

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY, et al.,)	
)	
<i>Plaintiffs,</i>)	Lead Case No. 1:20-cv-00855-APM
)	
v.)	Member Case No. 1:20-cv-00860-
)	APM
DAVID BERNHARDT, et al.,)	
)	
<i>Defendants,</i>)	RANCHERS’ RESPONSE TO
)	MOTIONS TO COMPLETE AND
and)	SUPPLEMENT THE
)	ADMINISTRATIVE RECORD
STATE of WYOMING and UPPER GREEN)	
RIVER CATTLE ASSOCIATION, et al.,)	
)	
<i>Defendant-Intervenors.</i>)	
)	

INTRODUCTION

Plaintiffs are requesting an extraordinary remedy that they do not need, in the name of providing assistance to the Court that it does not require, tactically using and reiterating “evidence” that ultimately has no utility in this case. Plaintiff Western Watersheds Project seek to compel the inclusion of May 7, 2020 Declaration of Dr. David Mattson (ECF No. 37-15) as a supplement to the administrative record (“AR”) in this case, arguing that it is “necessary to facilitate effective judicial review of Plaintiffs’ claims challenging FWS’s ‘no jeopardy’ determination” under the Endangered Species Act. ECF No. 37-1 at 2 (citing 16 U.S.C. §§ 1536(a)(2) and (b)(3)(A); 50 C.F.R. § 402.14(g)). However, the Court’s review of the agency actions at issue here will not be aided by this last-minute declaration and this record review case should not be muddled with such extra-record assertions. For the reasons discussed below, Plaintiffs’ motion to supplement the record should be denied.

Intervenor-Defendants, the Upper Green River Cattle Association, Sommers Ranch, LLC, Price Cattle Ranch, Murdock Land and Livestock Co., and the Wyoming Stock Growers Association (collectively “Ranchers”), submit this Response to Plaintiffs’ Motion to Complete and Supplement the Administrative Record (ECF No. 37) (“Pls.’ Mot.”) and Plaintiffs’ Memorandum of Points and Authorities in Support of their Motion (ECF No. 37-1) (“Pls.’ Mem.”).

Ranchers oppose the motion to supplement the AR with Dr. Mattson’s statements (ECF No. 37-1 p. 12-18), but take no position on the combined motions to complete the AR. (ECF No. 36); (ECF No. 37-1, p. 6-11).¹ Specifically, Ranchers defer to Federal Defendants’ response regarding the contentions raised in pages 6 to 11 of Western Watersheds Project’s brief (ECF No. 37-1) as well as the entirety of the Center for Biological Diversity’s brief (ECF No. 36-1).

ARGUMENT

Supplementing an administrative record with information admittedly not before the agency when it made a challenged decision is an extraordinary remedy that is disfavored by courts. Under the APA’s legal framework, “[a] reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” *Oceana, Inc. v. Ross*, 2020 WL 1905148 at *3 (D.D.C. 2020) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). As such, the general rule is that “neither party is entitled to supplement that record with litigation affidavits or other evidentiary material that was not before the agency.” *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991). A court will not allow parties to supplement the record “unless they can demonstrate unusual circumstances justifying a departure from this general rule.” *Am. Wildlands v.*

¹ Ranchers defer to the description of this case’s factual background contained in the State of Wyoming’s brief (ECF No. 40) opposing supplementation of the AR.

Kemphorne, 530 F.3d 991, 1002 (D.C. Cir. 2008). Moreover, this exception has become increasingly narrow; indeed, “the trend in the D.C. Circuit has been towards limiting the circumstances in which district courts may consider evidence outside the administrative record[.]” *Oceana*, 2020 WL 1905148, at n. 5 (citing *United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 4 (D.D.C. 2017)) (internal quotes omitted).

In the D.C. Circuit, an agency’s record may be supplemented in three isolated instances: (1) if the agency “deliberately or negligently excluded documents that may have been adverse to its decision,” (2) if background information was needed “to determine whether the agency considered all the relevant factors,” or (3) if the “agency failed to explain administrative action so as to frustrate judicial review.” *Am. Wildlands*, at 1002. Here, Plaintiffs only claim the second and third exceptions apply. *See* Pls’ Memo. at 12. However, the facts at hand demonstrate that none of the limited exceptions to the rule against record supplementation apply here.

A. The Federal Defendants Properly Considered all Relevant Factors.

Concerning the “relevant factors” exception, Plaintiffs acknowledge that they bear a heavy burden in trying to introduce extra-record evidence:

... “[t]o satisfy the ‘relevant factors’ exception, ‘the document in question must do more than raise ‘nuanced points’ about a particular issue; it must point out an ‘entirely new’ general subject matter that the defendant agency failed to consider.” . . . The “relevant factor” exception assists the Court in determining whether the agency “entirely failed to consider an important aspect of the problem.” . . . The *Oceana II* Court found that where the record “is completely ‘silent’ as to whether the agency considered” alleged important factors, and where a declaration “points out. . . gaps in the agency’s analysis and explains in detail why” it is necessary to consider the important factors, supplementation of the record with expert declarations is proper.

Pls.’ Mem. at 13 (citing *Oceana*, 2020 WL 1905148, at *4) (emphasis in original, citations omitted). Plaintiffs then argue that the Federal Defendants failed to consider factors such as whitebark pine availability, the lack of army cutworm moths, and the specific effects of livestock

conflicts with female grizzly bears. Pls.' Mem. at 13-16. Here, Plaintiffs fail to demonstrate that the Federal Defendants "entirely failed" to consider these various factors because both the record as a whole and the 2019 BiOp in particular are demonstrably *not* "silent" on these points. In reality, there are multiple scientific studies on each of these topics contained within the record and each of these topics is analyzed in the 2019 BiOp.

Plaintiffs first assert that "the agencies failed to discuss the correlation between the decline in whitebark pine availability and the rise in livestock conflicts in the UGRA Project area." Pls.' Mem. at 13-14. But this is not accurate. Whitebark pine availability was specifically analyzed in the following study: *Whitebark Pine, Population Density, and Home-Range Size of Grizzly Bears in the Greater Yellowstone Ecosystem* (Bjornlie 2014). More broadly, the opportunistic and widely omnivorous (and therefore divergent) dietary habits² of grizzly bears were documented in the collaborative *Response of Yellowstone grizzly bears to changes in food resources: a synthesis* (Interagency Grizzly Bear Study Team. 2013). These and other related sources pertaining to the relationship between grizzly populations/range and food availability (including whitebark pine) is contained in the record (FWS_006058) and was cited and relied upon by FWS in the 2019 BiOp. See FWS_000672, 000671, 000677, 000713.

Plaintiffs next assert that "the agencies failed to disclose the lack of army cutworm moths in or near the project area." Pls.' Mem. at 14-15. But again, this is not accurate. The presence of army cutworm moths within the UGRA Project Area was specifically analyzed in the following study: *Assessment of pesticide residues in army cutworm moths (Euxoa auxiliaris) from the Greater Yellowstone Ecosystem and their potential consequences to foraging grizzly bears (Ursus*

² Ranchers refer to the Federal Defendants' observation (ECF No. 41 at 21) that the Forest Service's Final Environmental Impact Statement fully considered the issues of putative correlations between whitebark pine availability and livestock conflicts as well as the absence of cutworm moth sites within the UGRA Project Area.

arctos horribilis) (Robison 2006). This and other related sources pertaining to the relationship between grizzly populations/range and food availability (including cutworm moths) is contained in the record (FWS_004232) and was cited and relied upon by FWS in the 2019 BiOp. See FWS_000671, 000720.

Plaintiffs next assert that even though a “mortality sink” is acknowledged by USFS to exist in the UGRA Project Area, “the record is silent on the impacts this mortality sink has on female grizzly bears in connection with authorizing the lethal take of an additional 72 grizzly bears with no limitation on female deaths.” Pls.’ Mem. at 15. Yet again, this is not accurate. The behavior and status of female grizzlies within the UGRA Project Area—including the impacts of lethal removal—was specifically analyzed in at least three studies: *Evaluation of Rules to Distinguish Unique Female Grizzly Bears With Cubs in Yellowstone* (Schwartz 2008); *Appraising status of the Yellowstone grizzly bear population by counting females with cubs-of-the-year* (Knight 1995); and *Mortality Patterns and Population Sinks for Yellowstone Grizzly Bears, 1973-1985* (Knight 1988). Each of these studies are contained in the record, along with multiple other related studies. See FWS_005085 (Schwartz 2008), FWS_002896 (Knight 1995), and FWS_002309 (Knight 1988). This topic is discussed at length in the 2019 BiOp. See FWS_000671, 000676-77,000681-82, 000685, 000695, 000699, 000701, and 000713-20.

In sum, Plaintiffs wholly fail to meet the heavy burden of showing that the Federal Defendants “entirely failed to consider an important aspect of the problem” or that the record is “completely silent” on the subjects of whitebark pine, army cutworm moths, or female grizzly mortality. The record reflects thorough consideration of these issues, as does the 2019 BiOp.

B. The Mattson Declaration will not Assist Judicial Review.

Regarding the third *American Wildlands* element, Plaintiffs make the general argument that the Mattson Declaration is necessary to “facilitate effective judicial review” of the case in

order to remedy a “gross procedural deficiency”—namely, the three factors described above. Pls. Mem. at 17-18. Plaintiffs have no factual support for this claim since, as shown above, the record as a whole and the 2019 BiOp in particular contains often significant discussion of whitebark pine and army cutworm moths on grizzly populations, as well as the impacts of management techniques on female grizzly bears. Plaintiffs merely disagree with the conclusions reached by the agency, and “mere disagreement with an agency's analysis . . . is not enough to warrant the consideration of extra-record evidence.” *Long v. United States Dep't of Health & Human Servs.*, 422 F. Supp. 3d 143, 157 (D.D.C. 2019) (internal quotations omitted) (citing *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 125 (D.D.C. 2017)).

Moreover, Plaintiffs have no legal support for their claim that consideration of the declaration facilitates judicial review. Plaintiffs only citation in support of their argument is *Oceana, Inc. v. Ross*, which they admit concerns a case where this Court *denied* a request to supplement the record because the environmentalists in that case failed to show that “‘the record [was] so bare that it prevents effective judicial review’ of the agency's conclusions.” 2020 WL 1905148 at *7 (citing *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010)). Far from being “bare,” the record here contains at least one study on each subject that Plaintiffs mention in their brief, and each of these subjects is discussed in the 2019 BiOp—sometimes at length. Accordingly, as in *Oceana*, there is “sufficient information in the record for the Court to determine what process the agency followed in reaching its conclusions.” *Id.* The Mattson Declaration would therefore only add brand new legal and scientific arguments which would hinder rather than further the purposes of judicial review of agency action under the APA.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff Western Watersheds Project's Motion to Supplement the AR.

DATED this 7th day of October 2020.

Respectfully submitted:

/s/ Brian E. Gregg

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2020, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties or counsel of record, as more fully reflected on the Notice of Electronic Filing.

s/ Brian E. Gregg