Marianne Dugan, Oregon State Bar # 932563
Internet e-mail address mdugan@mdugan.com
259 E. 5th Ave., Ste 200-D
Eugene, OR 97401
(541) 338-7072
Fax no. 866-650-5213
Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

PARTNERS IN FORESTRY COOPERATIVE; NORTHWOOD ALLIANCE, INC.; JOE HOVEL; ROD SHARKA; SHERRY ZOARS; STEVE GARSKE; RICH SLOAT; SID HARRING; and CATHERINE PARKER,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; ROBERT D. DELICH and LISA DELICH,

Defendants.

No. 2:12-cv-00184-RHB

PLAINTIFFS' RESPONSE TO MOTION TO STRIKE LAND EXCHANGE APPRAISAL FROM RECORD

---

**INTRODUCTION**

Plaintiffs object to the federal defendant's motion to strike from the record the excerpts of the appraisal of the federal lands in the land exchange that is the subject of this lawsuit. For ease of reference, rather than simply incorporating by reference their brief supporting submission of the appraisal to the court (Docket 72), the plaintiffs resubmit herein the arguments set forth in that brief, and augment those arguments with the following points. Plaintiffs first submit additional factual background and supplemental legal authority, and after that resubmit the earlier briefing.

## I. ADDITIONAL FACTUAL BACKGROUND

Plaintiff Joe Hovel explains in the declaration submitted herewith that he obtained the appraisal documents from the Forest Service itself. They clearly were in the possession of the agency.

## II. SUPPLEMENTAL AUTHORITY DEMONSTRATING THAT THE RECORD INCLUDES AGENCY DOCUMENTS THAT WERE NOT SPECIFICALLY REVIEWED BY THE DECISON-MAKER

In addition to the authority already submitted to the Court in Dkt 72, plaintiffs submit the following authorities.

The government's motion is misguided. Plaintiffs are not relying – and need not rely – on an "exception" to the record review rule, because these documents are *per se* part of the actual "whole record" the agency had before it. Under the APA, the court is required to review the agency's decision based on the "whole record." The voluntary time limits set by the parties cannot trump that statutory requirement.

As for the conferral issue, the plaintiffs submitted this document in affidavit/declaration form (as opposed to making a motion) because plaintiffs had promised in their summary judgment brief to identify the location of the appraisal documents in the voluminous administrative record when they were located. As explained in the prior briefing, it was shocking to plaintiffs' counsel that the appraisals turn out not to be in the record. The appraisal is a detailed description of the lands the public would lose if the exchange were finalized.

In Miami Nation of Indians of Indiana v. Babbitt, 979 F. Supp. 771 (N.D. Ind. 1996), the court rejected the agency's argument that "items are not part of the administrative record unless they were reviewed in some fashion by the ultimate decisionmaker." The court therefore

granted the plaintiff's motion to complete or supplement the administrative record, in part, because "a document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record." 979 F. Supp. at 777 (quoting Clairton Sportsmen's Club v. Pennsylvania Turnpike Commission, 882 F. Supp. 455, 464 (W.D. Penn. 1995)).

In the Miami Nation decision, the court explained:

> The United States also objects that it should not have to include in the administrative record all notes, personal logs and working papers, arguing that these items are not part of the administrative record unless they were reviewed in some fashion by the ultimate decision maker, who in this case was the Assistant Secretary of Indian Affairs. However, "a document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record." Clairton Sportsmen's Club v. Pennsylvania Turnpike Commission, 882 F. Supp. 455, 464 (W.D. Penn. 1995). Further, the United States already has included "extensive field notes and logs of field interviews, handwritten notes and data, and certain other notes and analyses" in the administrative record. The inclusion of these materials either belies the assertion that the Assistant Secretary only reviewed limited materials in rendering a decision, or suggests that the United States included these materials even though they never crossed the Assistant Secretary's desk. In any event, it supports the conclusion that the notes, logs, etc., should not be excluded across the board.

See also People of State of Cal. ex rel. Lockyer v. U.S. Dept. of Agriculture, 2006 WL 708914, *4 (N.D. Cal. 2006) (citing with approval Miami Nation); American Wild Horse Preservation Campaign v. Salazar, 859 F. Supp. 2d 33 (D.D.C. 2012)

Indeed, the U.S. Department of Justice's Environment and Natural Resources Division has stated in its "Guidance to Federal Agencies on Compiling the Administrative Record" (1999), that the record should include "documents and materials which were before or available to the decision-making office," including those that "were not specifically considered by the final agency decision-maker"). Exhibit B at 2.

The Forest Service's review of the appraisal is only a few pages in length. It is more about how the appraiser did the work than about the actual appraisal. It would be against the public interest to keep from the public, and from this Court, the actual relevant pages of the appraisal. The submitted excerpts from the appraisal containd critical information that is relevant to the Forest Supervisor's decision.

## III. AS EXPLAINED IN THE EARLIER BRIEF, IT IS APPROPRIATE FOR THE COURT TO CONSIDER THE EXCERPTS OF THE APPRAISAL

The appraisal was referred to on pages 9-10 of plaintiffs' summary judgment reply brief (Dkt 71). The appraisal excerpts were attached to the earlier briefing as Exhibit A. The undersigned attorney for the plaintiffs made statements in that earlier briefing/declaration based upon her personal knowledge, and she is competent to testify to the matters stated herein.

### A. Description of Excerpts Submitted

One of the plaintiff groups obtained the appraisals prior to this litigation being filed, by way of a Freedom of Information Act request. The plaintiffs' copy unfortunately has some highlighting and notations, but that is the only copy available to plaintiffs' counsel. Plaintiffs' counsel requested a clean copy be filed by the Forest Service, but the Forest Service counsel was not willing to do so.

The appraisal of the federal lands is nearly 300 pages long. Plaintiffs submit the following excerpts which provide important background information:

- Exhibit A at 1 through 11 - Forest Service staff review, confirming that staff reviewed the full appraisal and approved of its findings and conclusions.

- Exhibit A at 12 - cover of appraisal noting it was prepared "for" the U.S. Forest Service.

- Exhibit A at 13 – table of contents.

- Exhibit A at 14 through 17 - photos of federal lands proposed for privatization.

- Exhibit A at 18 - document cited on page 10 of plaintiffs' summary judgment reply brief (in paragraph (a)).

- Exhibit A at 19 - document cited on page 10 of plaintiffs' summary judgment reply brief (in paragraph (b)).

- Exhibit A at 20 - document cited on page 10 of plaintiffs' summary judgment reply brief (in paragraph (c)).

- Exhibit A at 21 - map showing location of Wildcat Falls.

### B. The Land Exchange Statute and Regulations Required the Agency (The "Secretary") to Review and Consider the Appraisal

43 U.S.C. 1716 is the statute that allows the federal government to conduct land exchanges. That statute requires that:

> The values of the lands exchanged by the Secretary under this Act and by the Secretary of Agriculture under applicable law relating to lands within the National Forest System either shall be equal, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary concerned as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

43 U.S.C. 1716(b). In order to comply with this equalization requirement, the statute requires "the Secretary concerned and other party or parties involved in the exchange" to "**arrange for appraisal**" of the lands; and requires **"submission of an appraisal or appraisals for review and approval by the Secretary."** Id. (d) (emph. added). See also 43 C.F.R. 2200.0-6(c) ("An exchange of lands or interests shall be based on market value **as determined by the Secretary through appraisal(s),** through bargaining based on appraisal(s), or through arbitration.") (emph.

added).

### C. The True Administrative Record Includes All Documents That Were Before the Agency Pertaining to the Decision to Be Made

More than forty years ago, in a case that arose in the Sixth Circuit, the Supreme Court explained that under the Administrative Procedure Act (APA), "review is to be based on the full administrative record that was before the Secretary at the time he made his decision." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (citing 5 U.S.C. 706). Because the lower court in Overton Park did not have the full record for review, the Supreme Court remanded.

The "whole record" subject to review under the APA is not merely those documents the agency has designated as the administrative record, but rather "includes everything that was before the agency pertaining to the merits of its decision." Portland Audubon Soc'y v. Endangered Species Comm'n, 984 F.2d 1534, 1548 (9th Cir. 1998). A complete record is necessary for judicial review. "An incomplete record must be viewed as a 'fictional account of the actual decisionmaking process.' . . . If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." Id. at 1548.

> The whole administrative record [] is not necessarily those documents that the agency has compiled and submitted as "the" administrative record. The "whole" administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decisionmakers and includes evidence contrary to the agency's position.

Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (citations and quotations omitted; emphasis added). "If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." Portland Audubon Society, 984 F.2d at 1548.

In several reported opinions, the federal courts have rejected government arguments that "items are not part of the administrative record unless they were reviewed in some fashion by the ultimate decisionmaker." Miami Nations of Indians of Ind. v. Babbitt, 979 F. Supp. 771, 777 (N.D. Ind. 1996). In Miami Nations, the court granted the plaintiff's motion to complete or supplement the administrative record, in part, because "a document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record."

In Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978)), an agency had "highly relevant" documents in its files, but asserted that those documents were "not considered by EPA to be part of the record as not relied upon in reaching its final order." Environmental Defense Fund, 458 F. Supp. at 661. The court flatly rejected the agency's attempt "to exclude from consideration pertinent material submitted as an integral part of the rulemaking process or otherwise located in EPA's own files." Id. The court went on to rule that the "agency may not [] skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceedings in question." Id.

"Publicly available reports, especially those relating to relevant issues and drafted as a result of an agency request, should be considered by the agency and therefore should be included in the administrative record." Ad Hoc Metals Coalition v. Whitman, 227 F. Supp. 2d 134, 142 (D.D.C. 2002). See also Envtl. Def. Fund v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978) (an agency may not excluded from the record "information in its own files which has great pertinence to the proceeding in question.").

Plaintiffs' counsel is aware of no authority for the novel proposition that the administrative record includes only documents that were reviewed by the actual decision-maker.

It stretches credulity to believe that the decision-maker in this case reviewed the entire 5000-page record. For example, more than 700 pages of the record are specialist reports and their supporting documentation in the fields of aquatics, botany, GIS data, heritage, recreation, soils, vegetation, and wildlife. Forest Service decision-makers, not surprisingly, delegate review of such minutiae to their specialists, and rely upon the specialists' summaries and reports. There is no rational explanation for treating the appraisal documents differently.

### D. Key Project Documents, and the Appraisal Review Document, Make Clear That the Agency Fulfilled its Duty to Review the Appraisal as Part of its Decision-making Process

The appraisal of the federal lands was clearly commissioned by the Forest Service, and Forest Service staff were involved in the legwork for the appraisal preparation. "During the summer of 2010, the Forest Service contracted with Compass Land Consulting to appraise 320 acres of federal land for possible exchange with Robert and Lisa Delich." Ex. A at 5.

> In September 2010, Contracting Officer Cathy Ansami awarded an appraisal contract to Compass Land Consulting and issued a notice to proceed. On September 22, 2010, a case specific assignment letter was sent to the appraiser by Teresa DeMuri, Review Appraiser and Contracting Officer's Representative. A pre-work meeting was conducted via phone conversation on September 24, 2010, between appraiser Bill Steigerwaldt and Ms. DeMuri. On October 20, 2010 Compass Land Consulting submitted electronic versions of the appraisal report for review. Ms. DeMuri sent questions concerning the report to Mr. Steigerwaldt on November 2, 2010. Ms. DeMuri and Mr. Steigerwaldt discussed the questions on November 5, 2010. The questions focused on minor clarifications. On November 10, 2010 Compass Land Consulting delivered 3 paper copies of the final appraisal report.

Ex. A at 5.

The appraisal of the federal lands was also clearly approved and adopted by the Forest Service. Ex. A at 1-11. The Forest Service's review document notes:

> The Ottawa National Forest Supervisor is considered the client for this review

> assignment and the intended users of this review report are the U.S. Forest Service and exchange proponent. . . . The intended use of this review report is to document appraisal report approval for agency use in negotiating the exchange of the subject parcel.

Ex. A at 4. The Forest Service reviewer stated that based on her review of the complete appraisal document, she found:

> The report was clearly written and is complete in terms of appropriate standards and the intended use. The appraiser did a good job of identifying the elements of value and explaining adjustments. Adjustments were reasonable and correctly applied. There were no significant mathematical errors or omissions. In my opinion, the appraiser's analyses, opinions, and conclusions are reasonable.
>
> Approval:
>
> In my opinion, the appraisal adequately meets the Uniform Standards of Professional Appraisal Practice and the Uniform Appraisal Standards for Federal Land Acquisitions. Therefore, I hereby approve agency use of the appraisal under review which concluded a market value of $290,000, as of July 1,2010.

Ex. A at 8.

The decision-maker explicitly purported to rely upon the appraisal. The October 2011 Revised Environmental Assessment (EA) (Document J02-02, PDF label AR001554) states::

> This proposal entails an exchange of approximately 320 acres of Federal land for approximately 421 acres of Non-Federal land all within Ontonagon County, Michigan. As previously stated, by federal regulation this exchange is based on value-for-value and not acre-for-acre. The overall value of the 421 acres offered by the proponent does not equal the value of the 320 acres of NFS land, but the difference in value is within the allowable range. The Federal Land Policy and Management Act of 1976 requires that the non-Federal and Federal properties involved in an exchange proposal, if not equal in value, can be made equal by either party by payment of cash not to exceed 25 percent of the Federal value. **A valuation of the properties in this exchange has been completed by a licensed and qualified appraiser and based on that work it was concluded that this exchange meets the requirement under the law. A final appraisal will be conducted to determine the exact values of the Non-Federal and Federal property and the amount of cash equalization required**. The decision document will stipulate the ultimate configuration and size of the exchange if approved.

AR 1568 (emph. added).

In the responses to public comment on the 2011 Revised EA, the Forest Service assured the public:

> The federal and nonfederal land appraisals were completed by a licensed and qualified appraiser. The appraisals were then reviewed and approved for use by Forest Service Qualified Review Appraiser. The determination of market value or monetary value of the lands proposed for exchange meets all federal requirements which govern such an exchange.

AR 1736.

In the December 2011 revised Decision Notice/Finding of No Significant Impact (DN/FONSI) (document K-01-001, PDF label AR001886), the Forest Service stated: "Appraisals for the federal and non-federal lands were approved for agency use on August 27, 2010, with an effective value on July 2010." AR 1889-90.

**CONCLUSION**

It was irrational for the Forest Service to omit the appraisals from the administrative record. The controlling case law and the APA itself require that the Court review the entire record. That record includes the appraisals, because they were key documents that were before the agency when it made its decision.

The Court should deny the federal defendant's motion to strike, and should feel free to consider the limited excerpts from the appraisal which plaintiffs have submitted to the Court.

/s/ Marianne Dugan
Marianne Dugan, Oregon State Bar # 932563
Attorney for Plaintiffs
259 E. 5th Ave., Ste 200-D
Eugene, Oregon 97401
(541) 338-7072
mdugan@mdugan.com