

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FILED

MAR 12 2020

Clerk, U.S. District Court
District Of Montana
Missoula

WILDEARTH GUARDIANS, et al.,

Plaintiffs,

and

SWAN VIEW COALITION, et al.,

Consolidated Plaintiffs,

vs.

BILL MULHOLLAND,¹ et al.,

Defendants,

and

DAVID BERNHARDT, et al.,

Consolidated Defendants.

Lead Case No.
CV 19-56-M-DWM

Member Case No.
CV 19-60-M-DWM

ORDER

In these consolidated cases, environmental groups challenge decisions by the Forest Service and Fish and Wildlife Service regarding the 2018 Forest Plan for the Flathead National Forest. Plaintiffs seek an order compelling Defendants to complete and supplement the administrative record. (Docs. 42, 45.) For the following reasons, the motion is granted in part and denied in part.

¹Bill Mulholland is substituted for Chip Weber. Fed. R. Civ. P. 25(d).

LEGAL STANDARDS

Judicial review of agency action under the Administrative Procedure Act (“APA”) is based on “the whole record” that existed at the time the agency made its decision. 5 U.S.C. § 706. The whole record “consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis omitted). If necessary, a reviewing court may order an agency to complete or supplement the administrative record.

As used here, completing the record means adding materials the agency considered but did not initially include as part of the administrative record. *Bruce v. Azar*, 389 F. Supp. 3d 716, 724 n.5 (N.D. Cal. 2019). While the agency’s certification of the record is entitled to a presumption of completeness, that presumption can be overcome by clear evidence that the agency relied on materials not already included in the record. *In re United States*, 875 F.3d 1200, 1206 (9th Cir.) *vacated on other grounds*, 138 S. Ct. 443 (2017).

Supplementing the record means adding materials the agency did not consider but that are necessary to effective judicial review. *Bruce*, 389 F. Supp. 3d at 724 n.5. Supplementation with extra-record material is appropriate in four limited circumstances: (1) to determine whether the agency considered all relevant factors and explained its decision, (2) when the agency relied on documents not in

the record, (3) to explain technical terms or complex subject matter, or (4) upon a showing of agency bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). These exceptions are narrowly construed and the party seeking to supplement the record bears a heavy burden. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

ANALYSIS

I. Completing the Record with Deliberative Materials

Plaintiffs argue that Defendants improperly omitted internal deliberative materials from the administrative record. Defendants respond that deliberative materials are not part of the administrative record in the first place. This Court has consistently held that deliberative materials are properly included in the administrative record under the Ninth Circuit's broad definition of what counts as "the whole record." Order, *Ksanka Kupaqa Xa'tçin, et al. v. U.S. Fish & Wildlife Serv. et al.*, No. CV 19-20-M-DWM (D. Mont. Mar. 9, 2020) (Doc. 64); *Ctr. for Bio. Diversity v. Bernhardt*, No. CV 19-109-M-DLC, 2020 WL 1130365 (D. Mont. Mar. 9, 2020); *Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2018 WL 1796217 (D. Mont. Apr. 16, 2018). Defendants' admission that deliberative materials were omitted overcomes the presumption that the administrative record is complete. *Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017). Plaintiffs have met

their burden to compel completion of the administrative record.

II. Supplementing the Record with the Mid-Swan Scoping Document

Plaintiffs argue supplementing the record with the Mid-Swan Scoping Document (Doc. 44-3) is necessary to determine whether Defendants considered all relevant factors and explained their decision. *See Lands Council*, 395 F.3d at 1030. The Mid-Swan Scoping Document is the first draft of a proposed landscape restoration project on the Flathead National Forest that will be implemented under the 2018 Forest Plan. (Doc. 44-3 at 4.) The project calls for 60 miles of new roads. (*Id.* at 24.) Plaintiffs argue the Mid-Swan Scoping Document shows Defendants failed to consider that the 2018 Forest Plan's road standards will result in significantly increased road construction.

However, admitting extra-record evidence is only proper to "plug holes in the administrative record." *Lands Council*, 395 F.3d at 1030. Here, Plaintiffs have not explained why the existing record is inadequate. Rather, their argument focuses on the 2018 Forest Plan's consequences, specifically wide-spread road construction. But the relevant factors exception "does not permit district courts to use extra-record evidence to judge the wisdom of agency action." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014).

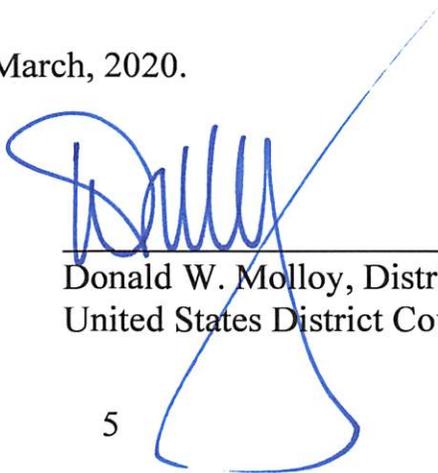
To be sure, 60 miles of new road is alarming, especially given past experience with non-compliance. *See All. for the Wild Rockies v. Probert*, 412 F.

Supp. 3d 1188, 1198 (D. Mont. 2019). Plaintiffs suggest that the 2018 Forest Plan says there will be no changes in road densities, while the Mid-Swan Scoping Document proves that false. This hints at agency bad faith, which can be grounds for supplementing the record. *Lands Council*, 395 F.3d at 1030. But Plaintiffs do not make that argument and, in any event, a strong showing of impropriety is required before the bad faith extra-record exception can be invoked. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988). Plaintiffs have not met, on this record, the heavy burden to show that the Mid-Swan Scoping Document is necessary to judicial review.

CONCLUSION

IT IS ORDERED that the motion to complete and supplement the administrative record (Doc. 42) is GRANTED granted with respect to deliberative materials and DENIED with respect to the Mid-Swan Scoping Document. Defendants shall complete the administrative record with deliberative materials within 60 days of the date of this Order. Any documents withheld shall be identified in a privilege log.

DATED this 12th day of March, 2020.



Donald W. Molloy, District Judge
United States District Court