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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

WILDEARTH GUARDIANS and GRAND CANYON TRUST, Plaintiffs, v. S.M.R. JEWELL, SECRETARY OF THE INTERIOR *et al.*, Federal Defendants and STATE OF UTAH, CANYON FUEL COMPANY, LLC, Defendant-Intervenors	2:16-cv-00168-DN **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO ADD DOCUMENTS TO THE ADMINISTRATIVE RECORD AND TO AUTHORIZE LIMITED DISCOVERY**

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INTRODUCTION

Federal Defendants, the Secretary of the Interior, the United States Bureau of Land Management ("BLM"), and the United States Forest Service ("Service"), file this memorandum in opposition to Plaintiffs' Motion to Add Documents to the Administrative Record and to Authorize Limited Discovery. ECF No. 70 ("AR Motion").

Plaintiffs challenge Federal Defendants' decisions allowing issuance of a coal lease for the "Flat Canyon" tract in Utah's Manti-La Sal National Forest. They ask the Court to allow limited discovery and to authorize use in merits briefing of a far-ranging compilation of extra-record materials relating to climate change and greenhouse gas emissions (GHGs), but these documents were not considered by the agencies in their decision-making processes.

In particular, Plaintiffs move the Court to: (1) order completion of the record by adding materials which they believe were considered by the agencies; (2) order supplementation of the record with extra-record evidence because, according to Plaintiffs, the decisions are not adequately explained or relevant factors were overlooked; (3) authorize Plaintiffs' to pursue their putative "failure to act" claims without being limited to the record, even though this Court has yet to rule on their motion for leave to amend the complaint; and (4) allow "limited discovery" on positions taken by agency personnel that the agencies ultimately never adopted. In short, Plaintiffs ask this Court for a fishing expedition that would vastly expand this lawsuit beyond the decision challenged in this suit.

An agency's designation of the administrative record, "is entitled to a presumption of administrative regularity." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (citation omitted). "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Id*. The Tenth Circuit has explained that

exceptions to the rule of record review are allowed only in "extremely limited" circumstances. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004). These include circumstances (1) where an agency has "ignored relevant factors it should have considered;" *id*.; (2) where the action is "not adequately explained;" *Am. Min. Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985); and (3) evidence coming into existence after the agency acted demonstrates that the actions were right or wrong. *Id*. (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825 (1971)). Plaintiffs invoke all three exceptions in the section of their brief entitled "Legal Standards," but in argument they rely only on exceptions 1 and 2.

As explained below, exception 1 is of no avail because the certified records in this case clearly demonstrate that the agencies considered climate change, greenhouse gas emissions (GHGs), and sage grouse conservation and thus cannot be said to have overlooked "relevant factors." *S. Utah Wilderness All. v. Thompson*, 811 F. Supp. 635, 642 (D. Utah 1993). Plaintiffs' supporting exhibits, derived from the challenged records, confirm this. *See* ECF Nos. 70-7 at FS5818-5822, 70-8 at BLM855-857, 869 (Exhibits 7 and 8, AR Motion). Exception 2 is likewise unavailing because the records in fact explain the agencies' reasoning. They also demonstrate why more detailed study would not meaningfully aid decision makers or inform the public, these being the "twin aims" of the National Environmental Policy Act ("NEPA"). *Balt. Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 97 (1983). Federal Defendants are prepared to stand on these explanations.

CASE BACKGROUND

In March 1998, Canyon Fuel Company ("Canyon"), an intervenor in this action and, at the time, a subsidiary of Arch Coal, submitted a Mineral Leasing Act ("MLA") application to BLM requesting competitive leasing of the Flat Canyon tract. ECF No. 13-1 ¶ 31; Ex. 1 at 1-2,

BLM2525 (2002 Record of Decision). In response, the agencies undertook the required consideration of Canyon's application.

In January 2002, following an extensive, formal NEPA process, the Service and BLM, as joint lead agencies, issued a Final EIS for the proposed leasing decision. *See* 67 Fed. Reg. 2,651 (Jan. 18, 2002). On January 3, 2002, the Service, as the surface-managing agency, signed a record of decision consenting to the lease sale. Ex. 1 at 1. Three months later, BLM issued its own record of decision, determining it would "offer [the Flat Canyon tract] through a competitive process." *See* 67 Fed. Reg. 36,214 (May 23, 2002); *see also* Ex. 1 at 1 (BLM Record of Decision) (deciding to "offer for lease by competitive bid a tract of Federal Coal identified as 'Flat Canyon Coal Lease Tract' (UTU-77114)"). However, shortly thereafter, Arch Coal asked that the lease sale be placed on hold. ECF No. 13-1 ¶ 36.

A period of ten years elapsed before Arch Coal, in 2012, requested that the Flat Canyon tract finally be offered for competitive bidding. Following agency proceedings further discussed below, BLM held a competitive sale. On July 31, 2015, BLM issued the Flat Canyon lease to Bowie Resources, Canyon's new parent company. *Id*. ¶ 44.

Before issuing the lease, it was necessary for each agency to consider new information, in accord with 40 C.F.R. § 1502.9(c)(1)(ii), one of NEPA's implementing regulations. In February 2013, the Service prepared a Supplemental Information Report ("SIR"), ECF No. 70-7 (Ex. 7, AR Motion),which reexamined the impacts of leasing the Flat Canyon tract, considered and disclosed new information on climate change, GHGs, and sage grouse conservation, and concluded that the 2002 EIS still adequately supported the Service's earlier consent decision. *Id.* In 2015, BLM prepared a Determination of NEPA Adequacy ("DNA"), ECF No. 70-8 (Ex. 8, AR Motion). Like the SIR, the DNA also considered leasing impacts, and it concluded that the

analyses of the 2002 EIS and the SIR were sufficient to proceed with implementation of the 2002 leasing decision.

Importantly, lease authorization does not, in and of itself, allow commencement of surface-disturbing activity or other environmentally-impactful action. Before commencing such operations, a lessee must obtain additional approvals, in two successive stages. In the first stage, the lessee must obtain a mining permit from the State of Utah under authority delegated pursuant to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). *See* 30 C.F.R. § 944.30 (State–Federal Cooperative Agreement between State of Utah and the Department of the Interior). In the second stage, the lessee must obtain approval, by the Secretary of the Interior or the Assistant Secretary, of a mining plan (or modification) developed in the first stage.

The MLA requires that Secretarial approval be based on a recommendation of the Office of Surface Mining Reclamation and Enforcement ("OSMRE"). *See* 30 C.F.R. § 746.13 (MLA implementing regulations). This process is now under way. In preparation for making the required recommendation, OSMRE has developed an environmental assessment ("EA") of the proposed Flat Canyon mining operation, which was made available for public comment this past summer. *See* Skyline Mine Flat Canyon Coal Lease Tract Mining Plan Modification Environmental Assessment (Jun. 2016) at:

http://www.wrcc.osmre.gov/initiatives/skylineMine/documents/EA.pdf

(last visited Nov. 8, 2016). The EA, not yet issued in final form, examines climate change, GHGs, and sage grouse conservation in detail. As a result, it calls into question whether the harms on which Plaintiffs base their right to sue could be remedied in this case in any meaningful way, short of duplicating the efforts of OSMRE.

STANDARD AND SCOPE OF REVIEW

The claims raised in this action are subject to the scope and standards for judicial review set forth in the APA. 5 U.S.C. §§ 701-706. Section 706 of the APA imposes a narrow and deferential standard for review of agency action, and the courts' role is solely to determine whether the challenged actions meet this standard based on a review of the administrative record that the agency provides to the court. 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party."); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The complete administrative record consists of all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (citation omitted).

The "designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court 'assumes the agency properly designated the [record] absent clear evidence to the contrary.'" *Citizens for Alts. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007) (citing *Bar MK Ranches*, 994 F.2d at 740); *Wilson v. Hodel*, 758 F.2d 1369, 1374 (10th Cir. 1985). Unless Plaintiffs demonstrate some irregularity by clear evidence or show that the record presented is insufficient to allow "substantial and meaningful [judicial] review," courts defer to the agency's certification of the administrative record as the "whole" record. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1138-39 (10th Cir. 1991); *accord Fla. Power & Light Co.*, 470 U.S. at 743-44.

The Tenth Circuit has recognized five "extremely limited" exceptions to the rule limiting judicial review to the administrative record. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). These exceptions, which allow a party to

introduce extra-record evidence, include the following "possible" justifications:

> (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates that the actions were right or wrong.

Custer Cty. Action Ass'n v. Garvey, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (citing *Am. Mining Cong.*, 772 F.2d at 626).

Plaintiffs discuss exceptions (1), (2), and (5) in support of expanding the records, but appear to rely only on the first and second exceptions in argument. In the subsections which follow, Federal Defendants address Plaintiffs' claimed entitlement to completion and supplementation of the records and to limited discovery.

ARGUMENT

Plaintiffs' arguments for significantly expanding the scope of the Court's review in this case fit into three categories. First, Plaintiffs request *completion* of the records, on the theory that a certain fair-market value ("FMV") analysis and unspecified "air quality permits and related documents" were inadvertently omitted. *See* AR Motion at 6. Second, they request *supplementation* of the records through the use of extra-record evidence because, in their view, the decisions are not adequately explained and relevant factors were ignored, thus preventing meaningful judicial review. Third, they request authorization to pursue a "failure to act" claim without being limited to the record, even though the claim has not been pled and the Court has not ruled on their motion for leave to plead it. Fourth, Plaintiffs request *limited discovery* relating to a supposed change of position by the agencies on the need to supplement an environmental impact statement ("EIS") prepared to support decision-making efforts. None of

these four contention supports an expanded scope of review, as discussed in the sections which follow.

1. The Administrative Records are Complete.

Plaintiffs contend the administrative records are incomplete and that the Court should enter an order directing that the following be added to the BLM record:

(1) a fair market value analysis, prepared to assess whether bids received in the competitive lease sale were adequate; and

(2) air quality permits and related documents.

AR Motion at 10-12.

As to the first item, the request should be denied because agency decision makers did not consider the document in making the challenged decision. Accompanying this memorandum as Exhibits 2 and 3 are the uncontroverted declarations of Kent Hoffman of BLM and Greg T. Montgomery of the Service, which certify the administrative records in this case. In addition to certifying the records, the declarations affirmatively state that the FMV analysis was not considered in making the challenged decisions. Controlling Tenth Circuit authority requires "clear evidence" to overcome this showing, *Citizens for Alts. to Radioactive Dumping*, 485 F.3d at 1097, but Plaintiffs present none.

Instead, they seek to circumvent the restrictions by arguing that the FMV analysis, completed in April 2015, predates lease issuance. However lease issuance is not the decision challenged in this case and it is not the action for which environmental analysis was undertaken. Rather, analysis was undertaken to support BLM's 2002 leasing decision, which constitutes the agency's official (and required) response to Canyon's leasing application. When presented with such an application, BLM has three options under the MLA and its implementing regulations. The agency may decide to (1) hold a competitive lease sale for the tract as applied for; (2) reject

the application; or (3) hold a competitive lease sale for a modified tract. *See* 43 C.F.R. §§ 3425.1-8, 3425.1-9.

Here, BLM decided to offer the tract as delineated. Ex. 1 at 7 (selecting Alternative B in the 2002 EIS). This is the decision point that required NEPA analysis. On the other hand, lease issuance is a ministerial act which implements a leasing decision. The First Amended Complaint – the operative pleading in this case – challenges agency action in "authorizing" the lease, thereby acknowledging that the subject agency action is lease authorization. ECF No. 13-1 at 35 (Prayer for Relief, paragraph A). So too does Plaintiffs' AR Motion, which characterizes the case as challenging conduct in "authorizing the Flat Canyon *lease sale*." ECF No. 70 at 4 (emphasis added). Plaintiffs contradict themselves in arguing that lease issuance determines the end-date for the administrative record. The contention should be rejected, as should Plaintiffs' request to complete the record with the FMV analysis.

As to the second item (air quality permits and related documents), neither agency was able to find these documents in their files or otherwise determine whether they were considered in the relevant proceedings. As a result, even if the agencies were able to obtain the documents from the permitting authority, that is, the State of Utah, they could not at the present time certify them as part of either the record and, on that basis, have declined to add them to the records. In these circumstances, Plaintiffs' contention that the air quality permits and related documents must be added to the record in order to "complete" it must be rejected.

2. The Administrative Records do not Require Supplementation.

Next Plaintiffs argue that supplementation of the records is required because, in their view, the decisions are not adequately explained and relevant factors were overlooked. Relying on one of NEPA's implementing regulations, they argue there are "significant new

circumstances or information relevant to environmental concerns and bearing on" the challenged decisions, AR Motion at 12 (citing 40 C.F.R. § 1502.9(c)(1)(ii)), and that these new circumstances or information demand a supplemental EIS. In an attempt to justify an expanded record, Plaintiffs proffer fourteen reports and studies, one relating to sage grouse conservation that BLM intends to add to its record and the rest relating to climate change.[1] But as explained below, the agency considered climate change and elected not to pursue further analysis. The reasonableness of this decision – which is ultimately what Plaintiffs challenge – is properly evaluated at the merits stage of this case, not in the posture of a motion to supplement.

Plaintiffs expend considerable effort in their motion discussing the proffered documents, arguing they are needed to "help the Court assess whether [there is] significant new information about climate change [arising] after 2002 that the agencies should have addressed in a supplemental EIS." AR Motion at 14. However, this is a question for the merits. At the present stage of litigation, on a motion to supplement, the Court must make a different assessment. It must conclude that the decision not to conduct further NEPA analysis is unexplained or that relevant factors were overlooked. Plaintiffs have not made the requisite showing on either point.

[1] These include the following: a 2013 report of the U.S. Fish and Wildlife Service on sage grouse conservation objectives (Plaintiffs' Ex. 34); a 2010 report of an interagency working group on the "social cost of carbon," along with revisions prepared in 2013 and 2015 (Plaintiffs' Exs. 18-20); a 2013 document entitled "Our Changing Planet," prepared by the U.S. Global Change Research Program and three subsequent revisions (Plaintiffs' Exs. 21-24); a 2010 draft guidance on consideration of climate change and GHGs, prepared by the White House Council on Environmental Quality, and a 2014 revision (Plaintiffs' Exs. 30-31); 2014 U.S. EPA inventory of greenhouse gas emissions and sinks, and a 2015 revision (Plaintiffs' Exs. 27-28); and three additional reports on climate change (Plaintiffs' Exs. 25, 26, and 29). Except for Ex. 34, relating to sage grouse conservation, none of these reports were considered by the agencies during their 2013 and 2015 proceedings. *See* Exs. 2, 3. BLM will add the sage grouse conservation report to the record.

As discussed at the outset, Plaintiffs cannot plausibly argue that factors such as climate change, GHGs, or global warming were overlooked. The Forest Service SIR, in which BLM concurred through its DNA, forecloses any such claim. The SIR disclosed that, after the 2002 decision was made, new information about climate change had emerged. "According to the U.S. Global Change Research Program (2009)," the document explained, "global warming is unequivocal, and the global warming that has occurred over the past 50 years is primarily human-caused." ECF No. 70-7 at FS5820.

The SIR noted, nonetheless, that "[s]tandardized protocols designed to measure factors that may contribute to climate change, and to quantify climatic impacts, are presently unavailable." *Id*. As a consequence, "assessment of specific impacts . . . on global climate change cannot be accurately estimated." *Id*. The SIR added that

> specific levels of significance have not yet been established by regulatory agencies. Therefore, climate change disclosure for the purpose of this SIR [was] limited to accounting for greenhouse gas (GHG) emissions changes resulting from the combustion of fossil fuels that would contribute incrementally to climate change.

Id. After summarizing the conclusions of the FEIS, the SIR noted two limitations on conducting the sort of plenary assessment of climate change Plaintiffs demand. ECF No. 70-7 at FS5821. First, "[e]ffects from fossil fuel GHGs may not be measurable for decades or centuries and modeling is very expensive and relies on assumptions." *Id*. Second, "[p]redicting the degree of impact any single [GHG] emitter may have on global climate change, or on the changes to biotic and abiotic systems that accompany climate change, is not possible at this time." *Id*.

Given these limitations, the SIR explained that "controversy [as] to what extent GHG emissions resulting from continued mining may contribute to global climate change, as well as the[] accompanying changes to natural systems cannot be quantified or predicted at this time."

Id. Based on these considerations, the agency concluded that the effects of its decision on climate change were adequately considered in the 2002 EIS, "so there is no need for additional analysis in a supplemental EIS." *Id*.

These passages demonstrate unequivocally that the factors of concern to Plaintiffs have not been overlooked. Further, they demonstrate that the agency explained its decision not to conduct further NEPA analysis. Plaintiffs may not agree with the agencies' substantive conclusion as to why more in-depth analysis is not needed, but under controlling law, they must make their case on the basis of the record that the agencies considered.[2]

3. Supplementation is not Warranted for Plaintiffs' Purported Failure to Act Claim

Plaintiffs next argue that review of their supposed "failure to act" claim under APA section 706(1) need not be limited to the record, but they do not specify what documents they would rely on. *See* AR Motion at 5-6. In any event, no inaction claim has been pled. Plaintiffs have merely sought *leave* to plead it in a second amended complaint. ECF No. 58. Notably, leave has not been granted and Federal Defendants have vigorously opposed leave, on well-established grounds. *See* ECF No. 62 at 5-6 (Opposition Brief) (asserting that the amendment is futile in light of *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)).

In *Marsh*, the Supreme Court made clear that in cases where an agency has affirmatively determined that supplemental NEPA analysis is unnecessary (as opposed to simply ignoring the question), judicial review occurs under the "arbitrary and capricious" standard of section

[2] Should the Court conclude that the actions are not adequately explained, it is appropriate that the agencies be given the first opportunity to offer additional explanation, rather than allowing reliance on a record strategically hand-picked by Plaintiffs or relying on expensive and potentially mistargeted discovery. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (if the record does not support the action, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation").

706(2)(A), *id*. at 376, not section 706(1), as Plaintiffs wrongly contend. Thus for the same reason that the motion to amend should be denied, Plaintiffs' request to expand the record should be denied, to the extent it is premised on the existence of a well-pled inaction claim.

Further, should the Court allow amendment of the complaint, Federal Defendants would then be presumptively entitled to review on an administrative record. *See Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268 (D. Colo. 1998) (D. Colo. Oct. 22, 1998). Only after Federal Defendants prepare a new record (or add the relevant materials to the existing one) would Plaintiffs be in a position to seek a departure from the rule of record review, by filing a motion in accord with the authorities discussed above and arguing that extra-record evidence is appropriate. Plaintiffs instead attempt to sidestep the normal processes.

Although it does not appear that this Court has considered the question, the District of Colorado has considered and rejected Plaintiffs' argument. *See Sierra Club*, 26 F. Supp. 2d 1268. There, the court explained that the judicial review provisions of the APA

> do not distinguish between a claim that an agency unlawfully failed to act and a claim based on action taken. In both cases, the court's review of the defendant agencies' actions is generally confined to the administrative record. The APA expressly states, at 5 U.S.C. § 706, "In making the foregoing determinations [under § 706(1) and (2)], the court shall review the whole record or those parts of it cited by a party ..."

Id. at 1271; *see also Cross Timbers Concerned Citizens v. Saginaw*, 991 F.Supp. 563, 570 (N.D.Tex.1997) (judicial review under § 706(1) and (2) is based on the administrative record already in existence).

Plaintiffs' motion does not address these decisions and instead relies on a Ninth Circuit decision in *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000). That decision, however, does not address the specific language of APA section 706 requiring that the court's determinations, under either section 706(1) and 706(2), be based upon an administrative

record. Further, any reading of *Friends of the Clearwater* as not requiring an administrative record (in circumstances where an agency has affirmatively decided against supplementation) is inconsistent with the Supreme Court's decision in *Marsh*, where the agency affirmatively decided that supplementation is not required. In contrast, *Friends of the Clearwater*, involved an agency's "refusal to prepare a supplemental environmental impact statement." *Id*. at 554 (9th Cir. 2000). This circumstance is not present here.

In sum, Plaintiffs fail to meet their burden of demonstrating a need for supplementation and their request for same should be denied.

4. Discovery is Unwarranted.

Finally, Plaintiffs request limited discovery relating to a supposed change of position by the agencies on the need to supplement an environmental impact statement ("EIS") prepared to support decision-making efforts. They focus on statements by agency employees in 2011, but these employees' personal (and preliminary) views that supplementation is required cannot bind the agencies. As one court has stated in regard to informal statements by agency personnel on the need for an EIS, "it would hardly make sense to hold the [agency] bound by the informal statements of its employees." *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 243 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993) (citing *American Trucking Assns. v. Atchinson, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967) (an agency "faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation"). Following formal consideration, the Service and BLM each decided, in 2013 and 2015, that supplementation is not warranted. The existence of a contrary view, at a time when the adequacy of the 2002 analysis had not been assessed, is no reason to depart from the rule of record review, particularly where the records explain and justify the agencies' conclusions.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the AR Motion be denied.

Respectfully submitted this 8th day of November, 2016.

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