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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP, Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, et al. Federal Defendants.	)	Case No. 1:11-CV-0946-JEC-WDS

FEDERAL DEFENDANTS' MOTION TO VACATE OR AMEND

INITIAL SCHEDULING ORDER [ECF NO. 18]

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INTRODUCTION

On October 21, 2011, Plaintiff Los Alamos Study Group initiated this litigation by filing a "Complaint for Declaratory Judgment and Injunctive Relief Under the National Environmental Policy Act," ECF No. 1. In its "Complaint," Plaintiff alleges Federal Defendants (principally, the U.S. Department of Energy/National Nuclear Security Administration ("DOE/NNSA")) violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, for actions related to the approval and design of the Chemistry and Metallurgy Research Building Replacement Nuclear Facility ("CMRR-NF") at the Los Alamos National Laboratory in northern New Mexico. Compl. ¶¶ 1, 81-130.

After Federal Defendants filed their "Answer" on January 9, 2012, ECF No. 17, this Court entered a standard Initial Scheduling Order on January 10, 2012, ECF No. 18. The Initial Scheduling Order sets a Rule 16 Scheduling Conference, directs the parties to plan for discovery pursuant to Rule 26(f), and orders initial disclosures under Rule 26(a)(1). Order ¶¶ 1, 2, 4. Plaintiff's claims, however, are not subject to the discovery and pretrial procedures of the Federal Rules of Civil Procedure. If Plaintiff's NEPA and APA claims are subject to judicial review at all, such review is governed by the provisions of the APA and the procedure set forth in Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994), based on the Administrative Record that Federal Defendants lodge with the Court. Pursuant to Olenhouse, Plaintiff's claims must be treated as an appeal, by reference to the Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure governing discovery and pretrial procedure. See, e.g., 42 F.3d at 1580 ("Reviews of agency action in the district court must be processed *as appeals*. In such circumstances

the district court should govern itself by referring to the Federal Rules of Appellate Procedure.") (emphasis in original).

As the Tenth Circuit admonished in Olenhouse, Plaintiff's appeal from DOE/NNSA's actions and alleged inactions may not be processed "as a separate and independent action, initiated by a complaint and subjected to discovery and a 'pretrial' motions practice." See 42 F.3d at 1579. Indeed, consistent with the admonishments in Olenhouse, the Federal Rules of Civil Procedure expressly exempt actions for review on an Administrative Record from initial disclosures. See Fed. R. Civ. P. 26(a)(1)(B)(i) ("The following proceedings are exempt from initial disclosure: (i) an action for review on an administrative record.").

Federal Defendants respectfully request that this Court vacate or amend its January 10, 2012 Initial Scheduling Order to make it consistent with the procedures set forth in the APA and Olenhouse. It is standard practice for Courts in the District of New Mexico to vacate Initial Scheduling Orders in NEPA/APA cases and to enter an order setting forth dates for production of the Administrative Record and for briefing the case on the merits. See, e.g., Exhs. A - H. Although Plaintiff has filed a motion for seeking a conference under Federal Rule of Civil Procedure 26(f), see ECF No. 14, that motion is plainly at odds with Rule 26(f) itself, the APA, Olenhouse, and the precedent of the District of New Mexico. Under similar circumstances, then-Chief Judge Parker rejected a similar attempt by plaintiffs in a NEPA case to circumvent the "Olenhouse rule" and to prematurely seek discovery prior to the lodging of the Administrative Record See Exh. I at 4-6.

Federal Defendants respectfully propose that the Initial Scheduling Order be vacated or amended to recognize that the "Olenhouse rule" governs this litigation, not the Federal Rules of

Civil Procedure, and that the Parties should propose a schedule for (1) the lodging of the Administrative Record, (2) resolving any disputes over the sufficiency or contents of the Administrative Record, and (3) briefing the case on the merits. The Parties should submit their proposed schedule (or competing proposed schedules, if the Parties cannot agree) to the Court by February 7, 2012 (the date set in the Initial Scheduling Order for production of a Joint Status Report and Provisional Discovery Plan ("JSR")). If necessary to resolve any disputes over competing proposed schedules, the Court should set a scheduling conference for February 14, 2012 (the date set for a "Rule 16 Scheduling Conference"). The requirements of the Initial Scheduling Order for a Rule 16 Scheduling Conference, for a Federal Rule of Civil Procedure 26(f) "meet and confer," for production of a JSR, and for initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1), should all be vacated for the reasons noted above.

Plaintiff, through counsel of record, has been consulted and opposes this Motion.

ARGUMENT

I. THE APA AND OLENHOUSE LIMIT JUDICIAL REVIEW OF AGENCY ACTION AND INACTION TO THE ADMINISTRATIVE RECORD

Each of the claims raised in Plaintiff's "Complaint" is subject to judicial review, if at all, pursuant to the scope and standards for judicial review set forth in the APA. See Compl. at ¶ 1 ("This action arises under the National Environmental Policy Act...This action also arises under the Administrative Procedure Act..."); id. at ¶¶ 81-130 (alleging violations under NEPA and the APA); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006) ("Because none of the statutory or regulatory provisions in question [including NEPA] provide for a private cause

of action, the judicial review provisions of the APA govern this suit."); Utah v. Babbitt, 137 F.3d 1193, 1203 (10th Cir. 1998) ("Because [NEPA does not] provide for a private right of action, Plaintiffs rely on the judicial review provisions of the APA in bringing their claims."); Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996) ("Because NEPA does not provide a private right of action for violations of its provisions, the County claims a right to judicial review under the APA.") (internal citation omitted).

Section 706 of the APA imposes a narrow and deferential standard of review of agency action or inaction, and the Court's role is solely to determine whether the challenged actions or inactions meet this standard based on a review of the Administrative Record that the federal agency provides to the Court. Camp v. Pitts, 411 U.S. 138, 142 (1973). See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (review of an action brought pursuant to the APA is "based on the full administrative record that was before the Secretary at the time he made his decision"), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); Vill. of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 972-73 (10th Cir. 1992) (*en banc*); Lodge Tower Condominium Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1374 (D. Colo. 1995). The APA expressly directs that, in reviewing final agency action or agency inaction, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The Supreme Court has held that "in cases where Congress has simply provided for review [under the APA], . . . [judicial] consideration is to be confined to the administrative record and . . . no *de novo* proceedings may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citations omitted).

"The complete administrative record consists of all documents and materials directly or

indirectly considered by the agency." Bar MK Ranches, 994 F.2d at 739 (citations omitted). The Supreme Court has held that the agency determines what constitutes the Administrative Record and that courts are to base their review on that Record. "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (citations omitted). The agency's designation of an Administrative Record is entitled to a presumption of regularity. "The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." Bar MK Ranches, 994 F.2d at 740 (citation omitted).

The Tenth Circuit recognized the unique procedures for judicial review of challenges to federal agency actions and inactions in the landmark case of Olenhouse, 42 F.3d at 1580. In Olenhouse, a class of farmers sought review under the APA of a decision by the Agriculture Stabilization and Conservation Service concerning wheat crop payments. Id. at 1572. The farmers asserted claims that, *inter alia*, the agency's action failed to comply with applicable laws and regulations, was unsupported by the record, and violated the farmers' rights under the Fifth Amendment of the United States Constitution. Id. The Tenth Circuit determined that this informal agency action was subject to judicial review pursuant to Section 706 of the APA. Id. at 1573. The Court found that informal agency action[1]/ must be "set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 1573-74 (quoting Overton Park, 401 U.S. at 413-14).

1/ For a distinction between formal and informal agency action, see Olenhouse, 42 F.3d at 1573 n.22.

The Tenth Circuit in Olenhouse emphasized that:

> A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district court must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.

Id. at 1580 (emphasis in original). The Tenth Circuit found that the process employed by the district court in reviewing the case, which included the use of pretrial motions practice, discovery, and a motion for summary judgment, is, "at its core . . . inconsistent with the standards for judicial review of agency action under the APA [and] invites (even requires) the reviewing court to rely on evidence outside the administrative record." Id. at 1579-80.[2/] The Olenhouse Court held that when a district court is reviewing agency action or inaction, it acts as a court of appeal and "it is improper for a district court to use methods and procedures designed for trial." Id. at 1564, 1580; see also Colo. Wild v. Vilsack, 713 F. Supp. 2d 1235, 1237, 1242-43 (D. Colo. 2010) (stating that, pursuant to Olenhouse, the court would "apply the Federal Rules of Appellate Procedure and, generally, limit [its] review to the evidence relied upon by the [federal agency] in reaching the challenged decision," and holding that reviewing whether the plaintiffs waived issues by inadequately noticing them in the district court was properly based on the Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure); Lodge Tower Condominium Ass'n, 880 F. Supp. at 1374 (stating that a

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[2/] The Tenth Circuit characterized the application of pretrial motions practice to actions for review of an administrative record as an "illicit procedure." Olenhouse 42 F.3d at 1579 ("The District Court's reliance on arguments, documents and other evidence outside the administrative record is due, at least in part, to the *illicit procedure* it employed to determine the issues for review [which included] process[ing] the . . . appeal as a separate and independent action, initiated by a complaint and subjected to discovery and a 'pretrial' motions practice.") (emphasis added).

district court does not sit as a finder of fact because agency action is "reviewed, not tried," rather, "the issue is not whether the material facts are disputed, but whether the agency properly dealt with the facts").

The principles of judicial review outlined in Olenhouse apply to all cases brought under the APA, including NEPA cases. S. Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 824 n. 4 (10th Cir. 2000); Wildearth Guardians v. U.S. Forest Serv., 668 F. Supp. 2d 1314, 1324 (D.N.M. 2009); Exh. I at 3. In a pre-Olenhouse NEPA case, Judge Conway applied these very principles and recognized that review of an administrative agency action is limited to the administrative record. All Indian Pueblo Council v. U.S., Civ. No. 78-0642JC, 1990 WL 446902, at *2 (D.N.M. Aug. 16, 1990). In a subsequent case brought under the APA considered by Judge Conway, the scheduling order was consistent with Olenhouse, see Exh. A, and Judge Conway expressly applied Olenhouse in the standard of review. IMC Kalium Carlsbad, Inc. v. Babbitt, 32 F. Supp. 2d 1264 (D.N.M. 1999), rev'd 206 F.3d 1003 (10th Cir. 2000).

As in Olenhouse, Plaintiff's claims here seek judicial review of Federal Defendants' actions and alleged inactions. These claims are thus subject to judicial review, if at all, pursuant to judicial review provisions of the APA, 5 U.S.C. § 706, and must be treated as appeals pursuant to Olenhouse, based on judicial review of the Administrative Record. The Court thus should vacate or amend its Initial Scheduling Order to be consistent with the principles of judicial review outlined in Olenhouse. See Exhs. A through I.

II. CONSIDERATION OF EXTRA-RECORD EVIDENCE IS PREMATURE AND APPROPRIATE ONLY IN LIMITED CIRCUMSTANCES NOT PRESENT HERE

This Court's order requires the parties to plan for discovery. Order ¶ 2. Such a plan, however, is premature because the Administrative Record has not yet been lodged with the Court. Until that Administrative Record is lodged with the Court, Plaintiff cannot make a showing that discovery is necessary or permissible under one of the narrow exceptions to the Administrative Record rule.

DOE/NNSA has already completed extensive environmental review of the proposed CMRR-NF in accordance with NEPA. The original review culminated in a November 2003 Environmental Impact Statement ("EIS") and a February 12, 2004 Record of Decision ("ROD") that approved construction of CMRR-NF and the associated Radiological Laboratory Utility Office Building ("RLUOB"). Since the 2004 ROD, new developments and information have necessitated modifications in the design of the proposed CMRR-NF. In continuing compliance with NEPA, DOE/NNSA elected to prepare a Supplemental EIS ("SEIS") to further analyze potential environmental impacts as DOE/NNSA identifies design changes necessary to maintain and improve the safety of CMRR-NF, even though the proposed scope of operations, building location, and footprint have not substantially changed. DOE/NNSA issued the Final SEIS on August 30, 2011. An amended ROD was signed on October 12, 2011, and appeared in the Federal Register on October 18, 2011. The documents and decisions that the agency considered in preparing the recently issued SEIS will be compiled, certified, and lodged as an Administrative Record in the near future, at a time designated by the Court. DOE/NNSA is already in the process of compiling the Administrative

Record, but this is an expensive and time-intensive task as it involves a complex and lengthy administrative decision-making process that dates back well more than a decade.

Once the Administrative Record has been lodged, limited discovery concerning its contents *may* be appropriate upon a proper showing by a party.[3]/ See, e.g., Bar MK Ranches, 994 F.2d at 739-40 ("When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question."); but see Sierra Club v. U.S. Dept. of Energy, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) (applying Olenhouse and the APA to NEPA and other claims to deny discovery because "Plaintiff has not demonstrated that the administrative record is insufficient for the court to make a determination on plaintiff's claims, or that the information plaintiff seeks in discovery is necessary for adequate judicial review").

As the Tenth Circuit held,

> [a] reviewing court may go outside of the administrative record only for limited purposes. For example: Where the administrative record fails to disclose the factors considered by the agency, a reviewing court may require additional findings or testimony from agency officials to determine if the action was justified; or where necessary for background information or for determining whether the agency considered all relevant factors including evidence contrary to the agency's position; or where necessary to explain technical terms or complex subject matter involved in the action.

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[3]/ The Supreme Court has emphasized, however, that discovery is disfavored even when a court concludes that an administrative record is inadequate to support the agency action. See, e.g., Fla. Power & Light Co., 470 U.S. at 744 ("[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); Lewis v. Babbitt, 998 F.2d 880, 882 (10th Cir. 1993) (to facilitate judicial review, reviewing court may obtain affidavits from the agency that provide additional explanations of the reasons for its decision).

Franklin Sav. Ass'n, 934 F.2d at 1137-38 (internal citations omitted); Am. Mining Cong. v. Thomas, 772 F.2d 617, 626 (10th Cir. 1985).[4]/ These exceptions apply to "extra-record" evidence and can only be established *after* an agency certifies the Administrative Record, which has not yet occurred in this case. Indeed, in a similar situation, then-Chief Judge Parker rejected an attempt by plaintiffs in a NEPA case to prematurely seek discovery and to circumvent the "Olenhouse rule." See Exh. I at 4-6. Chief Judge Parker found that limited discovery may be appropriate only if Plaintiff "came forward with clear evidence that the administrative record is deficient in a particular respect." Id. at 6. A determination that the Administrative Record is "deficient in a particular respect," of course, requires that the Administrative Record to be compiled, certified, and lodged prior to any showing of deficiency that might allow the highly unusual process of even limited discovery in a NEPA/APA case.

Because DOE/NNSA has yet to compile, certify, and lodge the Administrative Record, planning for discovery over what the Administrative Record contains, or does not contain, is premature. Olenhouse is controlling, and a scheduling order such as those commonly entered by this

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[4]/ American Mining Congress articulated the following five narrow exceptions to the rule limiting judicial review to the administrative record:

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

772 F.2d at 626 (internal citations omitted).

Court in NEPA cases and in Judge Conway's IMC Kalium case, see Exhs. A-H, is the proper procedure for treating this case as an appeal in accordance with Olenhouse.

III. ACTIONS FOR REVIEW ON AN ADMINISTRATIVE RECORD ARE EXEMPT FROM INITIAL DISCLOSURES UNDER BOTH THE FEDERAL AND LOCAL RULES OF CIVIL PROCEDURE

This Court also ordered initial disclosures under Federal Rule of Civil Procedure 26(a)(1) within 14 days of a "meet and confer" session to prepare a JSR under Rule 26(f). Order ¶¶ 4. The Federal Rules of Civil Procedure, however, expressly exempt actions for review of an Administrative Record from initial disclosure. See Fed. R. Civ. P. 26(a)(1)(B)(i) ("The following proceedings are exempt from initial disclosure: (i) an action for review on an administrative record."); Fed. R. Civ. P. 26(f)(1) ("*Except* in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable. . . .") (emphasis added).

The Local Rules of Civil Procedure also exempt this action from initial disclosure. D.N.M.LR-Civ. 26.3(a)(1) exempts "all disclosure in cases excluded from case management procedures by D.N.M.LR-Civ. 16.3," which excludes "proceedings requesting injunctive or other emergency relief" such as this one. D.N.M.LR-Civ. 16.3(r); see Compl., Prayer for Relief at A, D, and E (seeking injunctive relief). Magistrate Judge Torgerson considered an earlier request by Plaintiff for a Rule 26(f) conference and Rule 16 order in Plaintiff's prior case. Los Alamos Study Group v. U.S. Dep't of Energy, No. 1:10-CV-760-JCH-ACT (D.N.M. Apr. 8, 2011), ECF No. 51. Although Magistrate Judge Torgerson denied Plaintiff's motion to compel for prudential reasons, he also found that "[t]his action for declaratory judgment and injunctive relief is explicitly excluded

from pretrial case management procedures." Id. at 2.

Because both the Federal and Local Rules of Civil Procedure exempt actions for review of an Administrative Record (such as this one) from initial disclosure, this Court should amend its Initial Scheduling Order and exclude initial disclosures under Rule 26(a)(1).

IV. SUGGESTED PROCEDURE FOR PROCEEDING IN THIS LITIGATION PURSUANT TO THE APA AND OLENHOUSE

Because judicial review in this case is governed by the standards set forth in the APA and the principles enunciated in Olenhouse, the Court should proceed on the required presumption that the Administrative Record to be lodged by the Federal Defendants will be adequate for its review of the merits of Plaintiff's claims and that therefore discovery is neither necessary nor appropriate. Bar MK Ranches, 994 F.2d at 740.

Federal Defendants are already working with Plaintiff on a proposed schedule for lodging the Administrative Record, resolving its contents, and briefing the case on the merits to attempt to resolve informally any disputes over the content of the Administrative Record. Federal Defendants propose to distribute a draft index of Administrative Record documents and solicit comments from Plaintiff. Once the parties have completed this informal process to resolve the record, Federal Defendants will lodge the certified Administrative Record with the Court. The parties' informal resolution of the contents of the Administrative Record likely will reduce or eliminate the need for this Court's involvement over the contents of the Administrative Record.

After Federal Defendants lodge the Administrative Record for this case and provide copies of the documents to Plaintiff, Plaintiff may elect to file objections to the content of the

Administrative Record or seek supplementation under narrow circumstances. Federal Defendants respectfully suggest that the Parties should be afforded four to six weeks from the date of lodging the Administrative Record to file any motions concerning the content of the Administrative Record. The Court should then set a schedule for briefing the merits of the claims presented in this case based on the date the contents of the Administrative Record have been resolved. Federal Defendants propose that the framework outlined above be the basis for the case management conference currently set for February 14, 2012.

The suggested case management procedure outlined above is consistent with Olenhouse and reduces the likelihood of Court involvement in settling the contents of the Administrative Record. In accordance with Olenhouse, the District of New Mexico follows this procedure for actions alleging violations of NEPA or otherwise brought under the APA. See Exhs. A-H. Indeed, several of these scheduling orders provide for a comment period on the contents of the Administrative Record, see Exh. D, or a period in which a plaintiff may contest the contents of the Administrative Record, see Exhs. G, H, I. The Olenhouse procedure also was applied in the scheduling orders for Lee v. U.S. Air Force, 354 F.3d 1229 (10th Cir. 2004), which Plaintiff incorrectly cited in its motion for a Rule 16 conference. See ECF No. 14 at 4. In Lee, the Court deferred discovery and pretrial deadlines on non-APA claims because they might have been subject to a motion to dismiss on qualified immunity grounds, but allowed claims brought under the APA, including the plaintiffs' NEPA claims, to proceed under briefing on the merits in accordance with Olenhouse. Exh. B at 1 ("there is such no reason to delay consideration of the claims brought as appeals pursuant to the Administrative Procedure Act," and order the plaintiffs "file their brief in support of their appeal of

the administrative decision pursuant to the Administrative Procedure Act on their claims alleging violations of NEPA and the Noise Control Act" by a set date). The Court later referred to plaintiff's opening brief as an Olenhouse brief when it granted an extension of time. Exh. C.

The procedure outlined above of lodging the record, resolving its contents, and briefing the case on the merits is consistent with the case management practices in this District and reduces the need for judicial involvement.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court vacate or amend its January 10, 2012 Initial Scheduling Order. The Parties should submit a case management plan consistent with the principles of judicial review outlined in Olenhouse on or before January 24, 2012, and then have a conference with the Court on February 14, 2012. Federal Defendants will submit a proposed amended Initial Scheduling Order consistent with this Motion upon request.

Respectfully submitted on this 13th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2011, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, which transmitted a Notice of Electronic Fling to the following CM/ECF registrants:

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Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IMC KALIUM CARLSBAD, INC.,

Plaintiff,

vs. CIVIL NO. 97-1524 JC/RLP

BRUCE BABBIT, Secretary of the Interior, INTERIOR BOARD OF LAND APPEALS, BUREAU OF LAND MANAGEMENT, YATES PETROLEUM CORPORATION and POGO PRODUCING COMPANY,

Defendants.

ORDER SETTING BRIEFING SCHEDULE
AND VACATING RULE 16 SCHEDULE CONFERENCE

THIS MATTER having come before the Court for scheduling and to have Rule 16 Scheduling Conference vacated;

IT IS ORDERED that, on or before **May 1, 1998** Defendant shall file the administrative record, and that Plaintiff will file its motion on or before **June 15, 1998.**

IT IS FURTHER ORDERED that, on or before **August 3, 1998**, Defendant shall file its response; and that, on or before **August 24, 1998**, Plaintiff may file a reply.

IT IS FURTHER ORDERED that the Rule 16 Scheduling Conference set for April 29, 1998 is vacated.

IT IS SO ORDERED.

RICHARD L. PUGLISI
United States Magistrate Judge

Exhibit B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CHARLIE LEE, et al.,

Plaintiffs,

v. CIV 98-1056 BB/KBM-ACE

UNITED STATES AIR FORCE, et al.,

Defendants.

ORDER SETTING STATUS CONFERENCE AND CERTAIN DEADLINES

This matter is before the Court following a telephonic Rule 16 initial scheduling conference held December 15, 1999. The Court conferred with the parties and was advised that Plaintiffs will soon be filing a Second Amended Complaint which will set forth claims to which Defendants may file a motion to dismiss on qualified immunity grounds. Thus, I have concluded and the parties have agreed that setting certain discovery and pretrial deadlines is not advisable at this time. However, there is such no reason to delay consideration of the claims brought as appeals pursuant to the Administrative Procedures Act.

Wherefore,

IT IS HEREBY ORDERED THAT:

1. A telephonic status conference is set in my chambers on **Tuesday, February 29, 2000 at 2:00 p.m.** to discuss the progress of the case and the feasibility of setting further deadlines. Plaintiffs' counsel shall be responsible for initiating the call;

2. Plaintiffs shall file their Second Amended Complaint not later than **Friday, January 7, 2000**; and,

3. Plaintiffs shall file their brief in support of their appeal of the administrative decision pursuant to the Administrative Procedures Act on their claims alleging violations of NEPA and the Noise Control Act not later than **Monday, April 3, 2000**; Defendants shall file their response not later than **Monday, June 5, 2000**; Plaintiffs shall file their reply, if any, not later than **Wednesday, July 5, 2000**.

Karen B. Molzen

UNITED STATES MAGISTRATE JUDGE

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHARLIE LEE, et al.,

Plaintiffs,

vs.

Case No. 98-1056-BB-KBM-ACE

UNITED STATES AIR FORCE, et al.,

Defendants.

**ORDER GRANTING
AGREED MOTION TO EXTEND
TIME TO FILE INITIAL "OLENHOUSE" BRIEF
AND TO EXCEED PAGE LIMITATION**

THIS MATTER coming before the Court on Plaintiffs' Agreed Motion to Extend Time to File Initial "Olenhouse" Brief, the matter being unopposed, and the Court being advised in the premises.

IT IS HEREBY ORDERED: Plaintiffs' motion is granted as follows:

1. Plaintiffs are to file their initial on or before Friday, September 1, 2000; defendants' response is due 60 days after service of the initial brief; and plaintiffs' reply is due 15 days after service of the defendants' response;

2. Plaintiffs may file an initial brief not to exceed 55 pages in length.

UNITED STATES MAGISTRATE JUDGE

Submitted by:

SIMONS, CUDDY & FRIEDMAN, LLP

By: Frank M. Bond

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Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
04 MAY 13 PM 4:04
CLERK-LAS CRUCES

CHIHUAHUAN GRASSLANDS ALLIANCE *et al.*,
Plaintiff,

v.

GALE NORTON, SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants.

Civil No. 03-1423 WJ/LAM

~~[Proposed]~~ SCHEDULING ORDER

During a telephonic status conference on May 3, 2004, the parties presented an agreed case schedule. The Court hereby adopts that schedule, and orders as follows:

1. Defendants shall provide the administrative record to Plaintiffs by June 4, 2004;

2. Plaintiffs may provide comments to Defendants on completeness of the administrative record by July 16, 2004;

3. Defendants shall lodge with the Court and certify the administrative record by August 20, 2004;

4. Plaintiffs shall file their opening brief by October 1, 2004;

5. Defendants shall file their opposition brief by October 29, 2004; and

6. Plaintiffs shall file their reply brief by November 19, 2004.

It is SO ORDERED.

Lourdes Martínez

LOURDES A. MARTÍNEZ
UNITED STATES ~~DISTRICT~~ Magistrate JUDGE

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SUBMITTED BY:

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By: /s/ (Filed electronically on 5-7-04)
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SUBMISSION APPROVED BY:

Approval via email on 5-4-04
ERIK SCHLENKER-GOODRICH
Counsel for Plaintiffs

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT NEW MEXICO

SAN JUAN CITIZENS ALLIANCE; DINÉ CARE; OIL AND GAS ACCOUNTABILITY PROJECT; NATURAL RESOURCES DEFENSE COUNCIL; TRECIAFAYE BLANCETT; DON SCHRIEBER; and the COUNSELOR, PUEBLO PINTADO, and HUERFANO CHAPTERS of the NAVAJO NATION,

Plaintiffs,

v.

GALE NORTON, Secretary of the United States: Department of Interior; KATHLEEN CLARKE, Director of the Bureau of Land Management; LINDA S. RUNDELL, New Mexico State Director of the Bureau of Land Management; BUREAU OF LAND MANAGEMENT; and DEPARTMENT OF INTERIOR,

Defendants,

BURLINGTON RESOURCES OIL & GAS COMPANY LP; CONOCOPHILLIPS COMPANY, BP AMERICA PRODUCTION COMPANY; WILLIAMS PRODUCTION COMPANY LLC,

Defendant-Intervenors, and

NEW MEXICO STATE LAND OFFICE,

Defendant-Intervenors.

No. CV-04-1038 JH/RLP

[PROPOSED] ORDER GRANTING JOINT MOTION TO SET BRIEFING SCHEDULE AND TO VACATE INITIAL SCHEDULING ORDER

THIS MATTER having come before the Court and the Court having considered the record and the Parties' Joint Motion To Set Briefing Schedule And To Vacate Initial Scheduling Order, it is hereby Ordered that the Joint Motion is granted, the Initial Scheduling Order is vacated, and the Parties will comply with the following briefing schedule:

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- Federal Defendants will provide the Court and all Parties with a copy of the administrative record on or before January 14, 2005.
- Plaintiffs will file their opening brief on or before March 30, 2005.
- Defendants and Defendant-Intervenors will file their responses on or before May 16, 2005.
- Plaintiffs will file their reply on or before June 15, 2005.
- Opening and response briefs will be limited to 40 double-spaced pages. Reply briefs will be limited to 20 double-spaced pages.
- Oral Argument will be heard on TBD.

UNITED STATES MAGISTRATE JUDGE

Exhibit F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

THE STATE OF NEW MEXICO ex rel. GOVERNOR BILL RICHARDSON, et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Federal Defendants.

CIV. NO. 05-0460 BB/RHS and

NEW MEXICO WILDERNESS ALLIANCE, et al.,

Plaintiffs,

v.

LINDA RUNDELL, et al.,

Federal Defendants.

CIV. NO. 05-0588 BB/RHS (consolidated)

AGREED SCHEDULING ORDER

THIS MATTER came before the Court on the Parties' Stipulation and Motion to Set Briefing Schedule and the Parties' agreement to abide by that Stipulation. The Court, being advised of the issues, finds that the Parties' request to set a briefing schedule is well taken and GRANTS the Motion.

IT IS THEREFORE ORDERED that, in the interests of judicial economy and efficiency, the Court hereby sets the following schedule for resolving this case on the merits of Plaintiffs' claims and Federal Defendants' defenses:

1. On or before September 1, 2005, Federal Defendants will lodge an Administrative

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Record.

2. On or before October 15, 2005, the State and Conservation Plaintiffs will file opening briefs on the merits, the length of which will be consistent with the rules of the Tenth Circuit Court of Appeals.

3. On or before December 1, 2005, Federal Defendants and any Defendant-Intervenors will file response briefs on the merits, the length of which will be consistent with the rules of the Tenth Circuit Court of Appeals.

4. On or before December 21, 2005, the State and Conservation Plaintiffs will file reply briefs on the merits, the length of which will be consistent with the rules of the Tenth Circuit Court of Appeals.

5. The Parties will attempt to resolve any issues concerning the scope and content of the Administrative Record before moving the Court for relief. To the extent any significant issues relating to the exercise of the deliberative process privilege are not resolved, on or before September 21, 2005 the State and Conservation Plaintiffs may move this Court to vacate or amend the briefing schedule set forth above and may file motions challenging Federal Defendants' assertion of the privilege. To the extent any other issues are not resolved, the briefing schedule for any motions concerning the scope or content of the Administrative Record will coincide with the briefing schedule on the merits set forth above.

6. The Court will hold a hearing for oral argument on the briefs on the merits on or about January 31, 2006.

Entered this 28th day of July, 2005.

UNITED STATES DISTRICT JUDGE

Respectfully submitted,

electronically filed 07/19/2005
Andrew A. Smith
United States Department of Justice
Counsel for Federal Defendants

telephonically approved
Alletta Belin
Belin & Sugarman
Counsel for Plaintiffs in 05-0460

telephonically approved
Mike Harris
Earthjustice Legal Defense Fund, Inc.
Counsel for Plaintiffs in 05-0588

Exhibit G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

HUGH B. MCKEEN,

Plaintiff,

v. No. CIV 07-0503 MCA/KBM

UNITED STATES FOREST SERVICE, *et al.*,

Defendants.

ORDER

THIS MATTER came before the Court on the Parties' *Joint Motion for Scheduling Order* [Doc. 16] filed on September 5, 2007. Being fully advised in the premises, the Court finds that the Joint Motion is well taken and GRANTS the Joint Motion.

IT IS HEREBY ORDERED that the current litigation will proceed in accordance with the following schedule:

10/16/2007: Federal Defendants will lodge the Administrative Record for Plaintiff's claims with the Court in CD-Rom format. If Plaintiff contests the content of the Administrative Record, Plaintiff may submit a Motion to Supplement the Administrative Record on or before October 31, 2007. Federal Defendants' response will be due on November 30, 2007, with the Plaintiff's Reply in Support of his Motion due on December 21, 2007. Substantive briefing will then begin 30 days after the date of the Court's ruling on the Plaintiff's Motion to Supplement and continue on the time intervals set forth below.

If Plaintiff does not file a Motion to Supplement the contents of the Administrative Record by October 31, 2007, the briefing schedule will be as follows:

12/28/2007: Plaintiff files his Opening Brief on the Merits;

2/29/2008: Federal Defendants file their Response Brief on the Merits and any Motion to Dismiss;

3/31/2008: Plaintiff files his Reply Brief on the Merits and any response to Federal Defendants' Motion to Dismiss;

4/30/2008: Federal Defendants file their reply brief in support of their Motion to Dismiss.

In accordance with Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), the length of the Parties' briefs will be consistent with the Federal Rules of Appellate Procedure.

If necessary, oral argument will be set at a later date after the briefing is completed.

IT IS THEREFORE ORDERED that the parties' *Joint Motion for Scheduling Order* [Doc. 16] is **GRANTED** under the conditions stated above.

SO ORDERED this 10th day of September, 2007, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge

Exhibit H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

AMIGOS BRAVOS *et al.*

Plaintiffs,

v. No. CIV 09-37-JB/LFG

UNITED STATES BUREAU OF LAND MANAGEMENT, *et al.*,

Federal Defendants,

INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO,

Proposed Intervenor Defendant.

SCHEDULING ORDER

This matter is before the Court upon the submission by the Parties of a Joint Motion to Vacate this Court's April 7, 2009 Initial Scheduling Order, as modified by this Court's subsequent April 17, 2009 Order.

Upon consideration of the Joint Motion, IT IS HEREBY ORDERED that the Court vacates the initial scheduling order, as modified, and vacates the scheduling conference set for June 12, 2009. It is further ORDERED that:

1. Federal Defendants shall lodge the administrative record with this Court in keyword searchable CD-ROM or DVD format 30 calendar days subsequent to this Court's resolution of the Federal Defendants' motion to dismiss;

2. Plaintiffs shall file any necessary motion challenging the content or completeness of the administrative record 30 calendar days subsequent to Federal Defendants' lodging of the proposed administrative record;

3. Plaintiffs shall file their opening brief on the merits 30 calendar days after this Court resolves any motion challenging the content or completeness of the administrative record filed by Plaintiffs or, if no such motion is filed, 60 calendar days after Federal Defendants lodge the administrative record;

4. Federal Defendants shall file their response brief on the merits 30 calendar days after Plaintiffs file their opening brief on the merits;

5. Plaintiffs shall file their reply brief on the merits 21 calendar days after Federal Defendants file their response brief on the merits.

6. The length of the parties' briefs on the merits shall be governed by the Federal Rules of Appellate Procedure.

UNITED STATES DISTRICT JUDGE

Exhibit I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FOREST GUARDIANS,

Plaintiff,

v. **CIV. No. 00-490 JP/RLP &**

UNITED STATES FOREST SERVICE and ANN VENEMAN, in her capacity as Secretary of Agriculture of the United States,

Defendants,

SACRAMENTO GRAZING ASSOCIATION, CALVIN BISHOP, SAM FAIRCHILD, RANDY ELKINS, GRANT MYERS, RICK and KIM LESSENTINE, ROY HOLCOMB, and OTERO COUNTY

Defendant-Intervenors.

SACRAMENTO GRAZING ASSOCIATION, JIMMY GOSS, FRANCES GOSS, JUSTIN (SPIKE) GOSS, and BRENNA GOSS

Plaintiffs,

v. **CIV. No. 00-1240 JP/RLP**

(Consolidated)

UNITED STATES DEPARTMENT OF AGRICULTURE and ANN VENEMAN, in her capacity as Secretary of Agriculture of the United States, UNITED STATES FOREST SERVICE, DALE BOSWORTH, in his official capacity as Chief of the United States Forest Service, REGIONAL FORESTER ELEANOR TOWNS, in her individual and

official capacity, DEPUTY REGIONAL FORESTER/ APPEAL DECIDING OFFICER JAMES T. GLADEN, in his individual and official capacity, FOREST SUPERVISOR JOSE MARTINEZ, in his individual and official capacity, RANGER LARRY SANSOM, in his individual and official capacity, DISTRICT RANGER MAX GOODWIN, in his individual and official capacity, RANGER RICK NEWMON, in his individual and official capacity, and NEW MEXICO STATE GAME COMMISSION and STEPHEN DOERR as Commissioner of the New Mexico State Game Commission,

Defendants.

MEMORANDUM OPINION AND ORDER

On January 5, 2001, the Defendant United States filed a Motion to Limit Judicial Review to Administrative Record (Doc. No. 86) in this consolidated action. On January 29, 2001, Forest Guardians, Plaintiff in Civ. No. 00-490 JP/RLP, filed an Opposition to United States' Motion to Limit Review to Administrative Record (Doc. No. 97). On January 22, 2001, the Sacramento Grazing Association (SGA), Defendant-Intervenor in Civ. No. 00-490 JP/RLP and Plaintiff in Civ. No. 00-1240 JP/RLP, filed an Opposition to United States' Motion to Limit Judicial Review to Administrative Record (Doc. No. 95). On January 22, 2001, Otero County, Defendant-Intervenor in Civ. No. 00-490 JP/RLP, filed a Response to United States' Motion to Limit Judicial Review to Administrative Record (Doc. No. 93).

Plaintiff Forest Guardians has indicated that in light of its Amended Complaint, it no longer opposes the United States' motion. See Joint Motion to Vacate Hearing and Memorandum in Support (Doc. No. 134), filed June 8, 2001. Therefore, this Memorandum Opinion and Order will focus on the arguments that the SGA and Otero County have offered in response to the United States' motion.

This case involves challenges to actions taken by the United States Forest Service (USFS). A district court reviewing an agency action under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, acts as an appellate court, rather than as a trial court. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). The Supreme Court has stressed that the district court's "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). As the Tenth Circuit has explained, "[t]he 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). The court may consider material beyond this record "only for limited purposes." *Franklin Savings Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1991).

One circumstance under which the reviewing court may supplement the administrative record is where the plaintiff alleges that an agency decision was the product of bias and improper motives. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), the Supreme Court explained that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," particularly where the court has access to "administrative findings that were made at the same time as the decision." However, "a strong showing of bad faith or improper

behavior" might support such an inquiry. *Id.* See also, e.g., *Charter Township of Van Buren v. Adamkus*, 188 F.3d 506, *4 (table) (6th Cir. 1999); *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 736 F.2d 479, 481 (8th Cir. 1984).

In this case, the United States argues that the APA governs the claims raised in Plaintiff Sacramento Grazing Association's Complaint, and that this Court should hence apply the procedures outlined in *Olenhouse* in reviewing the challenged agency actions. In its Memorandum of Law in Support of Motion to Limit Judicial Review to Administrative Record (Doc. No. 87), filed January 5, 2001, the United States "requests an order limiting review to the administrative records, disallowing discovery, and setting a schedule for proceeding with disputes over the contents of the administrative records and for briefing the merits of Plaintiffs' claims." (10). The United States has stated that it seeks the determination that this case should "proceed under the guidelines set forth by the Tenth Circuit in *Olenhouse*" in order to distinguish it from cases following a standard discovery track. See United States' Reply in Support of its January 5, 2001 Motion to Limit Judicial Review to Administrative Record, at 3-4.

The SGA and Otero County oppose the United States' motion. The SGA argues, first, that this Court should consider evidence outside of the administrative record in addressing its Claims I, II, and IV, which are brought under the APA. The SGA does not seem to argue that the general framework of *Olenhouse* is inapplicable to these claims, but instead that an exception outlined in *Olenhouse* applies. The SGA notes that the *Olenhouse* court explained that "[i]f limitations in the administrative record make it impossible to conclude the action was the product of reasoned decisionmaking, the reviewing court may supplement the record." Opposition to United States' Motion to Limit Judicial Review to Administrative Record at 3, quoting 42 F.3d at

1575. The SGA contends that the administrative record in this case will be limited, because the record will not reveal the improper actions taken by USFS employees. The SGA has alleged, in support of its claims, that USFS representatives made a series of decisions with the unlawful intent of destroying the SGA's ranching operation. The SGA maintains that because of these allegations of malice, this case falls into the exception, described in *Overton Park*, for cases in which there are indications of agency bias.

However, this Court does not believe that the SGA has made the showing of bias and improper motive required for the Court to determine, at this time, that an exception to the *Olenhouse* rule applies. The Tenth Circuit has noted that "[t]he court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993), citing *Wilson v. Hodel*, 758 F.2d 1369, 1374 (10th Cir. 1985). Although the SGA has made a wide range of allegations concerning the USFS's alleged bias, it has thus far not cited "clear evidence" in support of its allegations.[1]

Therefore, this Court will declare, as the United States has requested, that this case falls under the rule set forth in *Olenhouse*, and that the Court will limit its review of the SGA's APA

[1] The only evidence to which the SGA refers in its Opposition to United States' Motion to Limit Review to Administrative Record is the affidavit of USFS wildlife biologist Pat Ward. The SGA asserts that this affidavit is the type of document which would not be included in the official administrative record, but which shows the bias of the USFS. On July 19, 2001, the United States added this document to the administrative record.

claims to the administrative record.[2] However, should the SGA come forward with clear evidence that the administrative record is deficient in a particular respect, this Court may allow limited discovery sufficient to develop a more complete record.

The SGA also argues that because the United States had not yet lodged an administrative record in this case as of the time of the filing of the motion to limit review, that the motion was not ripe. Otero County raises a similar argument in its Response to United States' Motion to Limit Judicial Review to Administrative Record. This Court notes, first, that the United States has now finished lodging its portion of the administrative record in this case. See Federal Defendants' Supplemental Notice of Lodging Administrative Record (Doc. No. 154), filed July 19, 2001. Second, this Court observes that Otero County and the SGA seem to have interpreted the United States's motion in limine as an attempt to foreclose subsequent challenges by the other parties to the content and completeness of the administrative record. The United States clarified, in its Reply, that "the parties should have an opportunity to challenge the administrative record lodged with the Court," if they do this "by filing a motion seeking leave to supplement the record or pursue some limited form of discovery." (5). This Court agrees. In ruling that the *Olenhouse* framework applies in this case, this Court does not intend to foreclose the SGA, Otero County, or the Forest Guardians from arguing that the administrative record lodged by the United States needs to be supplemented.

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[2] The SGA argues, in its Response, that any limitation of review to the administrative record would not apply to its Claim III (*Bivens* claim), or Claim VI (state tort claim). However, this Court has dismissed both of these claims in orders entered after the filing of the SGA's response. See Memorandum Opinion and Order of April 30, 2001 (Doc. 122); Memorandum Opinion and Order of June 8, 2001 (Doc. No. 133); and Order of August 8, 2001 (Doc. No. 162).

Now that the United States has completed filing its portion of the administrative record, this Court suggests that the parties attempt to agree to a timetable for the filing of challenges to the content of the record.

IT IS THEREFORE ORDERED THAT:

1) The United States' Motion to Limit Review to the Administrative Record is granted; and

2) The parties must confer in order to reach an agreement, by not later than August 22, 2001, as to a schedule for the filing of motions to supplement or challenge the administrative record lodged by the United States.

CHIEF UNITED STATES DISTRICT JUDGE