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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,

Plaintiff,

v.

THOMAS E. RASMUSSEN, Field Manager,
Lakeview Resource Area, **SHIRLEY**
GAMMON, District Manager, Lakeview
District BLM, **GALE A. NORTON**, Secretary,
U.S. Department of the Interior, **BUREAU OF**
LAND MANAGEMENT, and **U.S.**
DEPARTMENT OF THE INTERIOR,

Defendants.

Civil No. 05-1616-AS

MEMORANDUM IN
SUPPORT OF
MOTION TO COMPEL
SUPPLEMENTATION OF
ADMINISTRATIVE
RECORD

EXPEDITED HEARING
REQUESTED

Based on the following points and authorities, Plaintiff respectfully requests that this Court order Defendants to supplement the administrative record for this case with missing portions of a document previously submitted to Defendants. Specifically, Plaintiff requests that Defendants produce 101 related pages of a report entitled “Wilderness Inventory Recommendations: Lakeview BLM District.” The 101 pages include: a cover page, a two-page cover letter, a table of contents, three pages of maps, 13 pages of text, and 81 color photographs.

FACTS RELEVANT TO THIS MOTION

Plaintiff filed the complaint in this case on October 21, 2005. On December 8, 2005, the parties submitted a proposed stipulated scheduling order, which set December 12, 2005 as the deadline for the United States to lodge its administrative record and January 13, 2006 as the deadline for Plaintiff to file its motion for summary judgment. Because activity on the challenged decision is scheduled for the spring, the parties set a concise schedule so as to avoid the need for Plaintiff to move for a preliminary injunction at that time.

Defendants did submit an administrative record (“AR”) on December 12, 2005, containing most relevant documents. However, the administrative record produced does not include portions of a document at the heart of the case: a wilderness inventory submitted by Plaintiff to Defendant Bureau of Land Management (“BLM”). The document is important because both Claims for Relief in this action focus on, either in whole or in part, the BLM’s consideration of the wilderness resource in making the challenged final decision—including whether the agency considered Plaintiff’s wilderness inventory information. See Compl. at ¶¶ 32-43. Plaintiff now asks that the Court order Defendants to supplement the record with the relevant portions of that document.

ARGUMENT

I. DEFENDANTS MUST PRODUCE THE WHOLE RECORD FOR THE DECISION.

Plaintiff alleges that Defendants’ East-West Gulch Projects decision violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-61, and the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-84. Because neither of these statutes includes a provision specifically allowing judicial review of the claims in this case, Plaintiff seeks judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, which provides

for the review of “final agency action.” 5 U.S.C. § 704. The APA provides that in making its decision, “the court shall review the whole record or those parts of it cited by a party” 5 U.S.C. § 706 (emphasis added).

Courts have interpreted this provision to mean that review of an agency action must be based upon the full administrative record before the agency at the time it made its decision. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). “‘The whole record’ includes everything that was before the agency pertaining to the merits of its decision.” Portland Audubon Soc. v. Endangered Species Committee, 984 F.2d 1534, 1545 (9th Cir. 1993) (quoting Thompson v. U.S. Dep’t of Labor, 885 F.2d 551, 555-56 (9th Cir. 1989)). A complete record is vital to the court’s review of an agency action. Portland Audubon Soc’y, 984 F.2d at 1548 (also noting that “[i]f the record is not complete, then the requirement that the agency decision be supported by ‘the record’ becomes almost meaningless.”)

The whole administrative record is not necessarily those documents that the agency has unilaterally compiled and submitted. Rather, it consists of “all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.” Thompson, 885 F.2d at 555 (internal quotation marks omitted, emphasis in original). An agency may not submit a record to the court that contains only documents that might be favorable to the agency’s decision and which omits documents that it had, but that are contrary to its decisions and may bear upon the decision of the court. Nat’l Wildlife Fed’n v. Burford, 677 F.Supp. 1445, 1457 (D. Mont. 1985). Nor may an agency exclude information clearly before it on the grounds that it did not rely on such information. Fund for Animals v.

Williams, 245 F.Supp.2d 49, 55 (D.D.C. 2003); Ad hoc Metals Coalition v. Christine Whitman, 227 F.Supp. 2d 134, 139 (D.D.C. 2002).

II. PLAINTIFF’S WILDERNESS INVENTORY IS PART OF THE WHOLE RECORD BECAUSE IT WAS BEFORE DEFENDANTS AT THE TIME DEFENDANTS MADE THEIR FINAL DECISION.

Plaintiff’s wilderness inventory is a necessary part of the whole record because it was before Defendants at the time Defendants made their final decision (in which Defendants acknowledged the Inventory). The report, titled “Wilderness Inventory Recommendations: Lakeview BLM District” (“Inventory”), is 232 pages in length. It includes extremely detailed information on the wilderness characteristics for an area referred to as the Spaulding Proposed Wilderness Study Area Addition, which encompasses the East-West Gulch Projects planning area. The portion of the report relating to the Spaulding Addition is 101 pages in length, which includes the cover page, two-page cover letter, table of contents, three maps, 13 pages of text, and 81 photographs.

Plaintiff first supplied portions of the Inventory as an attachment to its comments on the Environmental Assessment, dated March 9, 2005. On March 29, 2005, the BLM issued a “Proposed Decision.” On April 1, 2005, Plaintiff submitted its full, 232-page inventory, titled “Wilderness Inventory Recommendations: Lakeview BLM District” (“Inventory”), along with a cover letter, to the Lakeview District BLM. Plaintiff submitted an administrative protest of the project on April 17, 2005. Finally, Defendants issued a protest response and “final decision” dated May 13, 2005. See Compl. at ¶¶ 25-27. In the BLM’s protest response letter, the Field Manager announced his “final decision” to implement the proposed project. AR tab 46 at 7.

Defendants acknowledged the Inventory was before them in their protest response and final decision, in which the BLM acknowledged receipt of “your recent Wilderness Inventory

Recommendation report (2005)” and cited both the text and a map of the Inventory. AR tab 46 at 4 (citing Inventory text at page 209 and Inventory map at page 216). Defendants further acknowledge receipt of the Inventory by placing the cover letter, dated April 1, 2005, in the AR at tab 43. However, Defendants only placed 13 pages of the report in the AR, excluding all of the maps and photographs. See AR tab 37 attachment.

Because the Inventory was “before the agency” before it made its final decision, and pertained to the merits of its decision, the Inventory is part of “the whole record.” Portland Audubon Soc., 984 F.2d at 1545. And because the “court shall review the whole record or those parts of it cited by a party,” 5 U.S.C. § 706, it belongs in the administrative record.

For the foregoing reasons and because of the concise briefing schedule, Plaintiff respectfully requests that this Court order Defendants to supplement the administrative record in an expedited fashion with the 101 relevant pages of Plaintiff’s wilderness inventory.

DATED this 22nd day of December, 2005.

Respectfully Submitted,

s/ Kristin F. Ruether

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Oregon Natural Desert Association

Of Attorneys for Plaintiff