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.

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION TO COMPEL DISCLOSURE NECESSARY TO COMPLETE AND SUPPLMENT DEFENDANTS' ADMINISTRATIVE RECORD

Plaintiffs, through counsel, file this Reply to support its Motion to Compel Disclosure Necessary to Complete and Supplement Defendants' Administrative Record.

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I. Introduction

A federal agency cannot use a contractor to fulfil its National Environmental Policy Act ("NEPA") obligations and then use this relationship to hide documents from itself, Plaintiffs, and the Court. Defendants claim that "[i]n light of the concerns raised in the prior litigation about the conduct of the NEPA analysis process, LMJV and the Forest Service developed and entered into a Memorandum of Understanding ("MOU") designed to ensure that the evaluation of the proposed land exchange would be *objective and transparent*" Fed Resp. at 3 (*emphasis added*). Although the Parties agree that the MOU and Employment Agreement must be considered in determining the contents of the Administrative Record, both Responses ignore key provisions of the MOU and Employment Agreement that define the scope of "documents" that comprise the Administrative Record, as did the Forest Service during the administrative proceedings below. Pl. Mot at 7 *quoting* W02230 (Employment Contract), W02277 (MOU). (contractor and subcontractor "documents and index will form the basis of the Administrative Record compiled and designated by the Forest Service" based on the definition of "document" that "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.").

As set out in Plaintiffs' Motion, Plaintiffs' request seeks compliance with the terms of the MOU, which require the lead contractor to maintain a full record, and disclose those documents upon request. Pl. Exh. 4 at 5. It is the Forest Service, and ultimately the Court, which decides the contents of the administrative record including information both directly and indirectly considered by private contractors who carried out the analysis underlying the Forest Service decisionmaking process. However, the Forest Service has shielded itself and ignored an important category of records by allowing fourteen private contractors to choose which

documents to provide the agency, thereby violating what the Forest Service response confirms is the agency's "sole responsibility for making decisions with regard to the NEPA analysis." FS Resp. at 9 *quoting* W02275 (MOU, § II).[1]

Notably, the Forest Service relies on declarations from a contractor and two employees from the San Luis Valley of Colorado. The reliance on low-level employees and a contractor contrasts with Summary Judgement Orders in related Freedom of Information Act cases that confirmed the Forest Service failed to conduct an adequate search and disclosure of agency records, especially at the Regional and Washington D.C. levels of the agency. *Rocky Mountain Wild v. U.S. Forest Service,* 14-cv-02496-WYD-KMT, ECF No. 31 at 8 (It is likely that if Rinella or the Washington D.C. office had participated in the search, responsive documents would have been located.) Defendant Maribeth Gustafson (Deptuty Regional Forester), who presumably has direct knowledge of the Regional and Washington D.C. activities, provided no testimony regarding contractor activities and records she directly and indirectly relied upon when resolving the objections, which is the Regional/Washington Office level decision under review here. Further, the Forest Service makes no attempt to explain the exclusion from the Administrative Record of nearly 100,000 pages released in the FOIA cases pursuant to Court Order after the Record was certified on November 13, 2015.

The most recent FOIA release includes a partial index from February 17, 2014 that confirms the Forest Service directed the contractors to exclude all emails created after August 25, 2011. Pls Exh. 10 at 2WC_FOIA_HC_002681. The twenty-eight page index also confirms the contractors created a large volume of records not identified on the truncated six page "screen

[1] The consultants were only instructed to provide documents that "supports the Analysis" and "demonstrates compliance with laws, regulations or policies." W02277.

shot" of an agency website that purportedly contains an "index of contractor documents provided to Forest Service." FS Resp. at 17 *citing* (W11513). Without the summary judgement orders in the ongoing FOIA litigation, the Forest Service would have successfully concealed existence of contractor records that Plaintiffs first requested in February 2014. An order from this court is now required to compel the disclosure of all contractor records, including the post-August 25, 2011 contractor emails the Forest Service arbitrarily excluded from the contractor index.

Both Responses confirm the Forest Service deliberately shielded the review and analysis from public, agency, and judicial review by delegating its authority to the third party contractors to choose what documents to assemble for review by the Parties and the Court, and which records remain hidden pursuant to the private contractor's exercise of government discretion. This abdication of authority runs directly contrary to the Forest Service Response, which confirms the agency must retain "sole responsibility for making decisions with regard to the NEPA analysis." W02275 (MOU, § II). By allowing the private contractors that conducted the analyses and drafted the documents to determine what constitutes the "whole agency record," the privatized agency NEPA process is neither objective nor transparent. The MOU confirms the Forest Service is tasked with making the initial determination of what documents on the Master Index should comprise the Administrative Record, subject to APA caselaw and the agreements it entered in the present case. W02277 (MOU, § IV (B)(ix). The presumption of regularity is overcome when the Forest Service has failed to follow the procedures set out in the MOU and Employment Agreement by excluding contractor emails from the index, and consequently, the documents reviewed by the Forest Service. Exh 10 (2WC_FOIA_HC_002681).

At this stage of the litigation,[2] Plaintiffs are indeed "asserting a right to evaluate which materials…should be included in the Record" (Int. Resp. at FN2), by seeking an order for the Forest Service to assemble and disclose the whole record before deciding what to designate as the Administrative Record.[3] *See* Motion at 4 *citing Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). Plaintiffs play a key role in the adversarial process to ensure Defendants submitted all documents and information considered and developed at all three stages of the Forest Service's decision and review process was nothing more and nothing less than the "whole record." *Id*. Intervenors are mostly correct that "Plaintiffs' Motion does not appear to ask the Court to complete or supplement the administrative record…at this time." Int. Resp. at 3. Plaintiffs are not "proffering broad categories of documents…that are 'likely' to exist" until it has a chance to examine and review those documents pursuant to the relevant standards. Int. Resp. at 4. Plaintiffs are arguing that *documents known to exist*, that were created and obtained by the contractors during the analysis and decisionmaking process being litigated, *are being ignored*. This universe of documents is in the possession of the private contractors who conducted much of the agency analysis and created the Environmental Impact Statement underlying this decision. Had these third party contractors been employees of the Forest Service, there is no question that any documents, communications, or records in their possession must be reviewed when determining what to include in the Administrative Record. Allowing WER and the 13 other contractors to choose and disclose only documents that support its analysis

[2]Plaintiffs intend to argue that the lack of agency oversight and lack of a contemporaneous record is an independent basis to invalidate and vacate the agency actions under review. *See e.g.*, ECF No. 1 at ¶¶92-101; 156, 258-269 (Claim Ten). The parties have not yet agreed upon point rulings, but this issue is among those issues Plaintiffs believe may be dispositive of all issues.
[3]Rocky Mountain Wild has been diligently working since 2014 to obtain the whole record by asserting its rights pursuant to the Freedom of Information Act.

highlights the importance of access and review of the "whole record" by the agency, the Parties, and the District Court.[4]

The Forest Service Response confirms the agency did not follow the MOU procedures requiring retention of all documents and production of the records upon request, where instead the contractors decided which documents should be included in the Administrative Record. FS Resp. at 16-17. The inherent faults in the record keeping process are highlighted by the assertion that it "would likely take hundreds of hours" for WER to "search through nearly five-years' worth of email and other records." Fed. Resp. at 15, Johnson Decl. ¶11. The lack of organized record keeping by the entities that conducted the analysis and drafted the NEPA documents undercuts the presumption of regularity and gives the Court ample grounds to find that these records should be turned over to the Forest Service (and Plaintiffs) to determine whether and how to supplement the Administrative Record with contractor records.

Plaintiffs' motion to compel can be granted based on the showing that omissions and gaps in the Administrative Record currently before the Court render it inadequate for meaningful judicial review. The Forest Service has ignored documents considered directly or indirectly by the decisionmakers who relied on the private contractors' analysis, but did not verify the integrity, independence and veracity of the private contractors' work. Alternatively, to the extent that the Forest Service and the lead contractor violated the MOU and the record cannot be reconstructed *post hoc*, judicial review has now been rendered impossible and the underlying agency action should be vacated and set aside. At a minimum, the Court should enter point

[4] The contractors were heavily invested in supporting the Forest Service decision, even participating in the agency review of administrative objections. *See* Exh. 11 (C0022005 – email from 3rd party contractor Jason Marks) ("a lot is riding on this document, and further input from you and [the Forest Service's attorney] Ken [Capps] will be critical to ensuring that it's defensible under administrative and legal challenge.").

rulings establishing that the irregular maintenance and production of the administrative record in this case does not support the normal APA judicial review process and burdens. *See Colorado Wild, Inc. v. U.S. Forest Serv*., 2007 U.S. Dist. LEXIS 83638, 5 (D. Colo. Nov. 1, 2007)

II. Standard of Review

Importantly, both Responses overstate the Forest Service's role in the preparation of the Administrative Record and ultimately, the District Court record. "An agency may not unilaterally determine what constitutes the Administrative Record, nor can the agency supplement the Administrative Record submitted to the district court with post hoc rationalizations for its decision" *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739-40 (10th Cir. 1993) *citations omitted*. "When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question." *Id. quoted by Colo. Envtl. Coal. v. Office of Legacy Mgm*t., 2010 U.S. Dist. LEXIS 7184, at *10 (D. Colo. Jan. 14, 2010)(granting leave to conduct discovery).

Where an adjudication did not take place at the administrative level to create a formal hearing record, just like any other civil case, the parties engage in contested motions to present their evidence and arguments and the District Court ultimately establishes the administrative record and allowable supplementation on which the District Court conducts APA review. *Id*. Both Responses rely on inapposite cases decided outside the Tenth Circuit to overstate the agency's role and thereby diminish the role of Plaintiffs and the District Court in establishing the Administrative Record and potential supplementation that will ultimately comprise the District Court record.

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. Another way to overcome the presumption of regularity requires the party seeking to complete the record to set forth: "(1) when the documents were presented to the agency; (2) to whom; (3) and under what context." *Center for Native Ecosystems*, 711 F.Supp.2d at 1275. These are the main thrusts of Plaintiffs' claims regarding the Forest Service conduct in designating the administrative record based on a record assembled almost entirely by government contractors paid by the project proponent.

Defendants place nearly all their focus on a third, independent inquiry, which recognizes that a "strong showing" of bad faith or improper behavior may result in discovery or an order to complete or supplement the administrative record. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1044 n.1 (10th Cir. 2001); *Uintah Cty. v. Jewell*, No. 2:10-cv-970 DB BCW, 2016 U.S. Dist. LEXIS 38930, at *20 n.65 (D. Utah Mar. 24, 2016). Importantly, a showing of bad faith is not required to grant Plaintiffs' motion on the two bases above. Bad faith and/or improper behavior in the present case provides a third, additional basis to compel the Forest Service to disclose these records, or if the Court so concludes, for Plaintiffs to pursue limited discovery to disgorge the targeted records from any party and/or its agents.[5]

Where the Forest Service again "failed to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether the LMJV-[contractor] relationship had violated the integrity of the NEPA and decision-making process," the pending motion may be granted based on any of three standards recognized in the

[5]Plaintiffs seek discovery-like components in an order to compel the three categories of records delineated by this motion to avoid the time and expense of discovery and to allow progress toward merits rulings. *See Colo. Wild, Inc. v. U.S. Forest Serv.*, 2007 U.S. Dist. LEXIS 83638, at *5 (D. Colo. Nov. 1, 2007).

10th Circuit caselaw: 1) complete omission of relevant information; 2) failure to follow procedures in the MOU; or, 3) a showing of bad faith or improper behavior. *Colo. Wild, Inc. v. United States Forest Serv*., 523 F. Supp. 2d 1213, 1230 (D. Colo. 2007).

III. Argument

The Administrative Record citations herein confirm that Items 3, 6, and 7 were considered as part of the Forest Service decisionmaking process and are within the "whole record" requirement. *Bar MK Ranches, 994 F.2d at 739.* To the extent the Forest Service provided declarations asserting the records in Items 3, 6, and 7 were not directly considered by Defendant Dallas or Defendant Gustafson, Plaintiffs assert they were "indirectly" considered and fall within either the "whole record" requirement or the exceptions applicable to extra-record evidence that should have been, but was not considered. *Lee v. U.S. Air Force,* 354 F.3d at 1242.

Here, the Responsible Officials are Defendant Dallas and Defendant Gustafson, neither of whom have sought to review the contractor records. 36 CFR §220.3 ("Responsible Official" is defined as "the Agency employee who has the authority to make and implement a decision on a proposed action."). Where the MOU confirms the documents directly and indirectly considered by the Responsible Officer, that decision must be made by the Responsible Officer, not delegated to a third-party contractor with an inherent interest in concealing materials adverse or contrary to its performance of the MOU/Employment Agreement. Failure to follow this procedure undercuts the presumption of regularity, as does the notable failure of Defendants to proffer any declaration of Defendant Gustafson, the Responsible Official who resolved the objections below.

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. Further, there cannot be a presumption of regularity when the Forest Service has not considered a universe of documents when compiling the Administrative Record currently before the Court.

Plaintiffs continue to reserve arguments involving as-yet undisclosed records until FOIA searches and disclosures are complete. On April 21, 2016, despite the April 18, 2016 deadline set by Judge Martinez for compliance with the Summary Judgement Order, the Forest Service field an unannounced motion for *post hoc* permission to withhold the contractor documents from FOIA disclosure. *Rocky Mountain Wild v. U.S. Forest Service*, 15-cv-127-WJM-CBS, ECF No. 58. Briefing on the issue is being held in abeyance (*Id*. at 59), and the result may provide documents which Plaintiffs may seek to file in the present case, along with other documents obtained through FOIA. *Id*. RMW is considering whether to file a Response or a motion to strike the Second Summary Judgment Motion as a *post hoc* request to violate the FOIA order that unnecessarily expands, complicates, and delays these related cases.[6]

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

Both Responses ignore the analogous FOIA caselaw confirming that, "records that are contractually owned by the government are agency records regardless of whether they are

[6]Defendant has been asked, and refused, to withdraw its *post hoc* FOIA motion despite the MOU provision that clearly states the contractors will "Respond to Freedom of Information Act (FOIA), 5 U.S.C. 552 and Privacy Act, 5 U.S.C. 552a requests regarding the Project and Analysis within established timeframes provided by the Forest Service." Pl. Exh. 4 at 6, s*ee also* W02280 ("The Proponent, Prime Consultant or any subcontractors will be given reasonable time to assert privilege on information or records considered proprietary under FOIA.").

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. Neither response addresses the operative factor, which is the admitted Forest Service ownership and control, confirmed by the MOU provision that, "The Prime Consultant's work product *will be considered Forest Service work product owned by the Forest Service* because it will be prepared under Forest Service supervision and is intended to meet legal requirements that apply to the Forest Service." Pl. Exh. 4 at 2 (emphasis added). Control is not contested. Instead, the Forest Service seeks unquestioning deference to the agency's decision to forego control and limit agency, public and judicial scrutiny by electing not to review or request contractor records that are "agency records" owned by Defendant pursuant to the MOU and Employment Agreement. FS Resp. at 14.[7]

In short, all contractor and sub-contractor documents are Forest Service owned and controlled federal agency records, which were actively ignored by the Forest Service in carrying out its statutory duties and in preparing the Administrative Record. Whether review confirms the contractor records are part of the whole record or as evidence showing the Forest Service ignored stubborn problems, the Court may simply order the collection of records pursuant to the terms of the MOU or grant Plaintiffs leave to propound discovery. Once collected, the Court should order

[7] Of particular concern is the fact that "WER did not have written contracts with the subcontractors." Fed. Exh. 4, ¶3. Unlike the terse instructions for inclusion provided to WER in the MOU, the 13 subcontractors had no parameters to guide decisions related to inclusion of documents. David Johnson acknowledges that the subcontractors "may have internal drafts and other work product that were never shared with WER or the Forest Service." *Id. at* ¶12. This deficiency, on its own, may prove fatal to agency action where the integrity of the NEPA analysis was not protected or examined by the Forest Service during the administrative proceedings.

their production by a date certain along with a 60 day period for the Parties' review to determine whether or not the agency records (a.k.a. contractor records) are relevant to the judicial review of existing claims (or any potential claim supported by information in the undisclosed agency records). Again, although amplified by Plaintiffs' allegations that LMJV engaged in prohibited interference with the NEPA contractors, collection and disclosure of contractor records is fundamental to the APA "whole record" and supplementation requirements.

1. Item 3 - NEPA Contractor Records and Emails

Neither Response addresses the expansive definition of "documents" used in the MOU, which includes contractor emails and other records. Pl. Mot. at 9-10 (*Citing MOU).*

As set out above, and reflected by the terms of the MOU, the Forest Service must have access to the whole record to decide what records should comprise the administrative record. *Bar MK Ranches, 994 F.2d at 739.* If Plaintiffs and Defendants both had the opportunity to review the whole record, there would be an even playing field in determining and arguing over what should be added to the record. Had the Forest Service followed its procedure and reviewed the whole record and made decisions about inclusion, a presumption of regularity may be afforded the agency. However, when the Forest Service refuses to review, let alone request, a universe of documents, the "whole record" has not been assembled and the Forest Service deserves no presumption of regularity as to its preparation of the Administrative Record. *Id*.

Both Responses confirm that the MOU was designed to address known problems within the agency and LMJV, but the "open and transparent" (FS Resp. at 3) provisions of the MOU were improperly ignored by an agency whose cages had been rattled by the project proponent throughout the analysis. *See* Pl. Exh. 7 at 1. This pressure was not limited to the last days of the analysis. The proponent brought pressure to bear throughout the process, particularly in March

2014 when Defendant Gustafson prepared a memo confirming the Forest Service was considering a decision confirming that LMJV already possessed reasonable access. Pl. Exh. 6 at 14 (C0021686). The involvement and threats by a powerful and connected individual – Red McCombs – confirm the importance of contractor records that the will remain secret unless the Court fashions an order designed to examine the transparency and integrity of the NEPA process.

Intervenors contradict the Forest Service position by alleging, "All of the documents generated by WER and its subcontractors that were considered – either directly or indirectly – by the decision maker *are already in the administrative record."* Int. Resp. at 16. This assertion is undermined by the twenty-eight page February 17, 2014 Index (Pl. Exh. 12) and Defendant's position that it would take hundreds of hours to collect undisclosed contractor records. Fed. Resp. at 15.[8] The truth is that the contractor records are federally owned agency records which should have been managed in a way that would have readily allowed the agency to determine what should be included in the Administrative Record. Further, as directed by the MOU, WER was only required to include in the administrative record documents that "demonstrate compliance," which could be interpreted to exclude anything that may not support the decision. WO2277. The undocumented, discretionary determination by someone outside of the agency cannot justify the inclusion and exclusion of documents presented for judicial review.

[8] Intervenor's opposition is related to the billing statement sought below. The MOU imposes the costs of producing the record on LMJV. Pl. Exh. 4 at 3 (the Proponent is solely responsible for all Primary Consultant and subcontractor fees, costs, and expenses). It is reasonable to infer that the Forest Service and LMJV cooperated in directing the contractor to maintain an abbreviated record as a cost-cutting measure and/or for the purpose of concealing improper emails and other prohibited communication between LMJV's agents and the private NEPA contractors. For purposes of the present motion, there is no basis to assert the cost of assembling a *post hoc* record to shield the matter from APA review. Where Intervenor is responsible for the cost of collecting and indexing the whole record, billing records are likely to reveal relevant information.

Intervenors allege that "the Forest Service reasonably delineated those materials generated by the WER and its subcontractors." Int. Resp. at 17. However, Intervenors argument is contrary to established fact, as the Forest Service could not have delineated materials never assembled by WER or presented for Forest Service review.

Intervenors speculate on which contractor records were "actually considered" by the Forest Service. Int. Resp. at 10. This bare assertion fails to establish what may have been in the possession of the contractors, which is a condition precedent for determining what was and was not considered in the analysis. Further, Intervenors conclude that unspecified records that were never assembled by WER or presented for Forest Service review "are not appropriate for inclusion in the Administrative Record…" Int. Resp. at 10. Perhaps Intervenors have seen these contractor records or sent emails and other records referenced in its Response, but otherwise, Intervenor's conclusion is speculative and without basis in fact. To argue the undisclosed records are not relevant, absent a thorough review of all the contractor records, flies in the face of logic.

Expecting Plaintiffs to point to "specific contractor records…directly considered by the Forest Service," while Plaintiffs are seeking to access and review of these records is equally absurd. This is the point – neither Plaintiffs, nor Defendants, can say what contractor records should be contained in the Administrative Record because these federally owned and controlled records are relegated to unsearched hard-drives, servers, and file cabinets of the federal contractors.

Despite the sparse information, Plaintiffs do show "(1) when the documents were presented to the agency; (2) to whom; (3) and under what context." *Center for Native Ecosystems*, 711 F.Supp.2d at 1275. There is no dispute that the documents were created or obtained during the period when the contract began - April 5, 2011, and the present. There is no

dispute that the documents were obtained, created, and transferred by and/or between the 14 contractors analyzing this government action and drafting the documents relied upon by the government decisionmakers. Context is established where these documents were indirectly and directly considered by the agency by virtue of the subcontractor possessing them as part of its federal contract. By relying on the Environmental Impact Statement the Forest Service indirectly considered all the information and analysis used by the contractors.

The Forest Service did not take steps to satisfy its independent duty to protect and confirm the integrity of the NEPA process. Pl. Exh. 4 at 6-9. These records, which include emails of some 14 subcontractors, may contain similar evidence of bad faith and improper influence that came to light via judicially compelled FOIA disclosures, also made many months after the final agency actions in the previous litigation. *Colo. Wild, Inc. v. United States Forest Serv.,* 523 F. Supp. 2d 1213, 1230 (D. Colo. 2007). Here, similar FOIA disclosures are ongoing, and as before, evidence throughout the limited Forest Service records confirms that documents were being destroyed and improperly kept from the public. There are communications where the contractors discuss stop-work orders, Red McCombs frustrations and pulling of political strings. Although not necessary to the required showing, these showings are compounded by reasonable suspicions created by the refusal to provide Plaintiffs with the records kept by the entities that conducted the analysis and prepared the EIS and decision documents.

Regardless of the standard applied, the Forest Service has not assembled the contractor records it owns, which is a necessary procedure to establish the "whole record" needed to examine the agency actions under review. The confirmed failure to implement the MOU "designed to ensure that the evaluation of the proposed land exchange would be objective and transparent" (Fed. Resp. at 6) prevents deference to the incomplete Forest Service record, and

supports an order designed to compel disclosure of agency records in the possession of the contractors for consideration by all Parties.

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

Both Responses largely ignore the Employment Agreement, which 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 [Western Lands Group] an updated project budget.[9] 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.

Neither Response provides examples of billing records or any evidence contradicting the inferences raised by cryptic emails between the contractors and the Forest Service. Pl. Motion at 12-13. Instead, differing interpretations were made on an existing Administrative Record that is devoid of the underlying communications involving the orders contractors received that admittedly approved, stopped, or resumed their work. Unlike the information contained in Item 3, the billing statements and communications should not take much time to collect and produce, assuming they are as limited as is required by the MOU. LMJV, a party to this litigation, presumably also has all these documents in its possession, as does each contractor.

[9]Western Lands Group is an agent of the proponent, LMJV.

The mere fact the Forest Service refuses to review these communications creates suspicion and an inference of willful ignorance. Documents involving budgets, statements of work, invoices, and other types of communication between the agency contractors and the bill-paying 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. Again, Plaintiffs provide "(1) when the documents were presented to the agency; (2) to whom; (3) and under what context." *Center for Native Ecosystems*, 711 F.Supp.2d at 1275. These communications were consistently exchanged between the proponent and the prime contractor – an agent of the agency. The Responses concede the communications and statements were exchanged for the purpose of approving additional analysis, requesting funds, billing for completed work, and communicating about the progress of the analysis. The Responses confirm the Forest Service was not privy to any of these communications that controlled resources available to the contractors preparing the NEPA analysis. The Forest Service should be ordered to direct the contractors to assemble the billing records and communications and to provide them to the Parties to determine their content and the need for inclusion in the Administrative Record.

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

Neither response identifies a legally cognizable basis to elevate a private confidentiality agreement into a privilege entitling a party to withhold a relevant settlement agreement containing access decisions that involve 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.

First, both responses accept that "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) *quoted in* Pl. Motion at

13. Although some states have recognized what is known as a "settlement privilege," the idea that a private agreement could equate to a privilege against disclosure has been widely rejected by the federal courts. *Tanner v. Johnston*, 2013 U.S. Dist. LEXIS 3512, at *3-5 (D. Utah Jan. 8, 2013) *quoting Pia v. Supernova Media, Inc*., 2011 U.S. Dist. LEXIS 140396, 2011 WL 6069271, at *1 (D. Ut. 2011)("A general concern for protecting confidentiality does not equate to privilege. . . . [L]itigants may not shield otherwise discoverable information from disclosure . . . merely by agreeing to maintain its confidentiality.") *citing DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684-86 (D. Kan. 2004)).

In a similar circumstance where future litigation was anticipated, the Kansas District Court reasoned that if private agreements could create privilege, it would allow parties anticipating later litigation "to construct a mechanism" that would defeat access to otherwise non-privileged information.. *Gifford v. Precision Pallet, Inc*., 2008 U.S. Dist. LEXIS 77502, at *8-9 (D. Kan. Aug. 28, 2008). Such is the case here where the federal land exchange is premised on easement and access decisions made in the private Settlement Agreement. Even in the Sixth Circuit, which has created a limited privilege for settlement negotiations, "this privilege does not extend to the terms of the final agreement." *State Farm Mutual Automobile v. Physiomatrix, Inc*., 2014 U.S. Dist. LEXIS 184665, 2014 WL 10294813, at *1 (E.D. Mich. Apr. 24, 2014) *citing Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc*., 332 F.3d 976, 981 (6th Cir. 2003).

The dispute here is limited to the final Settlement Agreement itself, which would not be included within the novel "settlement privilege" for settlement discussions adopted by the Sixth Circuit. *Id*. Moreover, where neither response requested nor provided any factual basis to create a common law settlement privilege in the Tenth Circuit, the Court need not address the merits of such a claim. *Gov't of Ghana v. ProEnergy Servs., LLC*, 677 F.3d 340, 344 n.3 (8th Cir.

2012)(declining to consider Sixth Circuit settlement privilege) *citing In re Subpoena Duces Tecum Issued to Commodity Futures Trading Commission*, 439 F.3d 740, 754-55 (D.C. Cir. 2006)(declining to rule on factually insufficient request to recognize settlement privilege). In short, there is no recognized privilege that can attach to the final Settlement Agreement.

Second, even if privilege were established, neither Response disputes the facts establishing waiver of any such privilege. Pl. Mot. at 16. Additional information, withheld by the Forest Service and released pursuant to Judge Martinez's Summary Judgement Order, confirms that the settlement agreement was shared with the Forest Service in a manner sufficient to disclose the content and intent of the agreement. Pls. Exh. 12 (2WC_FOIA_HC_001684). The Forest Service summary confirms the Settlement Agreement may have worked to predetermine the outcome of the NEPA analysis where "the settlement agreement hinges upon the ultimate transfer of the 177.6-acre parcel to the United States." *Id*. The fact that the Settlement Agreement was revealed and relied upon is confirmed by the untitled internal analysis confirming that the land exchange alternative is the only alternative that could conform with private decisions regarding access to the Village and the planned alterations in the Wolf Creek Ski Area Master Plan contained in the Wolf Creek Ski Area/LMJV Settlement Agreement. *Id*.

Third, both Responses attempt to argue the Settlement Agreement, which involves use and access to federal roads and lands, is irrelevant to a decision involving existing access, reasonable access, and conditions of access sought by LMJV for the sole purpose of constructing the Village at Wolf Creek. The agency records proffered with the Motion confirm the Settlement Agreement creates and implements the primary access to the Village and the Ski Area. Importantly, the most recent FOIA response contains a document surreptitiously provided to LMJV confirming that the Village proposal requires mandatory secondary access beyond the

direct primary access provided by the Land Exchange itself. Pl. Exh. 13 at WC_FOIA1_HC_02085 (FS employee Rinella to LMJV's Adam Poe: "If anybody asks, you found this blowing down the sidewalk last time you were in Creede.").

Instead of transparency, LMJV and the Forest Service assert confidentiality to cloak the existing scope of LMJV's shared access based on contingencies in the Settlement Agreement WCSA entered into under the duress of resolving litigation described by Randall Davey Pitcher, President and CEO of the Wolf Creek Ski Area, as "a "bet-the-company" case for the WCSA [Wolf Creek Ski Area]." Int. Exh. 23 at ¶6. LMJV submits and relies upon Mr. Pitcher's explanation of the contents of the Settlement Agreement as determining the intertwined Village proposal and "the future land use on the 300 acres (particularly on the skiable terrain), easements, land ownership, and a number of additional rights and obligations of each party to the other." *Id.* This statement alone confirms the Settlement Agreement, not the Forest Service, resolved questions regarding the management of the National Forest, plans to continue and expand the ski area operations conducted on the National Forest, and the proposed residential and commercial development, which would not exist but for the Wolf Creek Ski Area.

Fourth, the complex interplay between the various easements, access options, and land uses confirm the Settlement Agreement is relevant to a common thread among all the claims: the land exchange was presented as a predetermined outcome to avoid the analyses required by ANILCA, NEPA, and ESA. Here, the Forest Service allowed the private agreement to predetermine the scope of its analysis and options and to control WCSA's options in future use of federal public lands. The recently disclosed analysis questions the accuracy of Mr. Pitcher's testimony that the 2008 Settlement Agreement contemplated only "[t]he possibility of a land exchange between LMJV and the U.S. Forest Service. *Id. at ¶7(b)*. Indeed, the newly released

summary confirms that the settlement agreement is inextricably intertwined with the overlapping management decisions being carried out by the Forest Service as applied to access necessary for expansions proposed in the Ski Area Master Development Plan and the Village proposal. Pl. Exh. 12 at 2WC_FOIA_HC_001684 ("the settlement agreement hinges upon the ultimate transfer of the 177.6-acre parcel to the United States.")).

The Court should not rely on coy and misleading declarations contradicted by contemporaneously prepared agency documents confirming the Settlement Agreement played a key role in the federal decisionmaking. As Mr. Dallas stated at the time, the federal consideration of the LMJV proposal was halted until LMJV provided a detailed account of every provision, by letter and by discussion. Pl. Mot. at 15. Notably, the other main party to the Settlement Agreement conversations, Adam Poe, provided no declaration describing his letters, emails, and discussions with Forest Service personnel. Newly released documents confirm that Mr. Poe regularly exchanged information with the Forest Service on a wink and a nod basis, eroding any credibility given to Mr. Dallas in light of the contradictory documentary evidence confirming Mr. Dallas was provided with the information he correctly demanded. Pl. Exh. 13 ("you found this blowing down the sidewalk…").

Where documentary evidence contradicts Mr. Dallas' testimony inferring the Settlement Agreement and its terms were never conveyed to him or any other federal employee - relevant federal employees and LJMV agents could be put under oath in an evidentiary hearing and subjected to cross-examination. However, where the party asserting privilege has failed to identify a basis for privilege or meet its evidentiary burden to invoke a recognized federal privilege, there is no need to go through discovery practice or to conduct a hearing prior to the Court ordering release of the Settlement Agreement. Where a pattern of deception has been

identified, even if a privilege were to apply, the Tenth Circuit recognizes that the privilege should not prohibit inquiry into conduct relevant to the issues in the litigation. *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, at 1364 (10th Cir. 1987).

Plaintiffs respectfully request an order finding the Settlement Agreement is not privileged, and in the alternative, if subject to a colorable privilege claim, a finding that it is no longer confidential due to LMJV's disclosure of its terms. Transparency in National Forest management and judicial review is served by compelling LMJV to provide a true and correct copy of the Settlement Agreement for consideration in upcoming motions to complete and/or supplement the Administrative Record with extra-record evidence. Should the Court find full disclosure inappropriate, Plaintiffs alternatively request *in camera* review and an evidentiary hearing to examine relevant witnesses, to determine which terms of the agreement were communicated to the Forest Service, and to establish which provisions may be relevant to National Forest management, operation of the Ski Area (and expansions), Village at Wolf Creek development, establishment of existing access, and alternatives to the land exchange proposal.

IV. Conclusion

For reasons set forth herein, Plaintiffs respectfully request the Court 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 3rd Day of May 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 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
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