IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01342-WYD

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.

PLAINTIFFS' MOTION TO COMPEL DISCLOSURE NECESSARY TO COMPLETE AND SUPPLMENT DEFENDANTS' ADMINISTRATIVE RECORD

Plaintiffs, through counsel, move for resolution of three ripe Administrative Record issues in this Administrative Procedure Act case. 5 U.S.C. § 706.

I. Introduction

The current record consists of Administrative Records filed by both agency Defendants and "Additional Record Materials" filed by the Forest Service. ECF No. 19 (declarations on ECF, records on DVD, 11/13/2015). In related Freedom of Information Act ("FOIA") cases, the Forest Service continues its search for agency records pursuant to Summary Judgement Orders.[1]

[1]Rocky Mountain Wild reserves the right to pursue all issues in FOIA litigation, based on comprehensive review of the Forest Service searches and production scheduled for March 31, 2016. *Rocky Mountain Wild v. Forest Service ("RMW II")*, 15-cv-00127-WJM, ECF No. 56 (Summary Judgement Order at 27); *Rocky Mountain Wild v. Forest Service ("RMW I")*, 14-cv-02496-WYD-KMT, ECF No. 31. The *RMWII* disclosure is relevant to overlapping issues regarding scope of FOIA/APA searches. *See e.g. RMW I* at ECF No. 39 at 2 (FOIA search excluded Washington D.C. Offices of the Forest Service Chief and Undersecretary).

Defendants' ongoing FOIA searches confirm that no counsel for any party has received the "whole record" that may comprise the Administrative Record. To complicate matters, the parties are unable to readily compare the FOIA releases with the records filed in the present matter. Exh. 2, Item 11. Since the Administrative Record was filed, the Forest Service has discovered approximately 80,000 additional pages of agency records as a result of court-ordered FOIA searches and conferral in the present case. *RMW I*, ECF No. 39 at 3. Of these, 23,723 pages were ultimately disclosed. *Id*. at 9. Ongoing FOIA searches and production in *RMW II* will not be complete until March 31, 2016, with a status report due April 25, 2016. *RMW II,* ECF No. 56 at 27. During April 2016, the parties will assess the remaining issues and determine whether briefing or stipulation is required for completion and/or supplementation.

As stated below, the parties have agreed that Plaintiffs may file a follow-up motion on or before the April 26, 2016 Reply deadline for the present briefing. Plaintiffs submit that the sequenced consideration of outstanding issues is consistent with Local AP Docket practice where issues involving completion and supplementation records are presented "[o]nce the proper composition of the record is ascertained." *Wilderness Workshop v. Allen Crockett*, 2012 U.S. Dist. LEXIS 70161, at *6-7 (D. Colo. May 21, 2012). Plaintiffs and the Forest Service anticipate supplementing the record with some or all FOIA responses. Exh. 1-3 at Item 11. Until the FOIA search and disclosure is complete, Plaintiffs are unable to review the "whole record" to inform its APA supplementation or completion requests. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984)(remanding where party only had access to partial record.).

In order to move this litigation expeditiously toward resolution, this motion seeks resolution of three ripe issues identified in the conferral letters involving categories of records Plaintiffs assert should be included in the Administrative Record, or filed as a supplement. Exh.

1-3 (Items 3,6,7). During conferral, the Forest Service confirmed that responsive records exist for these three items. *Id*. The Forest Service has stated it will not collect nor disclose such records. *Id*. Ripe issues involve: third-party NEPA contractor records (Item 3); a settlement agreement the Forest Service based the agency action upon (Item 6); and, billing statements, budgets, and communications exchanged between LMJV and the contractors (Item 7). *Id*.

II. Compliance with Local Rule D.C.COLO.LCivR 7.1

The Parties conferred by phone, email, and letter (Exh. 1-3), and have narrowed their Administrative Record disputes from 13 issues to three contested issues presented here and five issues involving the ongoing FOIA searches. *RMW I,* ECF No. 56, *RMW II*, ECF No. 37.

In order to address the enumerated items identified in the exchange of letters addressing the Administrative Record, the Parties agreed Plaintiffs would file this motion addressing Items 3, 6, 7 on March 11, 2016. The parties agree that items 1, 4, 5, 8, 10, and 13 have been resolved.

Additional materials which are to be provided to Plaintiffs on March 31, 2016, under the Freedom of Information Act ("FOIA") pursuant to the Court's Order in *Rocky Mountain Wild v. Forest Service*, 15-cv-00127-WJM (ECF No. 56) may relate to items 2, 9, 11 and 12 in the parties' correspondence on record issues. The parties therefore agree that Plaintiffs may file, by April 26, a motion limited to addressing items 2, 9, 11, and 12. Should Plaintiffs file such a motion, the parties will confer and submit to the Court a schedule for resolution of the motion.

III. Standard of Review

The D.C. Circuit has succinctly described the "administrative record" for APA judicial review of final agency action as containing "neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) *accord Camp v. Pitts*, 411 U.S. 138, 142 (cannot omit records), *Citizens to*

Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)(agency may not include evidence not considered); *discussed in Water Supply & Storage Co. v. United States Dep't of Agric.,* 910 F. Supp. 2d 1261, 1266 (D. Colo. 2012); *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1278 (D. Colo. 2010); *Colo. Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1239 (D. Colo. 2010). The Tenth Circuit has applied this standard to Forest Service decisionmaking.

> The "whole record" in this case consists of all documents and materials considered by the Forest Supervisor (the Deciding Officer) in making his initial decision, as well as all documents and materials contained in the agency appeal record as developed throughout the agency review process by the Regional Forester and the Chief (the Reviewing Officers). Therefore, as long as Defendants submitted all documents and information considered and developed at all three stages of the Forest Service's decision and review process, nothing more and nothing less, the Administrative Record submitted to the district court was correct.

Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993)(emphasis supplied). Information or evidence not before the agency decisionmakers at the time of decision is properly considered by the District Court based on exceptions allowing extra-record supplementation. *Id*.

The Administrative Record receives a "presumption of regularity" only where the agency designation is "consistent with established procedures." *Wilderness Workshop,* 2012 U.S. Dist. LEXIS 70161, at *6 (D. Colo. May 21, 2012) *citing Bar MK Ranches,* 994 F.2d at 740. This presumption is created where an agency produces "the administrative record in existence at the time of the [agency] decision and…[not some new] record that is made initially in the reviewing court." *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004)(*quoting Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)) *accord Franklin Savings v. Ass'n v. Director, Office of Thrift Supervision,* 934 F.2d 1127, 1137 (10th Cir. 1991). Here, the "presumption of regularity" should not apply where the "Administrative Record" (ECF. No 19) before the agency at time of decision did not contain the "Additional

Record Materials" (ECF No. 19) or the additional agency records produced in response to ongoing FOIA searches in *RMW II*, the settlement agreement, and contractor records.

Even when the "presumption of regularity" applies, the presumption can be overcome by the party seeking to supplement the Administrative Record with additional materials.

> Defendants may not omit evidence and documents considered in the decisionmaking process. […] Once the proper composition of the record is ascertained, [the Court] must then consider exceptions allowing supplementation of the record with materials not actually considered by the agency, but which are necessary for the court to conduct a substantial inquiry.

Wilderness Workshop, 2012 U.S. Dist. LEXIS 70161, at *6-7 (D. Colo. May 21, 2012)(citations omitted). The presumption of regularity is rebutted by clear evidence to the contrary. *Id*, *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007)(*quoting Bar MK Ranches*, 994 F.2d at 740). The informed decisionmaking and procedural nature of NEPA often involves extra-record evidence.

> [I]n NEPA cases . . . a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.

Colorado Wild v. Vilsack, 713 F. Supp. 2d at 1241, *citing Suffolk v. Sec. of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1973)(internal quotations omitted). "Thus, the 10th Circuit has recognized the relevance of extra-record evidence in NEPA cases where there are gaps or inadequacies in the NEPA process." *Id*. at 1241 *citing Citizens for Alternative to Radioactive Dumping*, 485 F.3d 1091at 1096, *quoting Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004).*

Before informed determinations can be made on Administrative Record completion and supplementation, all parties must have access to the "whole record."

> For review to go forward on a partial record, we would have to be convinced that the selection of particular portions of the record was the result of mutual agreement between the parties after both sides had fully reviewed the complete record.

Walter O. Boswell Mem'l Hosp, 749 F.2d at 793 (D.C. Cir. 1984)(remanding to District Court for consideration based on the "whole record").

IV. Argument

The present motion addresses production of documents likely needed to "complete" the Administrative Record or that may be relied upon as "supplements" pursuant to an extra-record exception. *See e.g*. *Water Supply & Storage Co*, 910 F. Supp. 2d at 1266 (D. Colo. 2012) (describing exceptions). The distinction between competing the record and extra-record exceptions will be addressed in briefing filed on or before April 26, 2016, after review of the "whole record." *Id*. at 1265 ("Of course, one cannot review the "whole record" without knowing what comprises "the whole record."). For purposes of the present motion, Plaintiffs submit that all three categories of undisclosed documents should be included in the "Administrative Record" but also qualify under each of the extra-record exceptions. *Id*. In particular, Items 3, 6, and 7 involve documents "where the agency ignored relevant factors it should have considered or considered factors left out of the formal record." *Id*. at 1267 *quoting Lee v. U.S. Air Force,* 354 F.3d at 1242, *citing American Mining Cong. v. Thomas,* 772 F.2d 617, 626 (10th Cir. 1985).

Plaintiffs do not oppose the Forest Service supplementation of the Administrative Record with the "Additional Record Materials" obtained from a limited search of an email database for thirty-nine custodians. ECF No. 19-3 (Hagen Declaration) at FN1 (listing persons searched). However, Plaintiffs submit that "Additional Record Materials" assembled during APA litigation should be considered "extra-record evidence" in the absence of declarations by agency decisionmakers Dan Dallas and Maribeth Gustafson explaining the documents' role in their decisionmaking processes. *Bar MK Ranches*, 994 F.2d at 739 (10th Cir. 1993).

In short, the Administrative Record citations herein confirm that Items 3, 6, and 7 were likely considered as part of the Forest Service decisionmaking process and are within the "whole record" requirement. *Id*. To the extent the Forest Service may provide declarations asserting the records in Items 3, 6, and 7 were not considered, Plaintiffs anticipate the documents fall within the exceptions applicable to extra-record evidence. *Lee v. U.S. Air Force,* 354 F.3d at 1242.

A. Forest Service is Still Searching for FOIA Documents.

The parties remain uncertain as to the full scope of records relevant to the challenged decision, so there cannot be "mutual agreement" as to what should be included in the record. *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 793. Plaintiffs reserve arguments involving as-yet undisclosed records until FOIA searches are complete.

B. Forest Service has not Requested or Produced NEPA Contractor Records

Items 3 and 7 involve the Forest Service utilization of "a third-party contractor…to prepare a National Environmental Policy Act…analysis…of the proposal submitted to the Forest Service by the Proponent to…analyze the Village at Wolf Creek Land Exchange proposal. W02274[2] (Memorandum of Understanding ("MOU"). Fourteen sub-contractors were listed in the EIS as preparers. W11192. The MOU established that all contractors' "work product will be considered Forest Service work product." W02276. The MOU-required (W02276) employment contract specifies that contractor and subcontractor "documents and index will form the basis of the Administrative Record compiled and designated by the Forest Service." W02230 ("Employment Contract" – Exh.5), W02277 (MOU). The MOU and Employment Contract define the term 'document' to "includes data of any sort, including but not limited to electronic

[2]Provided as Exhibit 4. Other Administrative Record documents cited in this motion are provided as Exh. 5 - 8, which correspond to Bates prefixes C (Exh. 6), CP (Exh. 7), or W (Exh. 8).

media; planning data; maps; files; reports; e-mails; computer, audio or video tapes and disks; and other records." *Id*. Yet, the Forest Service has not requested contractor documents or work product for inclusion in the Administrative Record. Exhs. 1-3 at Items 3 and 7.

The MOU (W02282) and Employment Contract (W02231) confirm that all contractor records in the present case are federal agency records that must be produced upon request by the Forest Service. Analogous FOIA caselaw confirms that, "records that are contractually owned by the government are agency records regardless of whether they are physically in the government's **possession**, because they have been obtained by the government and are within the government's **control**." *Gilmore v. United States DOE*, 4 F. Supp. 2d 912, (N.D. Cal. 1998) (emphasis provided by Court), *citing Forsham v. Harris*, 445 U.S. 169, 181 (1980) *accord* W02285.

Outsourcing NEPA to private contractors is a controversial practice that may provide grounds to vacate an Environmental Impact Statement when the contractor "compromised the objectivity and integrity of the NEPA process." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991). The Complaint alleges facts and presents specific claims regarding contractors' conduct. ECF No 1 at ¶147-157. Review of the contractor's conduct is also relevant to any injunction that may issue in a NEPA case. *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002)(injunction issued based on balancing harms and concluding that "many of these costs may be self-inflicted" by the project proponent).

Based on *Davis*, a preliminary injunction issued in the previous NEPA lawsuit based on NEPA contractor document issues. *Colorado Wild Inc. v. U.S. Forest Serv*., 523 F.Supp.2d 1213, 1230 (D.Colo. 2007). The preliminary injunction was based on the Forest Service "fail[ure] to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether the LMJV-Tetra Tech relationship had violated the

integrity of the NEPA and decision-making process." *Id*. The case promptly settled after the Magistrate Judge ruled on Plaintiffs' motions regarding the refusal and subsequent inability to produce destroyed contractor records. *Colo. Wild, Inc. v. U.S. Forest Serv*., 2007 U.S. Dist. LEXIS 83638, 5 (D. Colo. Nov. 1, 2007)(confirming destruction and mishandling of contractor records); *Colorado Wild*, 06-cv-02089-JLK-DW (Doc. 147)(settlement and dismissal). The present motion addresses a similar failure to "collect" and "include" contractor documents.

In short, all contractor and sub-contractor documents are Forest Service records that form part of the Administrative Record and are essential to judicial review of each claim. Although amplified by Plaintiffs' allegations that LMJV's engaged in prohibited interference with the NEPA contractors, collection and inclusion of contractor records is a basic APA requirement.

1. Item 3 - NEPA Contractor Records and Emails

Western Ecological Resources (WER) is the prime consultant chosen by the Forest service to prepare the Environmental Impact Statement. W11192 (list of preparers). As alleged in the Complaint (ECF No.1 at ¶267):

> Defendants recognized the federal recordkeeping mandate early in the current NEPA process where the employment contract between the project proponent's agent and the Third-Party NEPA Contractor required ongoing maintenance of a master index of all documents that would constitute the Administrative Record.

Id. The Employment Contract and MOU confirm this allegation:

> As of the date of this contract, WER and its subcontractors will document all of their work, including any sampling, testing, field observations, literature searches, analyses, recommendations, letters, e-mails and other work that supports the EIS. WER shall maintain a master index of all documents it receives or generates that are directly or indirectly considered in the decision making process or that demonstrate compliance with laws, regulations or policies. The index will show at a minimum the date, author, addressee, source document, document number and page number, and subject matter of the document. WER and any subcontractors shall also document all the Forest Service records in a similar and compatible manner. The index shall be an appendix to the EIS and used to incorporate by reference the items listed in the index to the EIS. The index shall be updated

> throughout the preparation of the EIS. These documents and index will form the basis of the Administrative Record compiled and designated by the Forest Service. The term "document" as used in this paragraph includes data of any sort, including but not limited to electronic media; planning data; maps; files; reports; e-mails; computer, audio or video tapes and disks; and other records.

W02230 (Employment Contract)(emphasis supplied); W02277 (same). Despite this requirement, a master index of the Administrative Record was not created, and if it was, the master index was not included in the Administrative Record or the EIS. The Employment Contract states further:

> If a legal challenge arises to the Forest Service's legal compliance for this Project, WER and any subcontractors, must make available to the Forest Service any information requested by the Forest Service. WER will also respond to all Forest Service requests for information and testify at deposition and/or trial regarding any aspect of the Project about which WER possesses information.

W02231, W02278 (MOU).

According to the Forest Service, the "documents" were not provided to the Forest Service, because the Forest Service did not request them. Exh. 2 at 2. The failure to request the documents and lack of master index confirms the Administrative Record incomplete and was prepared outside required procedures. Regardless of their contents, the Forest Service's admitted failure to request the documents and master index confirms the Forest Service once again failed to exercise the minimum amount of oversight required when a third-party contractor is used to fulfill the agency's NEPA duties. *Colorado Wild*, 523 F.Supp.2d at 1230 (D.Colo. 2007)(failure to collect and include contractor records warranted injunctive relief).

The importance of collecting and including contractor records is heightened where WER was authorized to "obtain technical assistance or information from one or more independent, third-party subcontractors." W02276. WER ultimately used 13 subcontractors to assist in the analysis and preparation of these NEPA documents. W11192. Administrative Record evidence confirms the project proponent exercised political pressure at all levels of the Forest Service.

C0021685 ("It is commonly understood that Mr. McCombs brought political pressure to bear to realize his dream to develop the ski area."); C00025101 ("Red McCombs is getting "frustrated" and may "begin making calls to his friends in Washington."); CP003015("They said several times that Red was very frustrated and that "Red will do what Red will do" in terms of political contacts."); CP0002930 ("McCombs is rattling cages"). It is reasonable to infer that political pressure may be revealed by the contractor emails. However, the Forest Service refusal to collect and include documents from WER and the 13 third-party subcontractors effectively sweeps these issues "under the rug." *Lee v. U.S. Air Force*, 354 F.3d at 1242.

Importantly, contractor bias and undue influence are not the main bases for disclosure. The undisclosed criticisms and data exchanged between and among the contractors who wrote the EIS may confirm Plaintiffs' other claims where "[r]eliance on a single study criticized extensively by its authors in its particular application can obviously be an arbitrary and capricious action." *See Walter O. Boswell Mem'l Hosp.,* 749 F.2d at 803 *citing Almay, Inc. v. Califano*, 569 F.2d 674 (D.C. Cir. 1977).

An order compelling the Forest Service to collect and disclose the master index and all "documents" from WER and each sub-contractor would remedy Item 3. W02231. Alternatively, to avoid further delay and disputes, the Court could directly order and issue, or authorize Plaintiffs to issue, a subpoena *duces tecum* compelling WER and each sub-contractor to either produce the master index and all "documents" by a date certain or testify at deposition or trial on the issue shortly thereafter. *Id., Becker v. Kroll*, 494 F.3d 904, 921-922 (10th Cir. 2007).

2. Item 7 – Budgets and Billing Exchanged Between LMJV and Contractors

The Employment Agreement confirms that LMJV was provided monthly invoices with information allowing LMJV oversight of WER and the sub-contractor's activities.

> WER will provide invoices for this work together with invoices for its subcontractors. Following the scoping process for the EIS, WER will provide WLG an updated project budget. WER will provide WLG consolidated monthly invoices for such work no later than the last day of the month. WLG will immediately review such invoices and provide copies to the Proponent. All such bills will be due and payable within 30 days of receipt by the Proponent. Upon execution of this employment agreement, WER will submit to the Proponent an invoice for $20,000 which shall be used by WER and/or its subcontractors as a retainer. The first $10,000 of such retainer shall serve as payment for initial work under this contract. The remaining $10,000 shall be retained by WER and applied towards billings for fees and expenses near the end of the NEPA process.

W02232.

As set out above, and without presenting the ultimate question of undue influence and bias, the administrative record confirms that LMJV exerted influence on the Forest Service through various means, including phone calls, emails, and in-person meetings. *See also e.g.* C0021638 The reasonable inference that budgets, billing, and other means were similarly used to bring political pressure to bear on WER and the sub-contractors is supported by the limited record available to Plaintiffs. For example, on February 2, 2012, Jerry Powell who works for third-party contractor Wildlife Specialties, LLC wrote in an email to Forest Service biologist Randy Ghormley "We have been advised to stop work on the project. Mr. Ghormley responded: "[m]ust be the Sec. 7 Sec. 10 thing? Or can you talk now?" [Mr. Powell replied] "I don't know, but I suspect you are correct. I probably should not talk now. Just to be safe." C005662. On February 13, 2012, Rick Thompson, wildlife biologist for third-party contractor Western Ecosystems, wrote to Mr. Powell and Mr. Ghormley stating: "I just got off the phone with David Johnson [prime consultant]. We have been authorized to restart the project." C5739. Mr. Ghormley's assumption that it must be the "sec.7 Sec. 10 thing" refers to a disagreement between the project proponent and the Forest Service.

The limited Administrative Record supports further investigation into questions of LMJV budget and invoice approval constraining and influencing NEPA contractor analysis. *See e.g*. C0006139 (subcontractor email stating, "While it will be relatively easy to re-"pigeon hole" the effects, it will take additional time, effort, and budget that none of us have."); C0009299 ("I will need to prepare another SOW and budget request for this work. By the time that I am done getting beat up and receive approval, a week has usually transpired."). A specific instance of manipulation was alleged in the Complaint where, "the Forest Service and LMJV refused to pay the appraiser the added costs associated with choosing anything but the Comparison Sales approach." ECF No. 1 at ¶ 153, 247 (Claim 7 Violation of Land Exchange Regulations).

Despite these cryptic emails between the contractors and the Forest Service, the Administrative Record is devoid of the underlying communications involving the orders contractors received that approved, stopped, or resumed their work. Documents involving budgets, statements of work, invoices, and others type of communication between the consultant team and the proponent are highly relevant to review of the agency decisionmaking across all claims and should be collected and produced in the same manner as set out above for Item 3.

C. Item 6 - The Forest Service Based Agency Action on Settlement Agreement

Item 6 involves a purportedly confidential Settlement Agreement resolving litigation between LMJV and the Wolf Creek Ski Corporation ("WCSC") that involves National Forest System lands. ECF No. 1 at ¶49; *Wolf Creek Ski Corp v. Leavell-McCombs Jt,* 04-cv-01099-JLK-DW, ECF Nos. 327-330. To determine confidentiality in the present case, "federal common law of privileges applies since federal law provides the substantive law in this case." *Kovacs v. Hershey Co*., 2006 U.S. Dist. LEXIS 69342, 2006 WL 2781591 (D. Colo. Sept. 26, 2006)(citations omitted). A party asserting confidentiality bears the burden to establish the

privilege, and to demonstrate the asserted privilege has not been waived. *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979). During conferral, neither the Forest Service nor LMJV proffered confidentiality clause nor any authority supporting confidential status for a private settlement agreement that played an integral role in the Forest Service review of LMJV's proposals. Exhs. 1-3, Item 6. Plaintiffs' research found no such authority.

As set out in the Record of Decision, WCSC-owned land subject to the WCSC Special Use Permit was conveyed in the challenged land exchange, pursuant to the 2008 private Settlement Agreement to satisfy LMJV's asserted entitlement to expand the access conveyed in the 1987 land exchange. W12654 ("Wolf Creek Ski Corporation has agreed to make these two small parcels available for purchase by LMJV for inclusion in the land exchange"). LMJV disclosed the supposedly confidential information as early as 2010:

> Pursuant to the Confidential Settlement Agreement between WCSC and LMJV, WCSC has agreed to convey the other two WCSC parcels (Waterfall Area and Tranquility) to LMJV if the exchange occurs for LMJV to include in the exchange[…]. Forthcoming to you will be a letter from WCSC confirming that the Waterfall and Tranquility parcels will be made available for inclusion in the exchange, along with the relinquishment of a number of easements created under the Confidential Settlement Agreement which will be of no further use following the exchange.

C0026979-80(emphasis supplied). In other words, LMJV provided the Forest Service with the terms of the Settlement Agreement as the basis for the land exchange. *Id*.

When presented with Item 6 during conferral, the Forest Service agreed to provide Exhibit C to the Settlement Agreement and to include Exhibit C in a supplemental record filing. Exh. 3 at 4. However, the Administrative Record confirms the Forest Service reliance on the Settlement Agreement went far beyond Exhibit C. For example, in order to correct statements in LMJV's 2008 application, Defendant Dan Dallas was provided a full description of the Settlement Agreement.

> I immediately suspended all work on the analysis until we were provided an accurate application and an accounting of the private settlement between LMJV and WCSA of settlement terms that had an association with the NFS lands.

C0025320. The Forest Service also discussed the terms of the Settlement Agreement in establishing and analyzing the ANILCA access options. *See* e.g. W10534 ("Option 3 is the original plan that has preliminary approval in Mineral County and follows the Village's 2008 settlement agreement with the Ski Area." […] Option 2 is a new land plan on the land owned by The Village that the Ski Area has consented to, which could leave in effect some of the easements agreed to in the settlement agreement.").

The terms of the settlement agreement were discussed in emails, letters, and at meetings involving the Forest Service, contractors, and the public. *See e.g.* W13806 ("Discussion focused on the Proposed Action, the ANILCA alternative, and the Option III alternative (the agreement between Wolf Creek Ski Area and the Joint Venture) which were presented at the public open houses."); C0007619 ("Davey cant [*sic*] say no to the extension, as it is in the [Wolf Creek Ski Area] settlement agreement with the Village."); C0023979 ("It's part of our settlement agreement so there is no other contract. Davey will deed to us and we will deed to USA."), C0025197 ("I believe there was a change in private land ownership due to a settlement agreement between LMJV and WCSA."); C0034145 (referencing LMJV's "concise write-up of all terms and conditions from the settlement agreement between LM JV and Wolf Creek dated on or about June 2, 2008 that apply to the land involved in this exchange proposal."). The Forest Service internally, but not in the official analyses, compared its course of action against "[t]he settlement agreement [which] contemplated a smaller non-Federal parcel to be part of the land exchange than that currently proposed." C0034145.

Even if LMJV or the Forest Service could point to a Settlement Agreement provision or federal authority giving rise to privilege, LMJV waived confidentiality by inserting the private agreement into the federal transaction and analysis. For example, applying by analogy the doctrine of waiver of attorney-client privilege confirms that "[w]here a party injects part of a communication as evidence, fairness demands that the opposing party be allowed to examine the whole picture." *Sedillos v. Bd. of Educ. of Sch. Dist. No. 1*, 313 F. Supp. 2d 1091, 1094 (D. Colo. 2004), q*uoting Remington Arms Co. v. Liberty Mutual Ins. Co*., 142 F.R.D. 408 (D. Del. 1992).

Where the Forest Service and LMJV relied upon the Settlement Agreement to formulate and analyze the major federal action, confidentiality cannot be used as a shield to exclude the Settlement Agreement from APA review. *Id*. Plaintiffs would be prejudiced in presenting its case where, for example, the Settlement Agreement described to the Forest Service contains information about LMJV's existing access (Claim 1) and an undisclosed alternative course of action (Claim 2) that was not analyzed as a NEPA alternative. ECF. No. 1 at 44-47; C0034145.

Plaintiffs respectfully request an order finding the Settlement Agreement, even if subject to a colorable privilege claim, is no longer confidential due to LMJV's disclosure of its terms, and compelling LMJV to provide a true and correct copy of the Settlement Agreement.

V. Conclusion

For reasons set forth herein, Plaintiffs respectfully request the Court grant the unopposed request to allow Plaintiff to file an additional motion before the April 26, 2016 Reply deadline, compel the disclosure of all contractor documents and the master index, including billing and budgets, and compel LMJV to produce the Settlement Agreement.

Respectfully Submitted this 11th Day of March 2016

s/Travis E. Stills
Travis E. Stills
Energy & Conservation Law
1911 Main Ave., Suite 238
Durango, Colorado 81301
(970) 375-9231
stills@frontier.net

Matthew Sandler
Rocky Mountain Wild
1536 Wynkoop St. Suite 900
Denver, CO 80202
303-579-5162
Matt@rockymountainwild.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2016 I served a copy of this filing on all parties by using the CM/ECF system, except where noted below.

s/ Travis E. Stills
Travis E. Stills