United States Court of Appeals
for the Eighth Circuit

No. 16-3899

Lee M. Simmons

Plaintiff-Appellant

v.

Paul Daniel Smith,[1] in his official capacity as Acting Director of the National Park Service; Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior; United States of America

Defendants-Appellees

Appeal from United States District Court
for the District of Nebraska – Omaha

Submitted: November 14, 2017
Filed: April 30, 2018

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

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[1] Paul Daniel Smith is automatically substituted pursuant to Federal Rule of Appellate Procedure 43(c)(2).

Lee M. Simmons appeals the decision of the district court[2] granting summary judgment in favor of the National Park Service (NPS). Simmons argues that NPS violated § 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706, in establishing the boundaries of the Niobrara Scenic River Area (NSRA), both generally and with respect to his property. Simmons further argues that NPS violated the APA by treating him differently than his neighbors and acting in bad faith.

I.

The Niobrara River runs through northern Nebraska before flowing into the Missouri River along the border between Nebraska and South Dakota. In 1991, Congress enacted the Niobrara Scenic River Designation Act, Pub. L. No. 102-50, 105 Stat. 254 (codified in relevant part at 16 U.S.C. § 1274(a)(117)), which amended the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271–87, to place certain portions of the Niobrara under the administration of the Secretary of the Interior. Congress further directed the Secretary, "[a]fter consultation with State and local governments and the interested public," to "establish detailed boundaries" for the NSRA. 16 U.S.C. § 1274(a)(117), (b). The Secretary delegated this authority to NPS. By statute, "prior to the publication of boundaries" pursuant to § 1274(b), the preliminary boundaries were

[2] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

established at "one-quarter mile from the ordinary high water mark on each side of the river." *Id*. § 1275(d). These "[p]rovisional boundaries remain[ed] in place until amended by the action of the administering agency." *Sokol v. Kennedy*, 210 F.3d 876, 877 n.3 (8th Cir. 2000). However, that default does not "limit the possible scope of the study report to address areas which may lie more than one-quarter mile from the ordinary high water mark on each side of the river." 16 U.S.C. § 1275(d).

Simmons owns land on the banks of the Niobrara. In the instant case, we are concerned particularly with his land on the north side of the river in what is called the Sparks Quadrant. Among other things, Simmons uses his land to operate a recreational outfitter business—called Niobrara River Ranch—which offers both canoeing and lodging. Simmons's land is situated directly downriver from the Berry Bridge, a major launch point for boats on the Niobrara, and includes both a large stand of ponderosa pines and substantial river "viewshed"—a term that refers to the area that is visible to a canoeist paddling down the river. Because Simmons's land is on the bank of the Niobrara, the preliminary boundary for the NSRA included a substantial portion of his property, namely all of the property within one-quarter mile of the river. Simmons has an interest in determining how much of his land falls within the final boundary determined by NPS, because the WSRA places limitations on certain projects and the use of land that falls within a designated area. *See* 16 U.S.C. §§ 1278, 1281(a), 1283.

In 1992, NPS began the process of creating a General Management Plan (GMP) that articulated detailed, specifically-tailored boundaries for the NSRA. This process lasted over four years, and, in 1996, NPS promulgated its final boundary designation. This boundary was challenged by David Sokol, another landowner on the Niobrara (who is not a party in the instant litigation). After the district court granted summary judgment to NPS in that case, Sokol appealed to this court, and we reversed. We held that the standard used by NPS in its decision making did not satisfy the WSRA's declaration of policy. *Sokol*, 210 F.3d at 879. That provision of the statute explains:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

16 U.S.C. § 1271. In light of that statutory language, we held that the boundaries of the NSRA had to be drawn in such a way as to "protect and enhance the outstandingly remarkable values that caused the Niobrara River area to be included in the [Wild and Scenic River] System." *Sokol*, 210 F.3d at 879. We found that NPS had acted in violation of its statutory mandate by focusing on protecting merely "significant" and "important" values, and we remanded the case with

instructions that "the Park Service should select boundaries that seek to protect and enhance the outstandingly remarkable values of the Niobrara Scenic River Area." *Id*. at 879–81.

NPS started over. They engaged in a second boundary-drawing process, led by Paul Hedren, the NPS Superintendent of the Niobrara. This process began in 2000 and involved public meetings, conversations with local landowners and other stakeholders, and the compilation of scientific evidence. Throughout the process, in accordance with our opinion in *Sokol*, NPS sought to identify those aspects of the Niobrara that qualified as outstandingly remarkable values (ORVs) and to draw boundaries accordingly. NPS made extensive ORV findings, noting the presence of five types of ORVs in the NSRA: scenic, recreational, geologic, fish and wildlife, and paleontological (in the "other" category). *See* 16 U.S.C. § 1271. NPS also concluded that the historic and cultural values of the river—while interesting and important—were not outstandingly remarkable. *See id*.

NPS identified two of these ORVs—recreational and paleontological—only in specific locations. A number of recreational values were enumerated including canoeing, kayaking, and tubing. For paleontological values, NPS noted that the river had been called "the best bone hunter's river in the world" and identified 15 internationally significant fossil sites, 37 nationally significant sites, and 106 regionally significant ones. These values were found to exist in discrete locations throughout the region. But the other three ORVs—

scenic, geologic, and fish and wildlife—were found to exist more broadly. For scenic values, NPS determined that the designated section of the Niobrara "retains a timeless natural character with a splendid and nationally recognized mixing of distinct ecosystems, some at their farthest continental range." Its finding on geologic values was based on the uniqueness and abundance of the Niobrara Valley's varied waterfalls and the "inextricable links to the river's flora, fauna, and paleontology" that its geological features foster and enhance. As to fish and wildlife, NPS noted that the Niobrara Valley possesses a "profusion of habitats and animal species" that are an "outstanding example of Great Plains biological diversity," that this diversity fosters "hybridization and evolution," and that portions of the river are "potential critical habitat[s] for several threatened or endangered species." Thus, NPS determined that these three values existed "rim to rim" across the designated section of the river, encompassing over 150,000 acres of the Niobrara Valley.

On the basis of these ORV determinations, the draft GMP laid out three "boundary alternatives." Boundary Alternative 1 represented the preliminary boundary created by the statute. It was not preferred by NPS, among other reasons, because it was "not tailored to provide maximum protection to the most outstandingly remarkable values." Boundary Alternative 2 was drawn to favor scenic and paleontological values specifically, with a diminished focus on the other values. This boundary was not preferred, but NPS noted that it did "meet congressional intent for Wild and

Scenic river protection." Boundary Alternative 3—NPS's preferred boundary line—focused on protecting all five of the identified ORVs "as equitably as possible" and, therefore, also satisfied congressional intent.

In the process of drafting and modifying these boundary alternatives, NPS consulted a wide range of organizations with interests in the Niobrara Valley. In 2001, NPS made presentations to many of these groups and revised the GMP (including the boundary alternatives) based on the suggestions received. In 2002, NPS made further revisions and alterations based on feedback after public review. This process stretched into January 2003. On January 9, 2003, the location of Boundary Alternative 3 on Simmons's land was altered to include approximately 25 additional acres on the North bank of the Niobrara in the Sparks Quadrant. Boundary Alternative 3—as relevant to this appeal—underwent no further changes, and NPS selected this Alternative as the final boundary for the NSRA. In 2005, NPS published notice of the draft GMP providing a 60-day window for public comment. NPS responded to all of the comments it received (including those submitted by Simmons) when it promulgated the final GMP in February 2007.

Simmons filed various written objections to the NPS boundary (both generally and as to the boundary specifically on his property) in 2005, 2007, and 2012. When his comments did not cause NPS to alter the boundary, Simmons filed this lawsuit in 2013, challenging NPS's decision-making process under the APA. Both parties sought summary judgment. On all but

one claim,[3] the district court granted summary judgment to NPS, concluding that the boundary-line alterations challenged by Simmons were not arbitrary or capricious, and that NPS had not acted in bad faith or subjected Simmons to differential treatment. Simmons appeals that ruling.

II.

"We review de novo a district court's decision on whether an agency action violates the APA." *Friends of the Norbeck v. U.S. Forest Service*, 661 F.3d 969, 975 (8th Cir. 2011). As relevant here, we may set aside agency action under the APA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Sokol*, 210 F.3d at 878. "An agency decision is arbitrary or capricious if: the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Parks Conserv. Ass'n v. McCarthy*, 816 F.3d 989, 994 (8th Cir. 2016) (quoting

[3] As to the one claim on which Simmons was granted summary judgment—relating to an entirely different parcel of land—the district court held that "[a]bsent any showing that the boundary change was made for the purpose of protecting and enhancing the oustandingly remarkable values of the Niobrara Scenic River Area, as opposed to maintaining the Area's acreage at a certain number, . . . NPS's action was arbitrary and capricious." NPS has not appealed that ruling.

Lion Oil Co. v. EPA, 792 F.3d 978, 982 (8th Cir. 2015)). "Under this narrow standard, a court is not to substitute its judgment for that of the agency, yet the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made." *Id*. (internal quotation marks omitted) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43 (1983)). Similarly, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984).

III.

Simmons first challenges NPS's determination of ORVs, arguing that the conclusion reached by NPS regarding the scope of scenic, geologic, and fish and wildlife ORVs is not consistent with our opinion in *Sokol*. Simmons does not dispute the scientific data or NPS's expertise in this area. Instead, he argues, NPS acted impermissibly in concluding that these ORVs extend from rim to rim across the Niobrara Valley. First, Simmons asserts that these specific ORV determinations are incompatible with *Sokol*. Second, he argues, more broadly, that an ORV of any type cannot exist from rim to rim across an entire river valley because such an ORV finding "is the legal equivalent of finding no ORVs at all." Further, he contends that NPS did not

adequately identify the specific ORVs present on his property that would justify the disputed boundary.

A. Sokol footnote 11

Simmons's first argument relies heavily on footnote 11 of our *Sokol* opinion, which admonished NPS for "selecting land . . . simply to maximize the number of acres included in the" NSRA. 210 F.3d at 881 n.11. That consideration, we explained, did not comport with the statutory requirement that NPS select land to protect and enhance the ORVs present in the river area. We went on to note that we were "particularly troubl[ed]" by "the decision to include more than 10,000 acres of 'hypothetical' viewshed, land that a canoeist on the river would see if one assumed that there were no trees or foliage on the banks." *Id*. This, we held, was "a massively counterfactual assumption" because "60 to 70 per cent. of the Niobrara River is screened by dense trees and foliage." *Id*. Based on the record before us, we commented that much of this land was "ordinary, unstriking, and apparently unnecessary to protect the scenic values of the river." *Id*. In short, the inclusion of this land based on its "hypothetical" scenic value to a canoeist (who would be unable to actually see it) was not in keeping with the requirement that NPS focus on protecting the actual ORVs. *See id*.

Simmons argues that this footnote establishes that his land does not contain scenic ORVs. But we must examine the language upon which Simmons relies in context. *Sokol* relied on NPS's candid admission

that it had based its ORV determination—to the extent that it made one—on a hypothetical viewshed, and that its goal was not (as it should have been) ORV protection, but rather acreage maximization. These admissions made the agency's counterfactual assumptions "particularly troubling." However, because NPS employed the wrong standard, we did not tell NPS how it should determine ORVs on remand, nor did we limit NPS's discretion to consider new information and draw new conclusions about ORVs.

When it returned to the drawing board, NPS followed *Sokol*. In the GMP, NPS explicitly defined the criteria it would follow in identifying ORVs of each type. For scenic ORVs, NPS used the following "Outstandingly Remarkable Criteria":

> The landscape elements of landform, vegetation, water, color, and related factors result in notable or exemplary visual features and/or attractions. When analyzing scenic values, additional factors such as seasonal variations in vegetation, scale of cultural modifications, and the length of time negative intrusions (such as power lines) are viewed may be considered. Scenery and visual attractions may be highly diverse over the majority of the river or river segment.

NPS followed these criteria in identifying the specific plant communities and forest and prairie ecosystems that combine to make the scenic values outstandingly

remarkable.[4] NPS also noted the way that the scenic values overlapped and interacted with the geologic and fish and wildlife values. In short, Simmons does not identify any way that NPS's ORV identification process conflicted with our specific admonition in *Sokol* footnote 11, and we see none.

B. "Rim to rim" ORV.

Simmons next argues that it is inconsistent with *Sokol*'s more central holding—that NPS had used the incorrect standard, identifying "important" and "significant" values rather than "outstandingly remarkable" ones—for NPS to assert that any ORV can be present from rim to rim across the entire 150,000-acre Niobrara Valley. Simmons reasons as follows. In *Sokol*, we rejected the notion that NPS had "complete discretion." 210 F.3d at 878–79. Instead, we held, NPS had to make the boundary determination based on the standard contained in the WSRA, namely, "to protect and enhance the outstandingly remarkable values." *Id*. at 879. Finding a rim-to-rim ORV, Simmons asserts, must therefore run afoul of *Sokol*, because, if an ORV exists from rim to rim, then NPS has complete discretion to draw the boundary. However, this argument misreads

[4] NPS also had personnel canoe the entire length of the river to identify the actual, rather than hypothetical, viewshed. It appears NPS considered this in determining the locations of recreational ORVs, rather than scenic ORVs, because it represented what a recreational canoeist would actually see while canoeing down the river. We note this, nonetheless, because it is indicative of NPS's intent to address the concerns expressed in *Sokol* footnote 11.

Sokol and misunderstands the nature of discretion granted to the agency.

As discussed above, in *Sokol*, we reversed NPS's boundary determination because the agency had not selected the land to be included on the basis of the "outstandingly remarkable values" standard required by the statute. In defending the standard that it had used, the agency argued, inter alia, that the statute left the decision entirely within its discretion. 210 F.3d at 878. We rejected this argument because, while the specific boundary-drawing provision gave no standard, NPS's argument "completely ignore[d] controlling language elsewhere in the [WSRA]." *Id*. That language required that the Niobrara (and all rivers within the Wild and Scenic Rivers System) be "administered in such manner as to protect and enhance" the ORVs that caused it to be included in the system. *Id*. (quoting 16 U.S.C. § 1281(a)).

We did not, however, go further to interpret or elaborate on how the ORV standard would apply in any particular instance. And, as a logical matter, finding the existence of one ORV from rim to rim across the entire valley is not the equivalent of finding no ORVs whatsoever. Even after the ORVs were identified, NPS was required to use those ORV determinations when setting the actual boundaries for the NSRA. *See id* at 879. This was so regardless of the size of the area containing ORVs. And, as we noted in *Sokol*, "the [WSRA] does not require that the boundaries encompass all the outstandingly remarkable resources; this might be impossible given the acreage limitation

[of § 1274(b)]." *Id*. Thus, we see no implied or explicit conflict between our opinion in *Sokol* and NPS's determination, in light of the evidence, that certain ORVs extended across the entirety of the valley.[5]

C. Specific ORV.

Simmons also argues that NPS acted arbitrarily and capriciously in setting the boundary on his property because it did not identify specific ORVs that existed in that area. We agree with Simmons's premise to a certain extent, but, based on the facts of this case, we reach the opposite conclusion. In crafting the boundaries, NPS *is* required to use the ORV determinations as a guide to decide which land should be included within the boundary in order to protect and enhance the ORVs. But we have said that NPS is "not required to include only land with outstandingly remarkable values." *Sokol*, 210 F.3d at 879.[6] In this case,

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[5] Nor do we see any issue with an ultimate finding that an ORV might extend across the entire valley. One need only consider the case of the Grand Canyon—or one of many other singular (and large) national treasures—to recognize that an outstandingly remarkable value might exist across an expansive area.

[6] Rather, we explained,

> The Park Service's duty was to establish detailed boundaries, within the acreage limits of Section 1274(b), that would protect and enhance the outstandingly remarkable values that caused the river area to be included in the Wild and Scenic Rivers System. This duty does not always bar the administering agency from including unremarkable land; indeed, the Act could require such inclusion where necessary to protect

NPS explained that Boundary Alternative 3 sought to balance the various ORVs "as equitably as possible," which made it preferable to the other identified alternatives. Thus, as long as the boundary placement was "rationally connected," *State Farm*, 463 U.S. at 43, to the protection of ORVs, NPS was not required to identify a specific ORV on any specific piece of property. And Simmons does not allege that NPS acted contrary to its stated objective of protecting these values.

Moreover, the record amply demonstrates that multiple ORVs were identified within the boundary line in question. Specifically, Simmons's land contains a large portion of viewshed that is directly downstream from Berry Bridge, which is a common launch point for recreational canoeists on the river. His land also contains a large and particularly impressive stand of ponderosa pine trees and habitats that support bald eagle foraging. Indeed, the final boundary line on Simmons's property tracks quite closely the extent of the viewshed and the ponderosa stand. Simmons does not dispute these facts. Instead, he relies on a statement by Hedren—made during a lengthy deposition[7]—in which he said that he could not identify specific features on Simmons's property. But, read in context, that

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> outstandingly remarkable resources, e.g. because of the need for buffer zones around resources or because of discontinuities in a resource's locations.

Id.

[7] This deposition was granted, we note, solely "for the limited purpose of obtaining evidence that NPS officials acted in bad faith."

statement indicates confusion about the location of Simmons's property, not confusion about the existence of ORVs. At various other points in the deposition, Hedren clearly and specifically identified which ORVs motivated his boundary determination on this property.

In sum, we see no flaw—either generally or related specifically to Simmons's property – in the public, thorough, and comprehensive process that NPS undertook to establish the boundaries of the NSRA.

IV.

Simmons also raises claims of bad faith and differential treatment, arguing that NPS drew the boundary line on his property where it did because Hedren and he had personal dislike for each other. Agencies may act arbitrarily and capriciously if they treat similarly-situated parties differently or if they act with bad faith. *See Petroleum Commc'ns Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (differential treatment); *Latecoere Int'l, Inc. v. U.S. Dept. of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (bad faith). On the other hand, there is a well-established presumption that administrative officers are unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Here, Simmons's argument relies entirely on select quotes from Hedren's deposition that, when read in context, do not prove his case.[8] Thus,

[8] For example, Simmons argues that Hedren "favored" Simmons's brother, Carl Simmons, and moved the boundary line on

as to bad faith, we agree with the district court that "the evidence does not support this claim." And, indeed, the same is true regarding differential treatment. Simmons alleges that the district court did not examine all the evidence because, in its assessment of differential treatment, it looked only at the one landowner Simmons had identified "*as an example* of differing treatment." However, as the district court noted, that landowner was not treated differently and, both below and on appeal, Simmons identifies no facts that indicate NPS "treate[ed] similarly situated parties differently." *See Petroleum Commc'ns*, 22 F.3d at 1172. The district court looked at the only example that Simmons provided and correctly determined that no such differential treatment was evident. Based on the record and briefing before us, we agree.

V.

NPS engaged in a methodical, time-consuming boundary-drawing process. It used the appropriate statutory standard to identify oustandingly [sic] remarkable values and it drew a boundary line that

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the property after he discovered that Lee Simmons, and not Carl, owned the property. The record does not support this argument. Hedren knew throughout the entire process that the ownership of the Simmonses' familial property was fluid and there is no indication that his understanding shifted around the time that the boundary line was moved. Simmons implies that Hedren preferred Carl because he said that Carl was "sensitive to the resources, to the values of the river." In the very next sentence, however, Hedren said the same thing about Simmons: "Lee was sensitive to the resources and the values."

sought to protect those values. There is no evidence in the record that leads us to conclude that NPS subjected Simmons to disparate treatment or acted in bad faith. For these reasons, we affirm the district court's grant of summary judgment in favor of NPS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LEE M. SIMMONS, Plaintiff, v. JONATHAN B. JARVIS, in his official capacity as Director of the National park Service; SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; and the UNITED STATES OF AMERICA, Defendants.	8:13CV98 MEMORANDUM AND ORDER (Filed Sep. 12, 2016)

The plaintiff, Lee M. Simmons ("Simmons"), owns land in Cherry County, Nebraska, a portion of which is included within the boundaries of the Niobrara National Scenic River. He brings this action to contest the boundary line that was drawn by the National Park Service ("NPS") in March 2007. Defendants include Jonathan B. Jarvis, Director of the National Park Service, Sally Jewell, Secretary of the U.S. Department of Interior, and the United States of America.

I. BACKGROUND

A. The Wild and Scenic Rivers Act

"The Wild and Scenic Rivers Act ('WSRA'), 16 U.S.C. §§ 1271-1287, was enacted in 1968 out of

concern for the preservation of United States rivers, many of which had been subjected to overdevelopment and damming." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1027 (9th Cir. 2008). The WSRA codifies Congress's policy determination "that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271.

"As originally enacted, the WSRA named specific rivers or segments of rivers for inclusion in the Wild and Scenic River System ('WSRS')." *Friends of Yosemite*, 520 F.3d at 1027 (citing 16 U.S.C. § 1274(a)(1)-(a)(8)). "The WSRA also sets forth a procedure for future designations to the WSRS." *Id.* (citing 16 U.S.C. § 1273(a)). "WSRS components are administered by the Secretary of the Interior (including any component administered by the Secretary of the Interior through the National Park Service or the Fish and Wildlife Service) or, if the river falls within a national forest, the Secretary of Agriculture." *Id.* (citing 16 U.S.C. § 1281(c)-(d)).

B. Designation of Nebraska's Niobrara River as a National Scenic River

In 1991, Congress amended the WSRA to designate 76 miles of the Niobrara River in north-central Nebraska as a unit of the national Wild and Scenic Rivers System. *See* Niobrara Scenic River Designation Act of 1991, Pub. L. No. 102-50, §§ 2-3, 105 Stat 254, codified at 16 U.S.C. §§ 1274(a)(117), 1276(a)(111). "The amendment did not specify which or how much land in the immediate environment of the Niobrara River was ultimately to be included within the Act's protections.[1] Instead, it directed the Secretary of the Interior, pursuant to 16 U.S.C. § 1274(b), to select detailed boundaries for protected land in the Niobrara River area, totaling no more than 320 acres per river mile. The Secretary delegated this authority to the Park Service." *Sokol v. Kennedy*, 210 F.3d 876, 877 (8th Cir. 2000) (footnote omitted).

> In 1992, the Park Service began the decision-making process to establish boundaries for the river area, and to generate the required General Management Plan and Environmental Impact Statement. This process was thorough and lengthy, lasting over four years. The Park Service formed a planning team, led by Natural Resource Specialist William Conrod, to gather and analyze information

[1] "On designation, however, provisional boundaries were immediately set at one-quarter mile from the sides of the river banks. 16 U.S.C. § 1275(d). Provisional boundaries remain in place until amended by the action of the administering agency." *Sokol v. Kennedy*, 210 F.3d 876, 877 (8th Cir. 2000).

on the Niobrara River area from a wide variety of public and private sources. The planning team also developed its own information from personal observations and field studies of resources along the river. The planning team assembled a large amount of information that was used to create "resource maps." The team used these maps to develop boundary alternatives, seeking to maximize protection of various resources in the area. The Park Service also organized the Niobrara Scenic River Advisory Commission, a body of local residents, businessmen, environmental groups, and state officials, that contributed to the process and received public comment on the planned boundaries.

The Park Service did not evaluate the land adjacent to the Niobrara River in terms of "outstandingly remarkable" values. Instead, from the beginning, the planning team analyzed the Niobrara River area in terms of "significant" and "important" values. Park Service officials were more comfortable with the significance and importance standards because they were familiar with them from other regulatory contexts. Additionally, the planning team felt that the term, "outstandingly remarkable," was not clear and was relevant only to the selection of new rivers for inclusion in the Wild and Scenic Rivers System. Nevertheless, the planning team purported to adopt the outstandingly-remarkable-values standard retroactively after [an affected landowner,] Mr. [David] Sokol[,] complained, at the September 15, 1995, meeting of the Advisory

> Commission, that the significant-values standard violated the Act. The planning team's documents and field notes before Mr. Sokol's complaint spoke only in terms of significance or importance. Subsequently, the draft and final boundary alternatives, published by the team in 1996, explained that "significant" and "important" were being used merely as synonyms for "outstandingly remarkable." By the end of the process, the Park Service claimed to have dropped the significant/important-values standard altogether, and the Park Service's final Record of Decision speaks only in terms of "outstandingly remarkable values."

Id. at 877-78.

C. The Sokol Decision

In 1997, Mr. Sokol brought suit in this court (Case No. 8:97CV51) to challenge the boundaries set by NPS.[2] "He alleged that the Park Service had violated the Act by failing to apply an outstandingly-remarkable-values standard when selecting boundaries for the Niobrara Scenic River area. Defendants replied, first, that this standard did not apply because the Park Service had complete discretion under the Act to establish the boundaries as it saw fit. Second, they maintained that even if the outstandingly-remarkable-values standard was required, the Park Service had in fact

[2] The Park Service's action was reviewed under the Administrative Procedure Act for a determination of whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

used it." *Id.* at 878. This court granted summary judgment for the defendants, *see Sokol v. Kennedy*, 48 F.Supp.2d 911 (D.Neb. 1999) (Bataillon, J.), but the Court of Appeals reversed the decision and held that "the Park Service's boundary selection violated its statutory duty under the Act." 210 F.3d at 881. In particular, the Court held "[t]he Park Service failed to apply the relevant statutory authority in making its decision. It selected land for inclusion in the Niobrara Scenic River area without identifying and seeking to protect outstandingly remarkable values, as required by the Wild and Scenic Rivers Act." *Id.* at 878. The Court explained:

> We reject the defendants' first argument that the Park Service was free to select land for the river area as it saw fit, without regard for the outstandingly remarkable values that Congress sought to protect in the Niobrara. The defendants rely on 16 U.S.C. § 1274(b), pursuant to which Congress charged the Park Service to establish detailed boundaries. They argue that Section 1274(b) allows them complete discretion in choosing land, within the Section's acreage limitation. While it is true that Section 1274(b) itself says nothing to the contrary, the defendants' argument completely ignores controlling language elsewhere in the Act.
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> Each river area in the Wild and Scenic River System must be "administered in such manner as to protect and enhance the values which caused it to be included" in the System. 16 U.S.C. § 1281(a). The values which cause a

river area to be included in the System are the "outstandingly remarkable . . . values" of the river and of the related land adjacent to it.[3] Selecting detailed boundaries is an administrative act; it is an alteration of the river area already established by Congress.[4] As an administrative act, Section 1281(a) applied to the Park Service's selection of boundaries. Far from exercising complete discretion under that Section, the Park Service was required to make the boundary selection to protect and enhance the outstandingly remarkable values that caused the Niobrara River area to be included in the System.

Accordingly, we reject the defendants' contention that the Wild and Scenic Rivers Act provided no meaningful standard for the selection of detailed boundaries; this

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[3] "A river area may be "caused to be included" in the System, for the purposes of Section 1281(a), only if it contains 'a free-flowing stream and related adjacent land area that possesses one or more of the values referred to in Section 1271 of this title.' 16 U.S.C. § 1273(b). Section 1271 provides in turn: ' . . . certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved . . . [and] they and their immediate environments shall be protected. . . .' Thus, the 'values' referred to in Section 1281(a) are the 'outstandingly remarkable' values set out in Section 1271." *Sokol*, 210 F.3d at 878 n. 5.

[4] "Once a river area is included by Congress in the System, river-area boundaries are automatically established, on a provisional basis, one-quarter mile from the river's banks. 16 U.S.C. § 1275(d). An agency's selection of detailed boundaries does not bring the river area into existence; the river area exists before agency action." *Sokol*, 210 F.3d at 879 n. 6.

interpretation conflicts with the administrative duty clearly set out in Section 1281(a). . . . The defendants argue correctly that the Park Service was not required to include only land with outstandingly remarkable values. The Park Service's statutory duty was to establish detailed boundaries, within the acreage limits of Section 1274(b), that would protect and enhance the outstandingly remarkable values that caused the river area to be included in the Wild and Scenic Rivers System. This duty does not always bar the administering agency from including unremarkable land; indeed, the Act could require such inclusion where necessary to protect outstandingly remarkable resources, *e.g.* because of the need for buffer zones around resources or because of discontinuities in a resource's locations. Equally, the Act does not require that the boundaries encompass all the outstandingly remarkable resources; this might be impossible given the acreage limitation. Neither categorical alternative is required by our decision. The Act allows the administering agency discretion to decide which boundaries would best protect and enhance the outstandingly remarkable values in the river area, but it must identify and seek to protect those values, and not some broader category.

We also reject the defendants second argument—that the Park Service did, in fact, identify and seek to protect the outstandingly remarkable values of the Niobrara River area. As the defendants admit, the planning team consistently analyzed resources in the

Niobrara for their "significance" and "importance." These terms are not synonymous with "outstandingly remarkable." Significance and importance are much broader terms. . . .

The Park Service did not choose the terms "significance" and "importance" because they were synonyms for "outstandingly remarkable." These terms were derived from a separate legal standard used by Park Service officials to evaluate potential park lands, a standard with which they were more familiar than the Wild and Scenic River Act's outstandingly-remarkable-values standard. . . .

The values identified by the Park Service for protection likewise demonstrate that the planning team confused the standards appropriate for choosing potential parks and for selecting boundaries under the Wild and Scenic Rivers Act. . . . The record provides no evidence that the planning team later corrected its confusion, or that it assigned a special meaning to the terms "significance" and "importance," equivalent to the statutory terms. Mr. Conrod, the team captain, admitted no such conscious decision had ever occurred. Indeed, Mr. Conrod went so far as to express what almost amounted to contempt for the terms of the statute. . . .

The defendants argue that whatever errors may have been made in the initial process were corrected in the draft and final boundary alternatives and in the Record of Decision. It is true that, after Mr. Sokol

> complained that the wrong standard was being used, editorial changes were made to the draft and final boundary alternatives. Specifically, a few sentences were added noting that "significant" and "important" were to be understood to mean outstandingly remarkable. These *post hoc* re-definitions, however, were not sufficient to correct past errors upon which the boundary alternatives and Record of Decision were based. . . .
>
> . . . Even after the Record of Decision had been published, Mr. Conrod stated that the outstandingly-remarkable-values standard did not apply to the selection of boundaries, but applied only initially "in the context of consideration of new sites." The Park Service analyzed the river area under the wrong standard, failing to use the outstandingly-remarkable-values standard required by the Act in selecting boundaries; it failed to correct its initial mistakes.

Id. at 878-81 (footnotes and internal references omitted).

The Court of Appeals also found "evidence in the record to suggest that the Park Service was not selecting land to protect the river area's resources but simply to maximize the number of acres included in the system." *Id.* at 881 n. 11 (citing draft boundary alternative memorandum which stated that "preferred boundary alternative includes 'maximum statutory acreage,' compared with others which include only 'critical resources.'"). "Particularly troubling," the

Court stated, "was the decision to include more than 10,000 acres of 'hypothetical' viewshed, land that a canoeist on the river would see if one assumed that there were no trees or foliage along the banks. This was a massively counterfactual assumption; the Park Service knew that 60 to 70 per cent. of the Niobrara River is screened by dense trees and foliage. Much of the land included in this viewshed was ordinary, unstriking, and apparently unnecessary to protect the scenic values of the river. The Park Service may include only land which possesses outstandingly remarkable resources or which is actually necessary to protect such resources." *Id.* (internal references omitted).

Finding that the Park Service's boundary selection was not in accordance with law, the Eighth Circuit reversed and remanded to the district court with instructions to remand to the Park Service. The Court directed that "[o]n remand, the Park Service should select boundaries that seek to protect and enhance the outstandingly remarkable values of the Niobrara Scenic River Area." *Id.* at 881.

D. Post-Sokol Administrative Action

The redrawing of boundary lines was completed in 2007. The Final General Management Plan ("GMP") and Environmental Impact Statement ("EIS") describe three alternative boundaries and three alternative management plans that were considered by NPS, along with a description of the process the agency conducted in developing these alternatives. On March 26,

2007, NPS Regional Director, Ernest Quintana, approved the Record of Decision choosing Management Alternative B and Boundary Alternative 3 on the recommendation of Paul Hedren, who at the time was NPS Superintendent of the Niobrara National Scenic River.

E. Simmons' Lawsuit

The present action was commenced on March 25, 2013, with the filing of a two-count complaint. It is stated that "Simmons is a property owner who has a working ranch and operates a recreational outfitter business, which includes canoeing and lodging, on land adjacent to the Niobrara Scenic River in Cherry County, Nebraska" (Filing No. 1 at CM/ECF p. 3). Simmons generally alleges that "NPS has acted improperly and contrary to law with respect to establishment of boundaries and management of the Niobrara Scenic River" (Filing No. 1 at CM/ECF p. 3).

Count I of the complaint is brought under the Declaratory Judgment Act, and it is alleged that a case of actual controversy exists between Simmons and NPS pursuant to 28 U.S.C. § 2201 concerning NPS's failure:

> (a) to exercise its statutory duty to administer the Niobrara Scenic River by establishing detailed boundaries for the Niobrara Scenic River "in such manner as to protect and enhance the [outstandingly remarkable values ("ORV's")] which caused it to be included" in the WSR Act. *Sokol*, 210 F.3d at 878;

Friends, 348 F. 3d at 798 (hereinafter failure relating to "establishing detailed boundaries");

(b) in adopting a Final CMP [comprehensive management plan] that, while associating specific ORV's with Niobrara Scenic River corridor in a general fashion, does not reflect the precise location of the ORV's or how, in drawing the boundaries for Simmons, NPS sought to protect them, including the fact the Record of Decision reflects some ORV's are not protected by the present boundaries and, indeed, that not all ORV's have been fully located. *Friends*, 348 F. 3d at 798 (hereinafter failure to identify "precise location of ORV's on Simmons property");

(c) to provide any "concrete measure of use" or otherwise "sufficiently address 'user capacities'" pursuant to Section 1274(d)(1) of the WSR Act on the basis the VERP [Visitor Experience and Resource Protection] be "implemented through the adoption of quantitative measures sufficient to ensure its effectiveness as a current measure of user capacities" (and NPS'[s] further failure in the interim to "implement preliminary or temporary limits of some kind") as opposed to merely creating a "VERP framework . . . contain[ing] only sample standards and indicators" as was done in the Final CMP [comprehensive management plan (also referred to as the Final General Management Plan and Environmental Impact Statement)] by NPS for the Niobrara Scenic River. *Friends*, 348 F. 3d at

> 796-97 (hereinafter failure to "address user capacities"); and
>
> (d) in creating insufficient procedures in a "comprehensive fire management plan" identified in the Final CMP in an effort to meet the requirements that it manage the Niobrara Scenic River corridor "in such manner as to protect" the ORV's (hereinafter failure relating to "comprehensive fire management plan").

(Filing No. 1, ¶ 35.) The court is requested to enter an order "declaring the right of Simmons to require NPS (a) to exercise its statutory duty to administer the Niobrara Scenic River by properly establishing detailed boundaries; (b) to identify the precise location of ORV's on Simmons property; (c) to properly address user capacities; and (d) to create sufficient procedures in a comprehensive fire management plan." (Filing No. 1, ¶ 36.)

Count II of the complaint is brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, and it is alleged that NPS violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.* The court is requested to enter an order:

> (a) Declaring the right of Simmons to require NPS (a) to exercise its statutory duty to administer the Niobrara Scenic River by establishing new detailed boundaries for the Niobrara Scenic River "in such manner as to protect and enhance the [ORV's] which caused it to be included" in the WSR Act; (b)

to adopt and implement a new comprehensive management plan that reflects the precise location of all ORV's on Simmons property on the Niobrara Scenic River and how, in drawing the boundaries, the NPS sought to protect them; and (c) to provide in a revised Final CMP a "concrete measure of use" or otherwise "sufficiently address 'user capacities' " as required by Section 1274(d)(1) of the WSR Act (including implementation of reasonable interim "preliminary or temporary limits of some kind") that would provide certainty to Simmons in his outfitter business while at the same time provide the "recreational enhancements . . . envisioned" by the WSR Act acknowledged by NPS (Final CMP at 229); and (d) to manage the Niobrara Scenic River corridor "in such manner as to protect" the ORV's by creating sufficient procedures in a "comprehensive fire management plan" to be included in a new Final CMP in accordance with 16 U.S.C. § 1281(a).

(b) Entering a mandatory injunction compelling NPS to exercise its statutory duty to administer the Niobrara Scenic River by establishing new detailed boundaries for the Niobrara Scenic River "in such manner as to protect and enhance the [ORV's] which caused it to be included" in the WSR Act; (b) to adopt and implement a new comprehensive management plan that reflects the precise location of all ORV's on Simmons property on the Niobrara Scenic River and how, in drawing the boundaries, the NPS sought to protect them; (c) to provide in a revised Final CMP a

> "concrete measure of use" or otherwise "sufficiently address 'user capacities'" as required by Section 1274(d)(1) of the WSR Act (including implementation of reasonable interim "preliminary or temporary limits of some kind") that would provide certainty to Simmons in his outfitter business while at the same time provide the "recreational enhancements . . . envisioned" by the WSR Act acknowledged by NPS (Final CMP at 229); and (d) to manage the Niobrara Scenic River Corridor "in such manner as to protect" the ORV's by creating sufficient procedures in a "comprehensive fire management plan" to be included in a new Final CMP in accordance with 16 U.S.C. § 1281(a).
>
> (c) Ordering recovery to Simmons of his costs, attorney fees and expenses to the extent allowed by law pursuant to 28 U.S.C. § 2412; and
>
> (d) Providing such other or further relief to Simmons as the Court finds just or equitable or allowed by the pleadings.

(Filing No. 1 at CM/ECF p. 16-17.)

Defendants answered the complaint on July 15, 2013 (Filing No. 14). On September 5, 2013, Defendants filed the administrative record ("AR") for the 2007 General Management Plan and the associated Environmental Impact Statement for the Niobrara National Scenic River, Nebraska (Filing No. 24). The administrative record was supplemented on January 31, 2014 (Filing Nos. 37, 38).

On January 17, 2014, Defendants filed a motion to dismiss for lack of jurisdiction any claim regarding the decision of record as it applies to any landowner other than Simmons (Filing No. 32). Simmons responded to the motion by stating that he "does not seek to have any boundaries redrawn other than his own" (Filing No. 39 at CM/ECF p. 14). Based on that representation, the court denied the motion to dismiss without prejudice and indicated it would "review NPS's actions only insofar as they directly affect the plaintiff's property" (Filing No. 45 at CM/ECF p. 23).

Defendants' January 17th motion also requested a protective order to prevent any discovery (Filing No. 32). Simmons responded that discovery was warranted to investigate "the apparent bias of NPS officials [Stuart] Schneider and [Paul] Hedren against Simmons, and whether such bias caused the NPS to draw boundaries of the Niobrara Scenic River at least in part based on who owned the land, not on the ORVs associated with the land" (Filing No. 39 at CM/ECF p. 20). The court, after finding that Simmons had made a "sufficient showing to depose Hedren and Schneider and other persons who have knowledge concerning the placement of the boundary lines on Simmons' property," allowed Simmons "to take up to 5 depositions for the limited purpose of obtaining evidence that NPS officials acted in bad faith," and also authorized the defendants to "depose Simmons about his proposed testimony 'regarding how he was treated'" (Filing No. 45 at CM/ECF p. 23). The court then established a progression schedule which provided for the completion of

depositions by December 1, 2014, and the filing of motions for summary judgment by March 2, 2015 (Filing No. 48). These deadlines were subsequently extended until May 7 and July 2, 2015, respectively (Filing Nos. 53, 55, 61, 63 (text orders)).

On April 14, 2014, Simmons filed a motion to complete or supplement the administrative record by including (1) Geographic Information System (GIS) files or other electronically stored information that were used to identify the location of ORVs on the Niobrara and (2) NPS emails, computer files and other documents relating to property owned or managed by Simmons or his family along the Niobrara between 2002 and March 26, 2007 (Filing No. 65). The motion was granted in part on September 1, 2015, with the court directing Defendants to produce certain records and to identify individuals to be deposed regarding these matters; however, the administrative record was not enlarged. The court's order stated that "[a]bsent any threshold showing of bad faith or bias and/or that the administrative record is incomplete or needs to be supplemented, this case shall be resolved wholly on review of the administrative record" (Filing No. 92). A new schedule for summary judgment motions was established, and subsequently extended, which required Simmons to file a brief by January 11, 2016, Defendants to file a brief by February 10, 2016, and Simmons to file a reply brief by March 3, 2016 (Filing Nos. 92, 95 (text order)).

On January 11, 2016, Simmons filed a motion to complete or supplement the administrative record

with deposition testimony and exhibits, plus certain maps which show boundary lines of Simmons' property (Filing No. 102). The motion is supported by a brief (Filing No. 103) and an index of evidence (Filing No. 104). In addition, Simmons filed a motion for summary judgment (Filing No. 105) with a supporting brief (Filing No. 111) on January 11, 2016. Simmons asks the court to:

> A. Enter a declaratory judgment declaring:
>
> > (i) NPS failed to properly exercise its statutory duty in establishing detailed boundary for the Niobrara on [Simmons'] property in such manner only as to protect and enhance ORVs as required in *Sokol*;
> >
> > (ii) NPS failed to reflect the precise location of ORVs on [Simmons'] property within the Niobrara boundary;
> >
> > (iii) NPS shall within ninety (90) days of this Court's judgment redraw and redesignate a proper boundary on [Simmons'] property that, in light of the evidence, shall include only viewshed (scenic) ORVs specifically found by NPS within a quarter-mile of the Niobrara on [Simmons'] property.
>
> B. Enter judgment finding and concluding NPS violated the APA and/or NEPA:
>
> > (i) By NPS failing to properly exercise its statutory duty in establishing detailed boundary for the Niobrara on [Simmons']

> property in such manner only as to protect and enhance ORVs as required in *Sokol*;
>
> (ii) By NPS failing to reflect the precise location of ORVs on [Simmons'] property within the Niobrara boundary;
>
> (iii) And order NPS within ninety (90) days of this Court's judgment to redraw and re-designate a proper boundary on [Simmons'] property that, in light of the evidence, shall include only viewshed (scenic) ORVs specifically found by NPS within a quarter-mile of the Niobrara on [Simmons'] property.
>
> C. Enter an order providing [Simmons] the right to recover his costs, attorney fees and expenses under 28 U.S.C. § 2412 or otherwise under law; and
>
> D. Enter an order granting other or further relief as the Court finds just or equitable or allowed by the pleadings.

(Filing No. 106 at CM/ECF p. 52.)[5]

On February 10, 2016, Defendants filed a motion for summary judgment (Filing No. 109), together with a consolidated brief in support of their motion, in opposition to Simmons' motion to complete or supplement the administrative record, and in opposition to Simmons'

[5] Simmons' motion for summary judgment does not address NPS's alleged failure to "address user capacities" or alleged failure relating to "comprehensive fire management plan," and such claims are deemed withdrawn.

motion for summary judgment (Filing No. 111). Simmons filed a consolidated reply brief in support of his motion for summary judgment and his motion to complete or supplement the administrative record on March 3, 2016 (Filing No. 112), together with a supplemental index of evidence (Filing No. 113). On March 7, 2016, Simmons filed a reply brief in opposition to Defendants' motion for summary judgment (Filing No. 114).

On March 9, 2016, Defendants filed a motion requesting leave to file a surreply brief regarding Simmons' motion to complete or supplement the administrative record and a reply brief regarding their motion for summary judgment (Filing No. 116). A supporting brief was also filed (Filing No. 117). Simmons filed an opposing brief on March 21, 2016 (Filing No. 118).

II. DISCUSSION

In the discussion which follows, the court will rule on Defendants' motion to file further briefs (Filing No. 116), Simmons' motion to complete or supplement the administrative record (Filing No. 102), and the parties' cross-motions for summary judgment (Filing Nos. 105, 109).

A. Defendants' Motion to File Further Briefs

In their initial, 105-page brief, Defendants oppose Simmons' motion to complete or supplement the administrative record and object to Simmons making

reference to the additional material in the brief filed in support of his motion for summary judgment. Defendants claim prejudice and complain that they have been "force[d] to respond to all of Plaintiff's additional non-record evidence in the merits of the summary judgment response, rather than having the Court determine whether any of such additional evidence should even be considered as a supplement to the Administrative Record" (Filing No. 111 at CM/ECF p. 69). Simmons replies that he "has stream-lined the process" and disputes that Defendants have been prejudiced (Filing No. 112 at CM/ECF pp. 2-5).

Defendants now want to file a sur-reply brief to respond to Simmons' "streamlining" argument and to address Simmons' arguments that omitted NPS emails and certain deposition testimony and exhibits support his "bad faith" claim. Defendants also want to reply regarding the additional exhibits that were filed on March 3, 2016.

Under the circumstances, the court does not fault Simmons for referencing non-record evidence in his brief, nor does it find Defendants have been prejudiced. The briefing schedule that was established on September 1, 2015 (Filing No. 92), and extended on September 10, 2015 (Filing No. 95 (text order)), did not provide for Defendants to file a reply brief regarding their motion for summary judgment. The court does not believe the topics identified by Defendants require further discussion. Accordingly, Defendants' motion to file further briefs (Filing No. 116) will be denied.

B. Simmons' Motion to Complete or Supplement Administrative Record

"It is well-established that judicial review under the APA is limited to the administrative record that was before the agency when it made its decision." *Rochling v. Department of Veterans Affairs*, 725 F.3d 927, 936 (8th Cir. 2013) (quoting *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004)). "By confining judicial review to the administrative record, the APA precludes the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency." *Id.* (quoting *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 766).

"The 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). "When reviewing agency decisions, both a district court and an appellate court must make an independent decision based on the identical record that was before the fact finder." *Wilkins v. Secretary of Interior* 995 F.2d 850, 853 (8th Cir. 1993). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

Certain exceptions have been carved from the general rule limiting APA review to the administrative record. District courts are "permitted to admit extra-record evidence (1) if admission is necessary to

determine whether the agency has considered all relevant factors and has explained its decision; (2) if the agency has relied on documents not in the record; (3) when supplementing the record is necessary to explain technical terms or complex subject matter or (4) when the plaintiff makes a showing of agency bad faith." *Rochling v. Dep't of Veterans Affairs*, No. 8:10CV302, 2011 WL 5523556 at *3 (D.Neb. Sept. 27, 2011) (citing *The Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). "These exceptions apply only under extraordinary circumstances, and are not to be casually invoked unless the party seeking to depart from the record can make a strong showing that the specific extra-record material falls within one of the limited exceptions." *Id.* (quoting *Voyageurs Nat. Park Ass'n.*, 381 F.3d at 766).

"When there is a contemporaneous administrative record and no need for additional explanation of the agency decision, there must be a strong showing of bad faith or improper behavior before the reviewing court may permit discovery and evidentiary supplementation of the administrative record." *Voyageurs Nat. Park Ass'n.*, 381 F.3d at 766 (internal quotations omitted). "[T]o put facts relating to bad faith in play a plaintiff must first make a threshold showing of either a motivation for the Government employee in question to have acted in bad faith or conduct that is hard to explain absent bad faith.'" *Tech Sys., Inc. v. United States*, 97 Fed. Cl. 262, 265 (2011) (citation omitted) (quoting *Beta Analytics Intern., Inc. v. United States*, 61 Fed. Cl. 223 (2004). "Second, the plaintiff must persuade the

Court that discovery could lead to evidence which would provide the level of proof required to overcome the presumption of regularity and good faith." *Beta Analytics*, 61 Fed. Cl. at 226.

"The burden of proof required for supplementing the administrative record is lower than that required for demonstrating bad faith or bias on the merits." *Pitney Bowes Government Solutions, Inc. v. United States*, 93 Fed.Cl. 327, 332 (2010). "The test for supplementation is whether there are sufficient well-grounded allegations of bias to support an inquiry and supplementation; the protesting plaintiff need not make a showing of clear and convincing evidence of bias on the merits." *Id.* (citing *L-3 Communications Integrated Systems, L.P. v. United States*, 91 Fed.Cl. 347, 354 (2010)). "Consistent with this standard, . . . trial courts have [only] required a plaintiff to assert a reasonable factual predicate for such allegation." *Id.* (quoting *L-3 Communications*, 91 Fed.Cl. at 355).

Defendants object to Simmons' proposed expansion of the administrative record, except that they "do not oppose the introduction the maps and supporting documents provided by [Simmons'] expert surveyor, Mr. Neef" (Filing No. 111 at CM/ECF p. 71). The court previously found that "Simmons ha[d] made a sufficient showing to depose . . . persons who have knowledge concerning the placement of the boundary lines on Simmons's property . . . for the limited purpose of obtaining evidence that NPS officials acted in bad faith" (Filing No. 45 at CM/ECF p. 23). The court also ordered Defendants to produce 20 emails that referenced

"Simmons" and certain additional records (Filing No. 92 at CM/ECF pp. 11-12), which were later marked as deposition exhibits. The court will grant Simmons' motion (Filing No. 102) and will consider the exhibits that were filed by him on January 11, 2016 (Filing No. 104), and March 3, 2016 (Filing No. 113), together with the exhibits that were filed by Defendants on February 10, 2016 (Filing No. 110).

C. Parties' Cross-Motions for Summary Judgment

Simmons alleges that NPS's final record of decision on the 2007 General Management Plan and the associated Environmental Impact Statement for the Niobrara National Scenic River violated NEPA. "While NEPA does not authorize a private right of action, the Administrative Procedure Act (APA) permits judicial review of whether an agency's action complied with NEPA." *Friends of Norbeck v. United States Forest Service*, 661 F.3d 969, 973 (8th Cir. 2011). "NEPA's purpose is to ensure a fully informed and well considered decision, and disclosure to the public that the agency has considered environmental concerns in decision making." *Id.* (citation omitted). "As such, NEPA's mandate is 'essentially procedural' and its rules do not govern the substance of the decision itself." *Id.* at 974 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)).

Under the APA, an agency action shall not be set aside unless it was "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court's scope of review is narrow, and the court may not substitute its judgment for that of the agency. *See Niobrara River Ranch, L.L.C., v. Huber*, 373 F.3d 881, 884 (8th Cir. 2004). "However, an agency must provide a satisfactory explanation for its actions based on relevant data." *Id.* The court's review "is limited to determining whether a challenged agency decision considered 'the relevant factors' and whether an agency has committed 'a clear error of judgment.' *Id.* (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

"Arbitrary and capricious" review is "highly deferential" and "presumes the agency's action to be valid." *Envt'l. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C.Cir. 1981). "[T]he court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 105 (D.D.C. 1995) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989)). "Although nothing more than a brief statement is necessary, the core requirement is that the agency explain why it chose to do what it did." *Tourus Records, Inc. v. Drug*, 259 F.3d 731, 737 (D.C.Cir. 2001) (internal quotations and citation omitted).

"Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record." *Fulbright v. McHugh*, 67 F. Supp. 3d 81, 89 (D.D.C. 2014), *aff'd sub nom. Fulbright v. Murphy*, No. 14-5277, 2016 WL 3040524 (D.C. Cir. Apr. 29, 2016). However, "the standard set forth in Rule 56(a) does not apply because of the court's limited role in reviewing the administrative record." *Id.* (quoting *Coe v. McHugh*, 968 F.Supp.2d 237, 239 (D.D.C. 2013)).

Simmons argues that "NPS'[s] decisions during the boundary selection process to increase an initial, interim boundary on Simmons' property were based on impermissible grounds, including NPS'[s]: (1) assumption that the entire 150,000 acres in the Niobrara corridor 'rim to rim' included ORVs (which assumption was at odds with *Sokol*'s observation 60 to 70 percent of such land was 'ordinary' and 'unstriking'); (2) desire to reach a certain number of total acres (23,074) of ORVs for the Niobrara; (3) motivation to use the boundary selection process to prevent Simmons from developing a dam on his property; and (4) interest in rewarding another landowner (Krueger) for being more 'open' and supportive of NPS in the Niobrara area (Filing No. 106 at CM/ECF p. 3). He also claims the new evidence gathered through discovery "confirms Hedren had longstanding animus toward Simmons and acted in bad faith when increasing the boundary on Simmons' property" (Filing No. 106 at CM/ECF p. 3).

1. "Rim-to-Rim" Outstandingly Remarkable Values

On remand from the Eighth Circuit's *Sokol* decision, NPS determined that five of the seven Congressionally-identified ORVs were present and worthy of protection at the Niobrara River: (1) the Scenic Value (AR_8136-8137, 8139-8140); (2) the Recreational Value (AR_8138, 8143-8144); (3) the Geologic Value (AR_8141), (4) the Fish and Wildlife Value (AR_8145-8146); and (5) the Paleontological Value under the "Other Category" Value of the WSRA (AR_8147-8150). NPS determined the Scenic, Geologic, and Fish and Wildlife ORVs were present throughout the Niobrara Valley, rim-to-rim, covering 150,000 acres (AR_8136, 8141, 8145-8146).

NPS prepared three separate and distinct Boundary Alternatives (AR_8148, 8151, 8153-8158). Boundary Alternative 1 is the provisional boundary established by the WSRA, which was set one-quarter mile back on each side of the river from the ordinary high water mark (AR_8148, 8153-8154, 9076). Boundary Alternatives 2 and 3 represent adjustments to the provisional boundary that were intended to protect and enhance the ORVs. (AR_8148, 8151, 8155-8158). In particular, NPS made Boundary Alternative 3 wider between the Fort Niobrara National Wildlife Refuge and Norden Bridge "[d]ue to the complexity of the intertwined biological resources comprising the Scenic, Geologic, and Fish and Wildlife values. . . ." (AR_8151). Simmons' land is within this area (Filing 104-26, Neef Decl. ¶¶ 5,

8, Exs. D, G (sealed)).[6] NPS also increased the boundary in areas it considered more susceptible to development (AR_8125, 8137). NPS preferred, and eventually selected, Boundary Alternative 3, stating that it "equally protects the River's outstandingly remarkable scenic, recreational, geologic, fish and wildlife, and paleontological values within its 23,074 acres" (AR_9076, 9096).

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[6] The record shows that Simmons' property also contains Recreational Value and borders property containing Paleontological Value:

> A review of the Neef maps indicates several ORVs on Plaintiff's property. Exhibit D is based on a Cornell Dam quadrant map found at AR_4511. The preferred boundary line (green line) contains some of Plaintiff's land. (Filing 104-26, Neef Decl. ¶ 5, Ex. D (sealed)). Most of Plaintiff's land within the preferred boundary is within the Niobrara River Viewshed (red line, Recreational ORV) (Filing 104-26, Neef Decl. ¶ 5, Ex. D (sealed)). The preferred boundary also encompasses two regionally-significant fossil sites located just north of Plaintiff's land (represented by red triangles, Paleontological ORV). (Filing 104-26, Neef Decl. ¶ 5, Ex. D (sealed)).
>
> Exhibits E, F and G are based in the Sparks Quadrant maps found in the Administrative Record. (AR_4512, 4513, 4492). These maps identify several ORVs within Plaintiff's property. South of the River, Plaintiff's property includes Viewshed (red line, Recreational ORV), foliage (green shading, Scenic ORV), and waterfalls (yellow squares, Geologic and Scenic ORV's). North of the River, Plaintiff's property includes Viewshed (red line, Recreational ORV) and foliage (green shading, Scenic ORV). (Filing 104-26, Neef Decl. ¶¶ 6-8, Exs. E, F, G (sealed), see map legends).

(Filing No. 111 at CM/ECF p 36 (footnote omitted)).

NPS defends its "conclusion that three ORVS exist from rim-to-rim, encompassing 150,000 acres," by stating:

> The Scenic Value is supported by the six continental ecosystems that prosper and mix in the Niobrara River corridor, including but not limited to the ponderosa pine forest and savanna, and a Rocky Mountain vegetative stand located on the eastern edge. (AR_8136-8137, 8339-8340). The multifaceted geology of the Niobrara River supports and is linked inextricably to the rich vegetation and diverse fish and wildlife, and the wonderous [*sic*] array of waterfalls and remarkable paleontological resources. (AR_8141). The Fish and Wildlife Value is justified by the Niobrara Valley's support of nationally or regionally important populations of indigenous wildlife species, including populations of threatened, endangered, or sensitive species, including bald eagles, a sensitive species. (AR_8196-8199, 8341-8342). Further, the Niobrara River provides an exceptional habitat for the diverse species, and the convergence of the six ecosystems has supported both an east-west avian corridor for birds, and hybridization of several species. (AR_8145-8146). The largely natural condition of the valley makes the Niobrara River, from rim-to-rim, a unique wonder in the Great Plains and beyond.

(Filing No. 111 at CM/ECF p. 87.)

Simmons contends this finding of "rim-to-rim" ORVs is inconsistent with the Eighth Circuit's footnoted

comment in *Sokol* that "60 to 70 percent of the Niobrara River is screened by dense trees and foliage . . . [with] [m]uch of the land included in the viewshed . . . ordinary, unstriking, and apparently unnecessary to protect the scenic values of the river." 210 F.3d at 881 n. 11. That comment, however, was directed at NPS's "decision to include more than 10,000 acres of 'hypothetical' viewshed, land that a canoeist on the river would see if one assumed that there were no trees or foliage along the banks." *Id.* No such "hypothetical" viewshed was used by NPS on remand.

Instead, "[v]iewshed lines were drawn by NPS personnel who canoed the entire Niobrara River to map the viewshed. (AR_9105). Rangers also mapped the overlook viewsheds. (AR_8331, ¶ 43). 'Distance detail was drawn on topographic maps and often ground-truthed and plotted with global positioning equipment.' *Id.*" (Filing No. 111 at CM/ECF p. 9, ¶ 23). "The Recreational ORV maps in the Final GMP include two types of viewsheds: (1) the River Viewshed (represented by the area between red lines on either side of the river); and (2) the Overlook and Bridge Viewsheds (represented by various colored polygons) (AR_8143-8144)" (Filing No. 111 at CM/ECF p. 9, ¶ 23). As NPS further explains, it

> redrew the River Viewshed line to respond to the *Sokol* holding that 60 to 70 percent of the prior viewshed was not visible from the River. In 2000, Mr. Hedren advised the Niobrara Council that the NPS was going to map the actual "view shed" specifically to respond to

> the Court's ruling. Filing 110-4, Hedren Depo. 222:6-11; Filing 110-10, Ex. I, Depo. Ex. 18, p. 4. The NPS rangers drew new viewshed lines by canoeing the river, continually scanning the landscape, and documenting the details on topographic maps. (AR_8331, ¶ 43). The resulting River Viewshed was an essential component of the Recreational ORV and was included on maps in the GMP. (AR_8138, 8143-8144).

(Filing No. 111 at CM/ECF pp. 86-87.)

2. Maximizing Acreage

Simmons accuses NPS of also disobeying the Eighth Circuit's directive that it should not select boundaries "simply to maximize the number of acres included in the system." 210 F.3d at 881 n. 11. In particular, he complains that on January 10, 2003, the boundary line on his property was redrawn to compensate for a "substantial portion" of 25 acres that were removed from a neighboring property owned by Kerry Krueger (see Filing No. 106 at CM/ECF pp. 21-25, ¶¶ 47-54). NPS does not dispute that the boundary line was moved for this reason (see Filing No. 111 at CM/ECF pp. 52-56), and its Superintendent, Paul Hedren, so testified (see Filing No. 104-4 at CM/ECF pp. 53-54).[7] NPS also admits making "a conscious decision to keep the number of acres contained within

[7] While the court does not find that Hedren acted in bad faith or was unduly biased against Simmons, it is not required to disregard his deposition testimony or other supplemental evidence.

Boundary Alternative 3 constant after revealing the boundary alternatives to the public" (Filing No. 111 at CM/ECF p. 55). Hedren "wanted consistency" and "did not want to go to the public . . . [saying] it measured thus and so . . . and then the next time the measurement was different" (Filing No. 110-4 at CM/ECF p. 188). Absent any showing that the boundary change was made for the purpose of protecting and enhancing the outstandingly remarkable values of the Niobrara Scenic River Area, as opposed to maintaining the Area's acreage at a certain number,[8] the court finds that NPS's action was arbitrary and capricious.

3. Dam Prevention

Simmons charges that "Hedren made a final decision to dramatically increase the boundary on Simmons' property on January 9, 2003, even though he was fully aware he and NPS had not identified any ORVs on Simmons' property beyond the quarter-mile boundary" (Filing No. 114 at CM/ECF p. 16). Simmons speculates that Hedren made this decision, at least in part, because he wanted to prevent Simmons from constructing a dam on his property (see Filing No. 106 at CM/ECF pp. 17-19, ¶¶ 35-42). Suffice it to say the evidence does not support this claim.

While there is evidence that the Corps of Engineers, on May 23, 2003, denied Simmons a permit to

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[8] Even though Boundary Alternative 3's area of 23,074 acres is less than the statutory maximum of 24,320 acres, this does not justify the boundary change.

build a dam within 400 feet of the river, there is no evidence to indicate that NPS extended the boundaries to prevent Simmons from building a dam more than a one-quarter of a mile from the river. Indeed, all of the evidence is to the contrary—that the dam permit process had no effect on the boundary decisions (see Filing No. 111 at CM/ECF pp. 47-48). Simmons argues that an adverse inference should be drawn from the fact that certain documents were not included in the administrative record (see Filing No. 106 at CM/ECF pp. 34-35 (¶¶ 76-80), 50-51), but after carefully reviewing the documents identified by Simmons (Filing Nos. 104-20, 104-21, 104-22, 104-23) and NPS's response (see Filing No. 111 at CM/ECF pp. 62-65), the court is satisfied that NPS did not have adequate notice that documents pertaining to the dam permit process were relevant to the pending action. The court also declines to draw an adverse inference regarding any documents that were withheld prior to or during a Rule 30(b)(6) deposition.

4. Differential Treatment

Simmons argues that "NPS'[s] action toward [him] was arbitrary and capricious—regardless of NPS'[s] motivation or absence of bad faith—because NPS treated Simmons differently than similarly situated parties, *e.g.*, Krueger, in the Niobrara boundary selection process" (Filing No. 106 at CM/ECF p. 48). Because Simmons relies entirely upon NPS's decision to exclude 25 acres of Krueger's property from Boundary Alternative 3, and then to move the boundary line

further into Simmons' property to make up the difference, the court need not consider Simmons' differential treatment claim. The court has already determined, based on NPS's admissions, that such boundary change on Simmons' property was arbitrary and capricious.

5. Bad Faith

Finally, Simmons claims that "Hedren's subjective bad faith and animus toward Simmons—ratified by NPS through acquiescence—deprived Simmons of fair and honest consideration of the Niobrara boundary to be placed on his property" (Filing No. 106 at CM/ECF p. 49). Stating that Hedren "strongly opposed Simmons building a dam on his property" Simmons claims that "NPS improperly used . . . the boundary designation process to ensure Simmons would be blocked from building future dams" (Filing No. 106 at CM/ECF p. 49). As previously discussed, the evidence does not support this claim. Simmons additionally claims Hedren was concerned that Simmons would gain control of additional riverside property from his brother Carl (see Filing No. 106 at CM/ECF pp. 14-17, ¶¶ 29-33), and moved the boundary line in anticipation of this happening. This also is unfounded speculation. While the court permitted Simmons to conduct discovery to develop his bad faith claims, they are not borne out by the evidence.

D. Declaratory Judgment

Defendants argue that Simmons' request for declaratory and injunctive relief "is contrary to law in an administrative case" and that "[s]hould the Court determine the NPS action to be unlawful, . . . the appropriate remedy would be a remand to the agency because the agency is in the best position to evaluate the administrative record documents, along with evidence submitted by Plaintiff" (Filing No. 111 at CM/ECF pp. 101-02). The court agrees, although it does not believe any further evaluation will be necessary regarding the January 10, 2003 boundary change. *See Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 641 (8th Cir. 2007) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.") (quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002)); *Palavra v. I.N.S.*, 287 F.3d 690, 693 (8th Cir. 2002) ("If . . . an agency decides a case on a ground believed by an appellate court to be wrong, the case has to be remanded to the agency."). *Cf. Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 901 (8th Cir. 2013) ("An administrative remand may be appropriate when an agency procedurally errs by failing to articulate a reasoned basis for its decision. When an agency legally errs by acting outside its statutory authority, a remand would be futile and improper."). Accordingly, this matter will be remanded to NPS with directions to remove from the Niobrara Scenic River area that portion of Simmons' property that was added to the area by reason of changing Boundary Alternative 3 on

January 10, 2003 (see AR__004492, referencing "add on 25 acres here").

IT IS ORDERED:

1. Defendants' motion for leave to file further briefs (Filing No. 116) is denied.

2. Plaintiff's motion to complete or supplement the administrative record (Filing No. 102) is granted.

3. Plaintiff's motion for summary judgment (Filing No. 105) is granted in part and denied in part, as follows:

    a. The motion is granted to the extent Plaintiff claims the National Park Service acted arbitrarily and capriciously by changing a boundary line on January 10, 2003.

    b. In all other respects, the motion is denied.

4. Defendants' motion for summary judgment (Filing No. 109) is granted in part and denied in part, as follows:

    a. The motion is denied insofar as the January 10, 2003 boundary change is concerned, as to which claim Plaintiff has prevailed.

    b. In all other respects, the motion is granted and Plaintiff's other claims are dismissed with prejudice.

5. Judgment shall be entered by separate document, generally providing that this matter is remanded to the National Park Service with

directions to remove from the Niobrara Scenic River area that portion of Plaintiff's property that was added to the area by changing Boundary Alternative 3 on January 10, 2003.

DATED this 12th day of September, 2016.

BY THE COURT:

s/ Richard G. Kopf
Senior United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3899

Lee M. Simmons

Appellant

v.

Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior, et al.

Appellees

Appeal from U.S. District Court
for the District of Nebraska – Omaha
(8:13-cv-00098-RGK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Grasz would grant the petition for rehearing en banc.

July 17, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans