allegedly "support[] further investigation into questions of LMJV budget and invoice approval constraining and influencing NEPA contractor analysis." Plts' Motion at 13. These emails, even taken together, do not constitute clear evidence that discovery into the budgets and billing statements will unearth evidence of impropriety. *Comm. of 100*, 2015 WL 6406397, at *4. To the contrary, the communications merely prove that the contractors and subcontractors were in touch with the Forest Service regarding the scope and timing of the analysis. *See, e.g.*, Exhibit 13 at C0006139 (analyzing whether development constitutes a cumulative or an indirect effect); Exhibit 14 at C0009299

(discussing work deadline); Exhibit 15 at C0005662 (speculating reasons for work stoppage); Exhibit 16 at C0005739 (order to resume work). These types of conversations were expressly contemplated at the outset of the analysis. Exhibit 3 at W02280 (The Forest Service shall "[m]eet with the Prime Consultant throughout the preparation of the EIS to provide direction and make ultimate decisions regarding … the significant issues that will be addressed in the Analysis . . . and the alternatives to the proposed action").

Plaintiffs' Motion seeks to read significance into these "cryptic emails," *see* Plts' Motion at 13, but the law requires substantially more to depart from the general rule against discovery in administrative reviews. *Citizens for Appropriate Rural Roads v. Foxx*, No 15-1554, 2016 WL 828148, at *9–*10 (7th Cir. Mar. 3,2016). Stated another way, Plaintiffs cannot seek wholesale discovery of all budgets and billing statements in the hope of finding some wrongdoing because "[t]he law is the other way around." *Warren Bank v. Saxon*, 263 F. Supp. 34, 39 (E.D. Mich. 1966) (holding that the plaintiff could not, after merely alleging arbitrary conduct, depose an agency official "to see whether or not he really is arbitrary"), *aff'd,* 396 F.2d 52 (6th Cir. 1968). Accordingly, Plaintiffs' request for discovery of contractor budgets and billing statements should be denied.

3. In Any Event, Plaintiffs' Request For Wholesale Discovery of All Contractor Records Is Inappropriately Broad

Even if extra-record discovery were warranted in this case, the wholesale discovery of all contractor records requested in Plaintiffs' Motion is not appropriate in the context of this review of an agency action. Courts have made clear that when extra-record discovery is justified, only very narrow discovery is allowed. *Bar MK Ranches*, 994 F.2d at 740; *cf. Capital Eng'g & Mfg.*

Co. v. Weinberger, 695 F. Supp. 36, 41 (D.D.C. 1988) (observing that even when plaintiffs are entitled to discovery against an agency, they are not "necessarily entitled to ... depositions and potentially voluminous documentary materials"). For example, in *New York v. Salazar*, although the court concluded the plaintiffs had made a "sufficient showing to warrant limited discovery on the issue of bias and bad faith," the court refused to allow the plaintiffs to take multiple depositions and review all e-mail communications between a lobbyist and the agency decision maker. 701 F. Supp. 2d 224, 240–43 (N.D.N.Y. 2010). Instead of granting the plaintiffs' broad discovery requests—which were not nearly as sweeping as Plaintiffs' in this case—the court permitted the plaintiffs to conduct a single deposition. *Id.* at 241.

Here, in what would undoubtedly involve dozens of new custodians and potentially tens of thousands of documents, Plaintiffs seek disclosure of the following types of materials for the contractor *and all 13 subcontractors*: (1) all records, (2) all emails, (3) all budgets; (4) all billing statements; (5) all statements of work; and, (6) as a catch all, all "other[] type[s] of communication between the consultant team and the proponent." Plts' Motion at 11, 13. In a nutshell, Plaintiffs seek every shred of paper the contractor and subcontractors have on this project. This type of wholesale civil discovery is fundamentally inappropriate in the context of a review of an agency action. If the Court determines that some discovery is warranted, it should allow the parties to present further briefing or argument regarding the appropriate scope of narrow discovery targeted at any specific issues identified by the Court.

B. <u>There Is No Evidence the Confidential Settlement Agreement Itself Was Considered By The Agency, Nor a Showing Sufficient to Justify Its Production</u>

Plaintiffs seek disclosure of the Confidential Settlement Agreement ("the Settlement

Agreement" or "the Agreement") that resolved litigation between LMJV and Wolf Creek Ski Corporation ("the Ski Area") in 2008. *Wolf Creek Ski Corp. v. Leavell-McCombs Joint Venture*, 1:04-cv-01099-DW, ECF Nos. 327–30. The Settlement Agreement addressed a range of issues, many of which bear no relation to the present matter, but some of which affected the property rights to the private land LMJV offered in the land exchange ("Non-Federal Parcel"). Exhibit 17 at C0025197; Declaration of LMJV's Representative, Clint Jones, ¶¶5, 6[12]; Declaration of the President of the Wolf Creek Ski Area, Randall Davey Pitcher, ¶¶7(b), 8.[13]

The Agreement was implicated in 2010 when LMJV submitted its land exchange proposal to the Forest Service. Exhibit 18 at C0026979–84. Specifically, because the Non-Federal Parcel was owned in part by the Ski Area and subject to various easements and reservations, the Forest Service questioned LMJV's ability to convey the Non-Federal Parcel it offered in the land exchange alternative ("Alternative 2"). Exhibit 18. In fact, the Settlement Agreement contemplated a potential land exchange, and included terms pertaining to such exchange—terms LMJV and the Ski Area agreed could be disclosed in pursuit of that alternative. Jones Decl., ¶5; Pitcher Decl., ¶7(b). So, to alleviate the Forest Service's title concerns, LMJV was able to guarantee that LMJV had the authority to convey the Non-Federal parcel as proposed, without waiving the Agreement's confidentiality. Jones Decl., ¶5; Pitcher Decl., ¶7(c). *See* Exhibits 18, 19. The Forest Service was never provided and never read the Settlement Agreement. Feb. 24 Conferral Letter at 4. Rather, LMJV summarized certain terms pertaining to the land exchange, which the Forest Service has already included in the

[12] The Declaration of Clint Jones, hereinafter "Jones Decl." is attached as Exhibit 22.

[13] The Declaration of Randall Davey Pitcher, hereinafter "Pitcher Decl.," is attached as Exhibit 23.

Administrative Record. Jones Decl. ¶5; Exhibits 18, 19.

1. The Record Is Complete Without the Confidential Settlement Agreement

Plaintiffs argue that because the Forest Service considered summaries of certain terms of the Settlement Agreement, the Agreement itself should be added to the Administrative Record in full. *See* Plts' Motion at 14, 16. But the Forest Service never received and did not consider the Settlement in its entirety, and the Motion presents no evidence that it did.

The Forest Service did consider LMJV's summaries and explanations of the terms from the Settlement that governed property rights to the Non-Federal Parcel.[14] Exhibits 18, 19. Those documents, however, have already been included in the Administrative Record. *See* Jan. 25 Conferral Letter at 4–5[15]; Feb. 24 Conferral Letter at 4; Plts' Motion at 13–16 (citing Record documents). The Settlement Agreement itself is not properly part of the Administrative Record because the Forest Service never had possession of it and did not rely on the document itself in its decision making process. *See* Feb. 24 Conferral Letter at 4 ("the remainder of the settlement was not considered by the Agency in making the Wolf Creek land exchange decision"); Jones Decl., ¶3; Pitcher Decl., ¶¶9, 10.

To justify receiving a copy of the Agreement, Plaintiffs would have to meet the high burdens for supplementing the record or taking extra-record discovery, which they have not done. Accordingly, the Court should give the Forest Service's Record designation the

[14] In addition to the terms and conditions summarized in the various Record documents, the Forest Service received a copy of Exhibit C to the Settlement Agreement. Jones Decl., ¶ 4; Feb 24 Conferral Letter at 4 ("only Exhibit C of the settlement agreement … was ever provided to the Forest Service"). Exhibit C is an easement map of the private inholding; it marked the various encumbrances on the Non-Federal Exchange Parcel. *See* Exhibit 20. The Forest Service agreed to include Exhibit C in a supplemental record filing. Feb. 24 Conferral Letter at 4.

[15] The January 25, 2016 letter from Clay Samford to Plaintiffs' counsel regarding record conferral issues is attached to Plaintiffs' Motion at ECF 22-1.

appropriate deference and decline to order production of the Settlement Agreement or to add it to the Administrative Record.

2. The Settlement Agreement is Confidential

Plaintiffs suggest that the Forest Service and LMJV have opposed disclosure of the Settlement Agreement and its inclusion in the Administrative Record based on some evidentiary privilege for confidential documents. For its part, LMJV opposes inclusion of the Settlement Agreement in the Administrative Record for a more fundamental reason: the Forest Service did not consider—or even possess—the Settlement Agreement itself in reaching its decision, either directly or indirectly through its subordinates.[16]

Moreover, the Settlement Agreement is a confidential document that includes a great deal of information wholly unrelated to the proposed land exchange. Jones Decl., ¶¶3, 6; Pitcher Decl., ¶¶7, 8. That is, many of its provisions reflect the negotiated resolution of disputes between LMJV and the Ski Area that bear no relation to the Forest Service's decision in this case. Jones Decl., ¶6; Pitcher Decl., ¶¶7, 8. Neither LMJV nor the Ski Area disclosed or described these unrelated provisions to the Forest Service. Jones Decl., ¶6; Pitcher Decl., ¶¶8, 9. Moreover, LMJV's description of certain terms from the Settlement Agreement to the Forest Service did not waive the confidentiality of the Agreement itself—certainly not as to the unrelated terms. Jones Decl., ¶5 (Agreement contemplated disclosure of land exchange terms); Pitcher Decl., ¶7(c) (disclosure of land exchange terms was "not intended to waive the strict confidentiality of the global Settlement Agreement"). A party "does not waive . . .

[16] The Ski Area opposes production of the Agreement too, maintaining disclosure would harm it in a competitive industry and in its business dealings. Pitcher Decl., ¶¶ 8, 10.

confidentiality as to settlement documents 'absent indication that the documents had already been disclosed . . . in a manner that is inconsistent with [the party's] claims that the communications'" are confidential. *Sample v. City of Sheridan*, 10-CV-01452-WJM-KLM, 2012 WL 1156050, at *2 (D. Colo. Apr. 6, 2012) (quoting *Lamar Advertising of S.D., Inc. v. Kay*, 267 F.R.D. 568, 583 (D.S.D. 2010)). Accordingly, even if the Court determines that the Settlement Agreement should be produced, the production should be limited to a version redacting all terms not described to the Forest Service and should be governed by a suitable protective order.

IV.
CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion to Compel Disclosure Necessary to Complete and Supplement Defendants' Administrative Record.

April 11, 2015

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

/s/ Paul Trahan

William Leone (Colorado Bar No. 11403)
Tabor Center
1200 17th Street, Suite 1000
Denver, Colorado 80202
Tel: 303.801.2700
Fax: 303.801.2777
william.leone@nortonrosefulbright.com

Paul Trahan (Texas Bar No. 24003075)
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701
Tel: 512.474.5201
Fax: 512.536.4598
paul.trahan@nortonrosefulbright.com

Paul S. Weiland
NOSSAMAN LLP
18101 Von Karman Avenue
Suite 1800
Irving, CA 92612
Tel: 949.833.7800
Fax: 949.833.7878
pweiland@nossaman.com

Steven P. Quarles
NOSSAMAN LLP
1666 K Street, NW
Suite 500
Washington, DC 20006
Tele: 202.887.1400
Fax: 202.466.3215
squarles@nossaman.com
COUNSEL FOR DEFENDANT-INTERVENOR
LEAVELL McCOMBS JOINT VENTURE

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

MATTHEW SANDLER
Rocky Mountain Wild
1536 Wynkoop St., Suite 900
Denver, CO 80202
Tel: 303-579-5162
Matt@rockymountainwild.org

TRAVIS E. STILLS
Energy & Conservation Law
1911 Main Ave., Suite 238
Durango, CO 81301
Tel: 375-9231
stills@frontier.net
Attorneys for Plaintiffs

JOHN C. CRUDEN, Assistant Attorney General
BARCLAY SAMFORD
United States Department of Justice
Environment & Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Tel: 303-844-1475
Fax: 303-844-1350
Email: clay.samford@usdoj.gov
Attorneys for Defendants

/s/ Paul Trahan
Paul Trahan