

1 Robin Cooley (*pro hac vice*)  
2 Earthjustice  
3 1400 Glenarm Place, Suite 300  
4 Denver, CO 80202  
5 Tel: (303) 623-9466  
6 Fax: (303) 623-8083  
7 Email: rcooley@earthjustice.org

8 Marco Gonzales (CA Bar No. 190832)  
9 Coast Law Group LLP  
10 169 Saxony Road, Suite 204  
11 Encinitas, CA 92024  
12 Telephone: (760) 942-8505  
13 Fax: (760) 942-8515  
14 Email: marco@coastlawgroup.com

15 Attorneys for Plaintiffs

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FOREST GUARDIANS et al.,

Plaintiffs,

v.

DIRK KEMPTHORNE et al.,

Defendants,

ANADARKO PETROLEUM CORP. et al.,

Defendant-Intervenors.

)  
) Case No. 3:06-cv-02560-L-LSP  
)  
) **MEMORANDUM IN**  
) **SUPPORT OF PLAINTIFFS'**  
) **MOTION TO COMPEL**  
) **DISCOVERY**  
)  
) Date: March 26, 2008  
) Time: 9:00 AM  
) Courtroom: 14  
) Judge M. James Lorenz  
)

**TABLE OF CONTENTS**

1

2 TABLE OF AUTHORITIES ..... ii

3

4 INTRODUCTION ..... 1

5

6 BACKGROUND ..... 3

7 I. FWS’s FLAWED DECISION NOT TO PROTECT THE PLOVER ..... 3

8 II. THE ADMINISTRATIVE RECORD FOR THE PLOVER DECISION..... 4

9 A. Forest Guardians’ Concerns with the Initial Administrative Record..... 4

10 1. Lack of evidence regarding FWS’s change in position ..... 4

11 2. Lack of evidence of approval process..... 5

12 3. Potential involvement of Julie MacDonald..... 7

13 B. FWS’s Supplemental Administrative Record Fails to Fill the Gaps

14 in the Record ..... 8

15 C. FWS’s Second Supplemental Administrative Record Also Fails to Fill

16 the Gaps in the Record..... 10

17 III. FWS FAILS TO RESPOND TO FOREST GUARDIANS’ LIMITED DISCOVERY

18 REQUESTS ..... 11

19 ARGUMENT ..... 12

20 I. TO RESOLVE FOREST GUARDIANS’ CLAIMS, THIS COURT MUST REVIEW

21 THE WHOLE RECORD ..... 12

22 II. DISCOVERY IS WARRANTED IN THIS CASE BECAUSE THE

23 AGENCY DID NOT PROVIDE THE WHOLE RECORD..... 15

24 A. The Administrative Record Contains Significant Gaps..... 15

25 B. Forest Guardians Has Provided Evidence of Bad Faith..... 18

26 CONCLUSION..... 20

27

28

1  
2 **TABLE OF AUTHORITIES**

3 **FEDERAL CASES**

4 Animal Def. Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988).....15, 18

5 Baltimore Gas & Electric v. Natural Res. Def. Council, 462 U.S. 87 (1983).....12

6 Bar MK Ranches v. Yuetter, 994 F.2d 735 (10th Cir. 1993) .....15

7

8 Border Power Plant Working Group v. Department of Energy,  
260 F. Supp. 2d 997 (S.D. Ca. 2003) .....15

9

10 Camp v. Pitts, 411 U.S. 138 (1973).....14, 19

11 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) .....14, 18

12 Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) .....13

13 Ctr. for Biological Diversity v. FWS, 450 F.3d 930 (9th Cir. 2006) .....12

14 Ctr. for Biological Diversity v. FWS, 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) .....19

15 Defenders of Wildlife v. Babbitt, 958 F. Supp. 670 (D.D.C. 1997).....13

16 Exxon Corp. v. Dep’t of Energy, 91 F.R.D. 26 (N.D. Tex. 1981) .....14

17 Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991) .....15

18 Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005) .....15

19 Midwater Trawlers Coop. v. Dep’t of Commerce, 282 F.3d 710 (9th Cir. 2002) .....13

20 Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).....13

21 Nat’l Ass’n of Homebuilders v. Norton, 340 F.3d 835 (9th Cir. 2003) .....12

22 Natural Res. Def. Council v. Train, 519 F.2d 287 (D.C. Cir. 1975) .....15

23 Northwest Ecosystem Alliance v. FWS, 475 F.3d 1136 (9th Cir. 2007) .....13

24 Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994).....13

25 Orleans Audubon Society v. Babbitt, No. 94-3510 (E.D. La. May 2, 1997) .....16, 17

26

27

28





1 Notably, FWS did not reveal the one important exception until the agency filed its first  
2 supplemental record. The supplement showed that former Deputy Assistant Secretary for Fish,  
3 Wildlife, and Parks Julie MacDonald reviewed a draft plover listing decision and requested  
4 information from Regional FWS employees. This revelation is particularly troubling because  
5 Ms. MacDonald resigned in May 2007 after a Department of the Interior investigation revealed  
6 she had abused her position and, based on her own political agenda, manipulated scientific  
7 evidence in ESA listing actions between 2002 and 2007. Although the supplemental record  
8 shows she requested information, it does not include any of her direct communications or  
9 substantive discussions. Instead, the record includes only emails of other employees who  
10 happened to forward some of Ms. MacDonald's requests in a long chain of agency  
11 communications.  
12  
13

14 Because the documents FWS provided raise substantial questions about whether the  
15 agency withheld relevant information that should be part of the administrative record, Forest  
16 Guardians submitted limited discovery requests to FWS. FWS has refused to answer these  
17 requests. Forest Guardians therefore requests this Court compel FWS to respond. Although  
18 FWS and Forest Guardians consulted over the phone twice in an attempt to work out their  
19 differences, they were unable to do so. Accordingly, FWS and Forest Guardians consulted with  
20 the Court's law clerk and agreed that formal briefing is appropriate in this case. Forest  
21 Guardians has conferred with counsel for the Intervenor-Defendants, and they take no position  
22 on this Motion.  
23  
24  
25  
26  
27  
28

1 **BACKGROUND**

2 **I. FWS’S FLAWED DECISION NOT TO PROTECT THE PLOVER**

3 Forest Guardians is challenging FWS’s failure to list the imperiled mountain plover under  
4 the ESA because the agency ignored the best scientific evidence available, ignored the opinions  
5 of its own experts, and failed to provide scientific support for its 180° change in position—from  
6 a decision to list the plover to one not to list the plover. Complaint ¶¶ 95-103 [Doc. #1].

7  
8 Until FWS issued the final rule challenged in this case, it had repeatedly, over many  
9 years, found that the scientific evidence supported ESA listing of the plover. As early as 1982,  
10 FWS recognized that the mountain plover might need protection under the ESA. Complaint ¶  
11 54; Answer ¶ 54. In 1990, FWS determined the threats were sufficient to justify a proposed rule  
12 to list the plover as threatened or endangered. Complaint ¶ 55; Answer ¶ 55. FWS finally issued  
13 a proposed rule to list the plover as threatened in 1999. 64 Fed. Reg. 7,587 (Feb. 16, 1999).  
14 After further delay, a lawsuit forced FWS to take some action on the proposed rule by September  
15 3, 2003. Five scientific experts chosen by FWS reviewed the proposed rule and indicated that  
16 there was sufficient scientific information to support listing. 68 Fed. Reg. 53,083, 53,088-89  
17 (Sept. 9, 2003). As of July 17, 2003, FWS biologists had prepared a proposed rule listing the  
18 mountain plover as a threatened species based on significant population declines and threats to  
19 habitat in both its wintering and breeding range. Administrative Record (“AR”) 1-1-5.<sup>1</sup>

20  
21  
22  
23 When FWS published the final rule less than two months later on September 9, 2003,  
24 however, the agency changed its finding from one listing the plover to one not listing the plover.  
25 68 Fed. Reg. 53,083. As a result of this decision, the mountain plover has no protection under  
26

---

27  
28 <sup>1</sup> For the Court’s convenience, Plaintiffs have filed Administrative Record Excerpts in Support of  
Plaintiffs’ Motion to Compel Discovery. All administrative record and supplemental  
administrative record documents cited in this Motion are included as Exhibits to that filing.

1 the ESA. This dramatic change in position is the subject of this lawsuit. Forest Guardians  
2 contends that FWS did not adequately support this decision or rely on the best scientific evidence  
3 available, as mandated by the ESA. 16 U.S.C. § 1533(b)(1)(A). Accordingly, the focus of this  
4 Court's review will be FWS's decision-making process.  
5

## 6 **II. THE ADMINISTRATIVE RECORD FOR THE PLOVER DECISION**

7 The parties agree that judicial review is governed by the Administrative Procedure Act  
8 ("APA") and is based on the "administrative record" that was before the agency when it made its  
9 decision. As directed by the Court, FWS filed the administrative record on August 1, 2007.  
10 Federal Defendants' Notice of Lodging of Administrative Record [Doc. #41]. With the record,  
11 FWS filed the Declaration of Susan Linner, FWS Field Supervisor of the Colorado Services  
12 Field Office, the office housing the record. Ms. Linner certified that the documents provided  
13 comprised the "full and complete" administrative record. Declaration of Robin Cooley in  
14 Support of Plaintiffs' Motion to Compel Discovery ("Cooley Dec.") ¶ 2, Exh. 1.  
15  
16

### 17 **A. Forest Guardians' Concerns with the Initial Administrative Record**

18 After reviewing the administrative record, Forest Guardians identified numerous  
19 documents or other communications that were missing and detailed these omissions in a letter to  
20 FWS's counsel. *Id.* ¶ 3, Exh. 2. Although Forest Guardians had numerous concerns with the  
21 record, two are relevant for this Motion: (1) the lack of evidence as to why the agency changed  
22 its decision from one listing the plover to one not listing the plover, and (2) the lack of  
23 documentation of the approval process for the final rule. *Id.*, Exh. 2 at 2-3.  
24

#### 25 **1. Lack of evidence regarding FWS's change in position**

26 FWS Region 6, the lead office for the mountain plover decision, was prepared to list the  
27 plover until sometime around the end of July 2003. The record contains a draft rule proposing  
28 listing as a threatened species dated July 17, 2003. AR 1-1-5. However, sometime between July

1 17 and early August 2003, FWS changed its mind and decided to withdraw the proposed rule.  
2 An August 13, 2003 email from Robert Leachman, who was the lead biologist on the mountain  
3 plover listing, states: “[C]onference call last week between [Regional Office, Washington  
4 Office, and California Nevada Operations Office] yielded agreement to withdraw. [T]hat’s all I  
5 know.” AR 5-1-93. Apparently, Mr. Leachman was on vacation when FWS made the decision  
6 to withdraw. AR 5-1-92. Although not in the record, Forest Guardians obtained through a  
7 Freedom of Information Act (“FOIA”) request an email from Jill Parker, FWS Chief of  
8 Endangered Species in Region 6, that provides additional detail on the timeline:  
9

10  
11 Early Aug: listing pkg ready to go to [Washington Office], concurrence from  
12 [California Nevada Operations Office] likely as all substantive concerns  
13 addressed. Aug 8—green lite on withdrawal, to be done in [Regional Office] 3  
14 wks before deadline.

15 Cooley Dec. ¶ 3, Exh. 2, Attach. 1. These emails suggest this important decision was made  
16 during a conference call on August 8, 2003.

17 Not only did FWS fail to include Jill Parker’s e-mail in the record, but the agency also  
18 failed to include any documents regarding the substance of the conference call. *Id.*, Exh. 2 at 2-  
19 3. In fact, there is not a single personal communication, e-mail, letter, memo, or phone call  
20 record discussing FWS’s justification for changing from a listing to a withdrawal of the proposed  
21 rule.

## 22 **2. Lack of evidence of approval process**

23 Forest Guardians raised additional concerns about the lack of communications to or from  
24 FWS officials in Washington, D.C. who are typically involved in the listing decision approval  
25 process. *Id.*, Exh. 2 at 2. In its investigation of Julie MacDonald, discussed in detail below, the  
26 Office of the Inspector General (“OIG”) for the U.S. Department of the Interior examined FWS’s  
27 process for listing approvals at the time the agency issued the plover decision. Cooley Dec. ¶ 13,  
28

1 Exh. 11 at 3. According to the Report, the FWS Field Office would prepare a draft report for  
2 species listings, which the FWS Regional Office would review. Id. The Regional Solicitor’s  
3 Office would then prepare a draft legal analysis, which was sent to FWS headquarters in  
4 Washington, D.C. Id. In Washington, D.C., the Assistant Director for Endangered Species and  
5 the Solicitor’s Office would review the report. Id. Changes would be sent back to the Regional  
6 Office. Id. The draft would then be sent back for review to the Solicitor’s Office, the FWS  
7 Director, the Assistant Secretary for Fish, Wildlife and Parks, and the Chief of Staff of the  
8 Department, all of whom are located in Washington D.C. Id. Final approval of the listing  
9 decision was typically performed by the Deputy Associate Solicitor for Parks and Wildlife. Id.

12 Not only was the involvement of Washington D.C. officials the practice of FWS with  
13 respect to listing decisions, but Mr. Leachman’s e-mail confirms the involvement of FWS’s  
14 headquarters or “Washington Office” in the decision not to list the plover. AR 5-1-93.  
15 Moreover, Jill Parker’s e-mail suggests that Region 6 was not responsible for making the  
16 decision not to list the plover, and instead received the “green lite on withdrawal” from  
17 somewhere else within FWS or the Department of the Interior. Cooley Dec. ¶ 3, Exh. 2, Attach.  
18 1. Another e-mail from Jill Parker that Forest Guardians obtained from the same FOIA  
19 request—also not included in the record—indicates that the Washington Office turned all press  
20 calls on the final decision to withdrawal over to Region 6 because “they don’t want to dirty  
21 themselves with this one.” Id., Exh. 2, Attach. 2. These documents show that FWS officials in  
22 Washington, D.C. were involved in the plover decision. Yet, the record FWS provided  
23 contained no evidence of who reviewed the decision or the content of any input from these  
24 reviewers.  
25  
26  
27  
28



1 The United States District Court for the District of Idaho recently reviewed Julie  
2 MacDonald's involvement in FWS's decision not to list the greater sage grouse under the ESA.  
3 Western Watersheds Project v. FWS,<sup>2</sup> No. 06-277, at 32-34 (D. Id. Dec. 4, 2007) (Memorandum  
4 Decision) (Cooley Dec. ¶ 14, Exh. 12). The court held the decision was "tainted by [her]  
5 inexcusable conduct," which included "intervening in the listing process to ensure that the 'best  
6 science' supported a decision not to list the species . . . editing scientific conclusions [and]  
7 intimidating FWS staffers." Id. at 3. The court also commented on the problematic lack of  
8 evidence in the administrative record as a result of her interference.  
9  
10

11 MacDonald's principal tactic is to steer the "best science" to a pre-ordained  
12 outcome. That may explain why so much of the "best science" in this case was  
13 verbally communicated and never reduced to writing in any analytical or rigorous  
14 manner. This process allows the ultimate decision-makers to subjectively bend  
15 the "best science" to their own ends, while obscuring any inconsistencies.

16 Id. at 34.

17 Because Ms. MacDonald was the Deputy Secretary at the time of the plover decision,  
18 Forest Guardians was concerned that she may have influenced FWS's change in position  
19 between July 17 and early August 2003. The lack of any documents or other communications  
20 regarding the approval process and involvement of FWS officials in Washington D.C. only  
21 intensified these concerns. Accordingly, Forest Guardians requested that FWS fill in the gaps in  
22 the administrative record. Cooley Dec. ¶ 3, Exh. 2 at 2-3.

23 **B. FWS's Supplemental Administrative Record Fails to Fill the Gaps in the**  
24 **Record**

25 In response to Forest Guardians' letter, FWS agreed to conduct an additional search of its  
26 records and supplement the record by November 19, 2007. Id. ¶ 4, Exh. 3. FWS filed a  
27

28 <sup>2</sup> The court inadvertently refers to the Defendant in the caption as the U.S. Forest Service rather than the U.S. Fish and Wildlife Service.

1 supplemental record with sixty-three additional documents on November 19, 2007. Federal  
2 Defendants Notice of Lodging of Supplemental Administrative Record [Doc. # 45]. Again, Ms.  
3 Linner certified that it was the “full and complete” supplemental record. Cooley Dec. ¶ 5, Exh.  
4  
5 4. A few days later, FWS also responded to Forest Guardians’ concerns in a letter. Id. ¶ 6, Exh.  
6 5.

7 The documents FWS filed as the supplemental record, however, did not fill in the gaps  
8 regarding the agency’s abrupt change in position or the approval process. While the agency  
9 provided additional communications that occurred during that time period, none of the  
10 documents explained the decision to change the final rule from a listing to a withdrawal. In fact,  
11 the supplemental record created even more cause for concern because it established that Julie  
12 MacDonald was involved in the listing decision for the plover during the critical time period in  
13 which FWS changed its decision. Furthermore, there was still no evidence of involvement of  
14 anyone in Washington D.C. other than Julie MacDonald.  
15  
16

17 According to the supplemental record, on August 4, 2003, Ms. MacDonald asked for a  
18 copy of the listing petition, a list of all commenters on the rule, and the relevant research. Supp.  
19 AR 4-17 [Doc. #46-66]. On August 5, 2003, she requested information about grazing on the  
20 Pawnee National Grassland, where the plover population has declined dramatically. Id. She also  
21 requested scientific peer reviews of the rule on August 7, 2003. Id. Based on Mr. Leachman’s  
22 email, Forest Guardians estimates that the decision not to list the plover occurred during the  
23 week of August 4 through 8, 2003, and based on Jill Parker’s email, it likely occurred on August  
24 8, 2003. This is the precise time period when Ms. MacDonald reviewed the decision. Although  
25 some of her emails are included in the supplemental record, they are buried at the end of a chain  
26 of emails forwarded by various FWS employees. Id. Another email simply mentions her  
27  
28

1 involvement. Supp. AR 4-19 [Doc. #46-68]. None of Ms. MacDonald’s direct emails or other  
2 communications are included.

3  
4 In the supplemental record, FWS also provided an email from Jill Parker stating that the  
5 draft rule proposing to list the plover “went to SOL” on July 11, 2003. Supp. AR 4-5 [Doc. #46-  
6 54]. Forest Guardians believes SOL refers to the Solicitor’s Office in Washington D.C. Yet,  
7 there is no evidence of any consideration of the rule by the Solicitor’s Office in the  
8 administrative record.

9  
10 Finally, FWS failed to include the two e-mails from Jill Parker that Forest Guardians  
11 provided to the agency. Cooley Dec. ¶ 3, Exh. 2, Attach. 1 & 2. FWS’s attorney failed to even  
12 mention these e-mails in his response to Forest Guardians’ letter. *Id.* ¶ 6, Exh. 5. Accordingly,  
13 the supplemental administrative record raised even more concerns about the completeness of the  
14 administrative record.

15  
16 **C. FWS’s Second Supplemental Administrative Record Also Fails to Fill the  
17 Gaps in the Record**

18 In its November 21, 2007 letter, FWS stated that it had prepared a privilege log for both  
19 the original and supplemental administrative records. *Id.* On December 5, 2007, FWS provided  
20 Forest Guardians with the “preliminary privilege log.” *Id.* ¶ 7, Exh. 6. According to the log,  
21 FWS withheld twenty-two documents under the deliberative process privilege. *Id.* FWS never  
22 filed the privilege log with this Court.

23  
24 On January 11, 2008, FWS notified Forest Guardians that it intended to release a number  
25 of these privileged documents and include them in the administrative record. *Id.* ¶ 10. On  
26 January 22, 2008, FWS filed eleven documents listed on the privilege log and one additional  
27 document as the second supplemental administrative record. Federal Defendants’ Notice of  
28 Lodging Second Supplemental Administrative Record [Doc. #49]. Ms. Linner again certified

1 that the documents included the “full and complete” record. Declaration of Susan Linner  
2 Certifying Second Supplement to Administrative Record [Doc. #49-3]. Although this was the  
3 third time that Ms. Linner certified the record as complete, she provided no explanation of why  
4 her earlier claims were incorrect or why she was now certain that the record was complete.  
5

6 In the second supplemental record, FWS included an e-mail confirming that FWS  
7 officials in Washington D.C. were involved in approving the final plover rule. Second Supp. AR  
8 6-11 [Doc. #49-4] (“This version [of the Mountain Plover final rule] has gone to the other  
9 regions for concurrence and will be submitted to D.C. if it hasn’t already.”). However, there  
10 were no additional documents showing which D.C. employees received or reviewed the final  
11 decision.  
12

### 13 **III. FWS FAILS TO RESPOND TO FOREST GUARDIANS’ LIMITED DISCOVERY** 14 **REQUESTS**

15 Due to the gaps in the administrative record, Forest Guardians submitted to FWS limited  
16 discovery requests. Cooley Dec. ¶ 8, Exh. 7; see also id. ¶ 9, Exh. 8. These requests are  
17 narrowly tailored to determine whether FWS is withholding information that should be part of  
18 the administrative record, including information about whether the agency was influenced by  
19 political pressure rather than scientific evidence. The requests seek information about three  
20 topics: (1) the phone call referenced in Robert Leachman’s e-mail, (2) the approval process for  
21 the plover decision, and (3) the involvement of Julie MacDonald.  
22

23 FWS did not respond to the discovery requests. Cooley Dec. ¶ 11, Exh. 9. Instead, FWS  
24 claimed in response to each request:  
25

26 The Service objects in full to this interrogatory because this case is a challenge an  
27 an agency action, governed by the APA, and judicial review is confined to the  
28 administrative record. Thus, this request is impermissible and no future response  
is required.

1 Id. at 5-12. FWS also objected to some requests based on the attorney-client privilege and  
2 attorney work-product privilege. Id. at 5-6, 12. FWS provided no privilege log or other  
3 explanation in support of its assertion of these privileges.<sup>3</sup>  
4

## 5 **ARGUMENT**

6 Forest Guardians seeks discovery to complete the administrative record and determine  
7 whether Julie MacDonald exerted inappropriate influence on agency scientists. To resolve  
8 Forest Guardians' claims, this Court must consider the whole record that formed the basis of the  
9 agency's decision. Because FWS has not produced evidence of conversations or other  
10 communications that influenced its decision to disrupt 20 years of precedent and find that the  
11 plover did not deserve protection under the ESA, discovery is appropriate in this case.  
12

### 13 **I. TO RESOLVE FOREST GUARDIANS' CLAIMS, THIS COURT MUST REVIEW** 14 **THE WHOLE RECORD**

15 ESA listing decisions are reviewed under the Administrative Procedure Act ("APA").  
16 Watersheds Project v. Matejko, 468 F.3d 1099, 1107 (9th Cir. 2006); Ctr. for Biological  
17 Diversity v. FWS, 450 F.3d 930, 934 n.4 (9th Cir. 2006); Nat'l Assoc. of Homebuilders v.  
18 Norton, 340 F.3d 835, 840-41 (9th Cir. 2003). Under the APA, this Court must set aside a listing  
19 decision if it is arbitrary and capricious or contrary to law. 5 U.S.C. § 706(2)(A).  
20

21 A listing decision is arbitrary and capricious if FWS failed to "consider[] the relevant  
22 factors and articulate[] a rational connection between the facts found and choice made."  
23

24 Baltimore Gas & Electric v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983). Similarly, this  
25 Court must reverse the agency if it has "relied on factors which Congress has not intended it to  
26

---

27  
28 <sup>3</sup> During the conference call with the Court's clerk, the parties agreed to postpone consideration  
of the merits of FWS's privilege assertions until the Court determines whether FWS must  
respond to discovery.

1 consider, entirely failed to consider an important aspect of the problem, [or] offered an  
2 explanation for its decision that runs counter to the evidence before the agency.” Motor Vehicle  
3 Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). At its core, the arbitrary  
4 and capricious standard, “focuses on the rationality of the decision making process rather than  
5 the rationality of the actual decision.” Olenhouse v. Commodity Credit Corp., 42 F.3d 1560,  
6 1575 (10th Cir. 1994) (emphasis added). Accordingly, the reviewing court’s focus will be on the  
7 decision making process and the information that influenced that process.  
8

9  
10 A listing decision is contrary to law if it violates ESA requirements. Under the ESA,  
11 FWS must make listing decisions “solely on the basis of the best scientific and commercial data  
12 available” and not on political factors. 16 U.S.C. § 1533(b)(1)(A); Northwest Ecosystem  
13 Alliance v. FWS, 475 F.3d 1136, 1137 (9th Cir. 2007); Midwater Trawlers Coop. v. Dep’t of  
14 Commerce, 282 F.3d 710, 720 (9th Cir. 2002) (“[T]he best available politics does not equate to  
15 the best available science.”). Furthermore, FWS cannot ignore available biological information,  
16 including the evidence of its own experts. Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir.  
17 1988); Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 679-84 (D.D.C. 1997). As with the  
18 APA, the reviewing court’s focus under the ESA will be on the process and the factors that  
19 influenced the agency’s decision.  
20

21  
22 Forest Guardians challenges FWS’s failure to comply with the APA and ESA.  
23 Specifically, FWS failed to articulate any explanation, much less a rational one, for its 180°  
24 change in position with respect to the plover listing. Furthermore, the agency relied on factors  
25 which Congress did not intend it to consider by ignoring the best scientific evidence available,  
26 including the opinions of its own experts. Complaint ¶¶ 95-103 [Doc. #1]. To resolve Forest  
27 Guardians’ claims, it is essential that this Court review the “whole record” established during the  
28

1 agency's decision-making process. 5 U.S.C. § 706; Citizens to Preserve Overton Park v. Volpe,  
2 401 U.S. 402, 420 (1971).

3 The whole record consists only of documents in existence at the time the decision was  
4 made. Camp v. Pitts, 411 U.S. 138, 142 (1973). However, it must include “everything that was  
5 before the agency pertaining to the merits of its decision.” Portland Audubon Soc’y v.  
6 Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (emphasis added).

7 Accordingly, the record must contain all materials the agency considered either directly or  
8 indirectly, including evidence that is contrary to the final decision. Thompson v. U.S. Dept. of  
9 Labor, 885 F.2d 551, 555 (9th Cir. 1989). An “incomplete record” provides only a “fictional  
10 account of the actual decision-making process” and makes the requirement that the agency  
11 decision be supported by the record “almost meaningless.” Portland Audubon, 984 F.2d at 1548  
12 (internal quotations omitted); Exxon Corp. v. Dep’t of Energy, 91 F.R.D. 26, 33 (N.D. Tex.  
13 1981) (“Thus, a record may be ‘adequate’ because it fully articulates the agency’s reasoning, yet  
14 at the same time be ‘inadequate’ because it fails to provide the court all documents, memoranda  
15 and other evidence which were considered directly or indirectly by the agency.”).

16 In this case, the record must include a full explanation for why the agency abruptly  
17 decided not to list the plover as well as all communications that influenced the agency’s decision.  
18 Otherwise, it will be impossible for this Court to determine whether the agency articulated a  
19 rational explanation for its decision or based its decision on politics or other factors not grounded  
20 in science.  
21  
22  
23  
24  
25  
26  
27  
28

1 **II. DISCOVERY IS WARRANTED IN THIS CASE BECAUSE THE AGENCY DID**  
2 **NOT PROVIDE THE WHOLE RECORD.**

3 On the whole, plaintiffs are at a disadvantage with respect to the contents of the  
4 administrative record because it is up to the agency to compile and produce the record. While  
5 the general rule is that judicial review should be limited to the record, Lands Council v. Powell,  
6 395 F.3d 1019, 1029 (9th Cir. 2005), this Court does not have to accept blindly whatever the  
7 agency provides as the “whole record.” It may allow discovery where it appears that the agency  
8 failed to include all the evidence it considered or where there is a showing of bad faith. Both  
9 justifications are present in this case.  
10

11 **A. The Administrative Record Contains Significant Gaps**

12 Discovery is appropriate in a record review case “when it appears the agency has relied  
13 on documents or materials not included in the record.” Animal Def. Council v. Hodel, 840 F.2d  
14 1432, 1436 (9th Cir. 1988) (quotation omitted); Public Power Council v. Johnson, 674 F.2d 791,  
15 794 (9th Cir. 1982); see also Havasupai Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991);  
16 Border Power Plant Working Group v. Dep’t of Energy, 260 F. Supp.2d 997, 1011-12 (S.D. Ca.  
17 2003). Where there are “gaps” in the record, plaintiffs must conduct discovery to determine “all  
18 documents and materials directly or indirectly considered by agency decisionmakers.” Public  
19 Power Council, 674 F.2d at 794; see also Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th  
20 Cir. 1993) (“When a showing is made that the record may not be complete, limited discovery is  
21 appropriate to resolve that question.”); Natural Res. Def. Council v. Train, 519 F.2d 287, 292  
22 (D.C. Cir. 1975) (“[P]laintiffs are entitled to an opportunity to determine, by limited discovery,  
23 whether any other documents which are properly part of the administrative record have been  
24 withheld.”).  
25  
26  
27  
28

1 In Public Power Council, the Ninth Circuit allowed plaintiffs to go outside the proffered  
2 administrative record to obtain the testimony of agency officials who negotiated the disputed  
3 contracts because plaintiffs' made a showing that the agency "relied on various memoranda and  
4 notes of negotiating meetings which are not now part of the record." 674 F.2d at 794. The  
5 Western District of Washington allowed plaintiffs to conduct discovery where documents  
6 obtained through a Freedom of Information Act ("FOIA") request revealed that the federal  
7 defendants' decision to modify a key component of the Northwest Forest Plan may have been  
8 influenced by the timber industry. Pacific Coast Fed'n of Fishermen's Assoc. v. Nat'l Marine  
9 Fisheries Serv., No. 04-1299, at 8-9 (W.D. Wash. Feb. 22, 2005) (Order of Federal Defendants'  
10 Motion for Protective Order and to Quash Discovery) (Cooley Dec. ¶ 14, Exh. 13). The court  
11 allowed discovery because the documents provided a "reasonable basis to believe that  
12 communications regarding the timber industry proposal within agencies, between agencies, or  
13 between agencies and others may have been considered by agency decisionmakers." Id. at 9.

14  
15  
16  
17 Similarly, in an ESA case nearly identical to this case, the United States District Court for  
18 the Eastern District of Louisiana allowed discovery. Orleans Audubon Soc'y v. Babbitt, No. 94-  
19 3510 (E.D. La. May 2, 1997) (Order and Reasons) (Cooley Dec. ¶ 14, Exh. 14). In that case,  
20 plaintiffs challenged FWS's failure to designate critical habitat for the gulf sturgeon, a threatened  
21 species under the ESA. Although the agency prepared and circulated a draft proposal to  
22 designate critical habitat because it would benefit the sturgeon, the Regional Director changed  
23 the decision a few days later and decided to issue a final rule stating critical habitat was  
24 unnecessary. Id. at 3-4. The court allowed discovery because the "lack of any documentation  
25 [in the record] to explain specifically the FWS Regional Director's decision to reject the draft  
26  
27  
28

1 proposal strongly indicate[s] that the Court’s review of the agency action will be frustrated  
2 unless the court is satisfied that the record is complete.” Id. at 7.

3  
4 The same is true here. Currently, the record fails to provide any explanation for the  
5 agency’s dramatic change in position within an exceedingly short time and suggests that it was  
6 based on politics and not science. The record reveals that for more than 20 years prior to the  
7 listing decision challenged in this case, FWS believed the plover was declining and needed  
8 protection. The agency proposed to list the plover under the ESA in 1999, and was forced by a  
9 lawsuit to make a final decision by September 2003. 64 Fed. Reg. 7,587. The lead scientist on  
10 the plover finding was working on a draft rule to list the plover under the ESA as late as mid-  
11 July 2003. AR-1-1-5. Although FWS overturned that decision sometime within the next two  
12 months, there is no evidence in the record of who made that decision or why.

13  
14 One email in the record suggests that the decision may have been made on a conference  
15 call with FWS’s Washington Office. AR 5-1-93. The record contains no evidence regarding the  
16 participants or the substance of this call. In fact, despite ample evidence that FWS officials in  
17 D.C. reviewed and approved the plover decision, the record contains no evidence of this review  
18 or any communications between D.C. officials and the Regional office other than Julie  
19 MacDonald. Moreover, as discussed below, Ms. MacDonald’s involvement and her history of  
20 changing listing decisions based on politics rather than science only heightens the need for a  
21 complete record of the approval process.

22  
23 Accordingly, Forest Guardians has made a strong showing that the agency’s decision was  
24 influenced by communications that are not included in the administrative record. Because this  
25 Court’s review will be frustrated without a complete picture of why the agency reversed more  
26  
27  
28

1 than 20 years of scientific evidence, this Court should compel FWS to respond to Forest  
2 Guardians' discovery requests.

3 **B. Forest Guardians Has Provided Evidence of Bad Faith**

4 Courts will also allow discovery on the administrative record where plaintiffs make a  
5 showing of agency bad faith. Animal Def. Council, 840 F.2d at 1436-37; Public Power Council,  
6 674 F.2d at 797. Even if the "so-called 'record' looks complete on its face and appears to  
7 support the decision of the agency," plaintiffs can refute that by making a "showing of  
8 impropriety in the process." Portland Audubon, 984 F.2d at 1548. A showing of "impropriety  
9 creates an appearance of irregularity which the agency must then show to be harmless." Id. In  
10 fact, where plaintiffs make a strong showing of improper behavior, they are entitled to discovery  
11 regarding the mental processes of the administrative decision-makers. Overton Park, 401 U.S.  
12 402, 420 (1971).

13 Here, Forest Guardians has made a strong showing of impropriety. There is evidence that  
14 FWS relied on communications with a political appointee who the agency has acknowledged  
15 bullied biologists and altered scientific conclusions in listing decisions during her tenure. While  
16 Ms. MacDonald's involvement raises considerable concerns on its own, her participation in this  
17 case is particularly troubling because FWS revealed it only after Forest Guardians complained  
18 that the record was incomplete, and the agency produced more than sixty additional records that  
19 had been omitted from the original record. Even then, FWS did not provide actual copies of Ms.  
20 MacDonald's emails or evidence of other communications related to the mountain plover  
21 decision. Instead, FWS included only copies of other employee emails, which contained  
22 forwards of Ms. MacDonald's requests or references to her involvement.

23 At least two district courts have already overturned ESA listing decisions based on Ms.  
24 MacDonald's inappropriate actions. The District of Idaho explicitly held:

1 Finally, the FWS decision was tainted by the inexcusable conduct of one of its  
2 own executives. Julie MacDonald, a Deputy Assistant Secretary who was neither  
3 a scientist nor a sage-grouse expert, had a well-documented history of intervening  
4 in the listing process to ensure that the “best science” supported a decision not to  
5 list the species. Her tactics included everything from editing scientific  
6 conclusions to intimidating FWS staffers. Her extensive involvement in the sage-  
7 grouse listing decision process taints the FWS’s decision and requires a  
8 reconsideration without her involvement.

9 Western Watersheds Project, No. 06-277, at 3 (Cooley Dec. ¶ 14, Exh. 12). Similarly, the  
10 Northern District of California overturned FWS decisions regarding the ESA listing of the  
11 California tiger salamander, noting at several points the inappropriate direction from Ms.  
12 MacDonald to change scientific conclusions. Ctr. for Biological Diversity v. FWS, 2005 WL  
13 2000928, at \* 4 (N.D. Cal. Aug. 19, 2005) (“In an e-mail sent four days before the deadline for  
14 the final rule . . . Julie MacDonald directed the scientific review team to [change the final  
15 rule.]”); id. (“Assistant Deputy Secretary of the Interior [Julie MacDonald] immediately gave a  
16 directive to the scientific review team to draft a rule that down-listed all three populations to  
17 ‘threatened.’”); id. at \*15 (“A memorandum of a telephone conversation from a staff member  
18 with Julie MacDonald stated that, ‘Julie thinks [various populations] should be un-DPS’d [and  
19 other populations] are not significant (even though genetics state otherwise).’”). These decisions  
20 show the importance of obtaining all the evidence of Julie MacDonald’s involvement in listing  
21 decisions. Otherwise, the court will be unable to determine if she manipulated the work of  
22 agency scientists in the plover decision as she did in these cases.

23 FWS’s bad faith is also evidenced by its failure to provide the complete administrative  
24 record at the outset. The administrative record is established at the time the agency makes its  
25 decision; it is not some ever-changing set of documents that the agency puts together during  
26 litigation to support its position. See, e.g., Camp, 411 U.S. at 142; Thompson, 885 F.2d at 555  
27 (holding agency must include documents contrary to its position). In this case, the record existed  
28

1 at the time the agency decided not to list the plover in 2003. After Forest Guardians sued in  
2 2006, the agency had more than eight months to prepare the record. See Complaint [Doc. #1]  
3 (filed Nov. 29, 2006); Federal Defendants' Lodging of Administrative Record [Doc. #41] (filed  
4 Aug. 2, 2007). Yet, FWS failed to produce the complete record and has now offered two  
5 different supplements. FWS official Susan Linner's three certifications upon producing the  
6 original record and each of the supplements that the record is "full and complete" now rings  
7 hollow. Furthermore, even these supplements fail to fill the gaps in the record identified by  
8 Forest Guardians. This bad faith on the part of the agency is an additional reason for this Court  
9 to grant discovery.  
10  
11

## 12 CONCLUSION

13 Forest Guardians is entitled to discovery in this case to complete the administrative  
14 record because there are significant gaps in the record and evidence of agency bad faith.  
15 Because Forest Guardians' discovery requests are narrowly tailored to these specific issues, the  
16 Court should compel FWS to respond.  
17  
18

19 Respectfully submitted February 7, 2008,

20 s/ Robin Cooley  
21 Robin Cooley  
22 EARTHJUSTICE  
23 1400 Glenarm Place, Suite 300  
24 Denver, CO 80202  
25 Tel: (303) 623-9466  
26 Fax: (303) 623-8083  
27 Email: rcooley@earthjustice.org

28 Attorney for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 7, 2008, I served the foregoing MEMORANDUM IN  
3 SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY by electronic service  
4 pursuant to L.R. 5-135(a) upon the following counsel who have consented to electronic filing in  
5 this case:

6 Lawson E. Fite  
7 lawson.fite@usdoj.gov

8 Michael B. Wigmore  
9 michael.Wigmore@bingham.com

10 John Poulos  
11 john.poulos@pillsburylaw.com

12 Robert Nichols  
13 bnicho@state.wy.us

14 Jesus Rae Chavez  
15 jesus.chavez@bingham.com

16 Thomas Jacobson  
17 tom.jacobson@greshamsavage.com

18 s/ Robin Cooley