

# THE JOURNAL OF FEDERAL AGENCY ACTION

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#### Editorial Office

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## Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,  
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@  
meyerowitzcommunications.com, 631.291.5541.

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Morgan Morrisette Wright, Publisher, Full Court Press at mwright@fastcase.com  
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# Expanding the Administrative Record in Administrative Procedure Act Litigation

Steven D. Gordon\*

*In this article, the author explains that in most Administrative Procedure Act cases, there is no issue about the completeness of the administrative record. The basis for the agency's action is fully disclosed in the record that it produces. And when an administrative record is incomplete, the matter can sometimes be resolved through discussions between counsel. Litigation over expanding the administrative record is unusual. But, the author concludes, it can be vital to the outcome of the case.*

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Challenges to federal agency actions under the judicial review provisions of the Administrative Procedure Act (APA) are normally adjudicated without any discovery, on the basis of an administrative record that is produced by the agency. The Supreme Court has instructed that “courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.”<sup>1</sup> “[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>2</sup> If the reviewing court cannot evaluate the challenged agency action on the basis of the record before it, the matter is usually remanded to the agency for additional investigation or explanation.<sup>3</sup>

Nonetheless, there are three situations in which an APA plaintiff may seek to expand the administrative record produced by the agency. The first is where the plaintiff believes that the agency has omitted relevant documents or information from the record and seeks to complete the record by adding them. The second is where the plaintiff seeks to supplement the existing record with documents or materials that were not before the agency but which the plaintiff believes are necessary for the court to assess the APA claim. The third is where the plaintiff seeks discovery from the agency to supplement the administrative record.

“[J]udicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing



court as the administrative record.”<sup>4</sup> However, “[t]here is a strong presumption against discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process.”<sup>5</sup> The rationale is that “further judicial inquiry into ‘executive motivation’ represents ‘a substantial intrusion’ into the workings of another branch of Government and should normally be avoided.”<sup>6</sup> Furthermore, “limiting supplementation of the administrative record serves both to incentivize parties to ‘structure their participation [in the administrative process] so that it . . . alerts the agency to the [parties’] position and contentions,’ and to prevent parties from making an end run around the agency’s substantive . . . judgments.”<sup>7</sup>

The courts recognize that, in exceptional circumstances, it is appropriate to expand the administrative record supplied by the agency or even to permit discovery about the administrative decision-making process. In the U.S. Court of Appeals for the Ninth Circuit, “a reviewing court may consider extra-record evidence where admission of that evidence (1) is necessary to determine whether the agency has considered all relevant factors and has explained its decision; (2) is necessary to determine whether 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 plaintiffs make a showing of agency bad faith.”<sup>8</sup> The U.S. Court of Appeals for the District of Columbia Circuit has said that additional evidence may be considered when: (1) the agency failed to examine all relevant factors, (2) the agency failed to explain adequately its grounds for decision, (3) the agency acted in bad faith, or (4) the agency engaged in improper behavior.<sup>9</sup> “Underlying all of these exceptions is the assessment that resort to extra-record information [is necessary] to enable judicial review to become effective.”<sup>10</sup>

## **The Contents of the Administrative Record**

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The APA specifies that judicial review is to be based on the “whole record” before the agency.<sup>11</sup> The Supreme Court has held that the “whole record” means “the full administrative record that was before the Secretary at the time he made his decision.”<sup>12</sup> This includes “all documents and materials directly or indirectly

considered by the agency.”<sup>13</sup> Documents indirectly considered by the agency include those that were relied on by subordinates and so were constructively considered by the ultimate decision-maker.<sup>14</sup>

“A complete administrative record . . . does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege.”<sup>15</sup> However, the treatment of predecisional and deliberative documents has sparked division among the courts. There are two rationales for excluding such deliberative materials: (1) judicial review of agency action should be based on an agency’s stated justification, not the predecisional process, and (2) excluding deliberative materials promotes better decisions by encouraging uninhibited and frank discussion among policy makers.<sup>16</sup>

The D.C. Circuit has held that deliberative documents “are not a part of the administrative record to begin with,” are not discoverable, and “do not need to be logged as withheld from the administrative record.”<sup>17</sup> But the Second, Fourth, and Ninth Circuits have upheld the use of privilege logs with respect to deliberative materials in APA cases.<sup>18</sup> And a number of district courts have held that “deliberative documents are not categorically excluded from the administrative record. Rather, they are excluded upon a substantiated claim of the deliberative process privilege.”<sup>19</sup> They have reasoned that “[a]llowing courts a role in adjudicating whether particular documents are properly withheld from the record on the basis of privilege is consistent with, not contrary to, the mandate of the courts to review the ‘whole record.’”<sup>20</sup>

Some district courts have gone further and required “deliberative materials (such as internal comments, draft reports, emails, and meeting notes) to be added to the administrative record if they were considered in the agency’s decision.”<sup>21</sup> District courts in the Ninth Circuit are split on this issue.<sup>22</sup>

Accordingly, in courts apart from the D.C. Circuit, plaintiffs should consider raising the issue of whether deliberative materials are being withheld from the administrative record and demanding a privilege log if they are. Further, this issue may affect a plaintiff’s choice of venue in an APA suit. Plaintiffs can file suit either where they are located or in the District of Columbia where the government is located.<sup>23</sup> If there is a desire to seek access to deliberative materials in connection with the case, then suit should not be brought in D.C.

## Expanding the Record to Explain Agency Action

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The administrative record may be expanded when necessary to explain agency action. However, this exception is limited to “gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review.”<sup>24</sup> In such a case, the court may “obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary.”<sup>25</sup> Note that this exception does not necessarily permit discovery by the plaintiff. Indeed, “[w]hen there is a need to supplement the record to explain agency action, the preferred procedure is to remand to the agency for its amplification.”<sup>26</sup>

This exception has been described as “the most difficult to apply.”<sup>27</sup> It permits a district court to consider extra-record evidence to develop a background against which it can evaluate the integrity of the agency’s analysis, but it does not permit the court to use extra-record evidence to judge the wisdom of the agency’s action. “[R]eviewing courts may not look to this evidence as a basis for questioning the agency’s scientific analyses or conclusions.”<sup>28</sup>

## Expanding the Record to Explain Agency Inaction

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APA cases predicated on agency inaction, that is, seeking to compel an agency to act, are something of a special category. Like other APA suits, they are supposed to be decided on the basis of the record before the agency. However, “when a court is asked to review agency inaction before the agency has made a final decision, there is often no official statement of the agency’s justification for its actions or inactions.”<sup>29</sup> Thus, in these cases, “the administrative record provides ‘the presumptive starting point,’ . . . but not necessarily the outer limit of evidence that may be considered.”<sup>30</sup>

“For example, where an agency has failed to act, there simply may not be a record to review because the agency quite literally has done nothing.”<sup>31</sup> “And because there is no clear end-point to decision-making when an agency has failed to act, some courts have allowed an agency to supplement the record with relevant documents generated after the agency produced the administrative record.”<sup>32</sup>

To determine whether agency action has been unreasonably delayed, many courts apply the six-factor *TRAC* test established by the D.C. Circuit.<sup>33</sup> Accordingly, in one recent case, although the agency filed a 4,616-page administrative record, plaintiffs sought additional discovery tied to the *TRAC* factors. The district court considered each of these discovery requests but ultimately rejected virtually all of them based on traditional reasons for denying discovery: because certain requests sought information already included in the administrative record, because certain requests sought documents that are exempt from disclosure pursuant to the deliberative process privilege, and because certain requests were not relevant or proportional to the needs of the case.<sup>34</sup>

## Adding Explanatory Material

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The administrative record may also be supplemented where “necessary to permit explanation or clarification of technical terms or subject matter involved in the agency action under review.”<sup>35</sup> While this exception is widely recognized, it has been applied only infrequently.<sup>36</sup> Note that it involves supplementing the record as to ancillary matters but not as to the agency’s actual decision-making process.

## Completing the Record

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The most frequently invoked rationale for supplementing an administrative record is that the agency failed to include all of the documents or materials that it actually considered. Because the APA provides that judicial review shall be based on the whole record, supplementation of the record is appropriate in this situation.<sup>37</sup> “It is black-letter administrative law that in an [APA] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision.”<sup>38</sup>

“An agency may not scrub the record of all evidence that does not support the agency’s final decision.”<sup>39</sup> It may not exclude pertinent but unfavorable information. “Nor may the agency exclude information on the grounds that it did not ‘rely’ on the excluded information in its final decision.”<sup>40</sup> It “cannot exclude evidence and materials that were available to the agency as part of its decision making process just because the ultimate decision maker did not

consider or use that information in coming to his final decision.”<sup>41</sup> Instead, an agency “must produce the full record that was before the agency at the time the decision was made.”<sup>42</sup>

The agency enjoys a presumption that it properly designated the administrative record.<sup>43</sup> Nonetheless, “[a] plaintiff can make a *prima facie* showing that an agency excluded adverse information from the record by proving that the documents at issue (1) were known to the agency at the time it made its decision, (2) are directly related to the decision, and (3) are adverse to the agency’s decision.”<sup>44</sup> “Agency consideration is a touchstone of a motion to complete the record—the addition of relevant documents that were considered, directly or indirectly, by the agency decisionmaker at the time of the decision are properly part of the record.”<sup>45</sup> “[O]n a motion to complete the record, a plaintiff must ‘put forth concrete evidence and identify reasonable, non-speculative grounds for [its] belief that the documents were considered by the agency and not included in the record.’”<sup>46</sup>

For example, “it is axiomatic that documents created by an agency itself or otherwise located in its files were before it.”<sup>47</sup> Source documents cited by the agency but missing from the administrative record can be added to it. “[C]itation of a source to support a factual proposition is generally enough to manifest actual consideration by the agency and support inclusion in the record.”<sup>48</sup> Likewise, where the data necessary to make an estimate in an agency decision is contained in a particular file, that file should be included in the record.<sup>49</sup> And correspondence related to a pending agency decision should be included as part of the administrative record.<sup>50</sup>

Where a sufficient showing is made that relevant documents have been omitted from the administrative record, a court may order limited discovery as to the completeness of the record.<sup>51</sup> If a court concludes that the record produced “clearly do[es] not constitute the ‘whole record’ compiled by the agency,” it will order the agency to complete the record.<sup>52</sup>

“Completion [of the administrative record] entails ensuring that the entire record is before the court—the addition of those documents that influenced the agency in its decisionmaking [rather than] the addition of newly created evidence or of documents that were not before the agency when the decision was made, but should have been. . . .”<sup>53</sup> Thus, completing the record does not involve any intrusion into the decision-making of the agency, but rather requires full disclosure on the part of the agency.

## Demonstrating That the Agency Failed to Consider All Relevant Factors

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Courts permit supplementation of the administrative record to demonstrate that the agency failed to consider all the relevant factors.<sup>54</sup> “It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.”<sup>55</sup> To satisfy this exception, “the document in question must do more than raise ‘nuanced points’ about a particular issue; it must point out an ‘entirely new’ general subject matter that the defendant agency failed to consider.”<sup>56</sup>

In one case, for example, the plaintiff proffered an expert declaration to show that the agency had failed to consider several different issues. The court found that the existing record was sufficient to show whether the agency had considered one issue, and so refused to admit that portion of the declaration. In contrast, the record was silent as to two other issues and so the court admitted those portions of the declaration to determine whether the agency had considered them. The court also permitted the agency to submit a declaration from its own expert to address the purported gaps in the record.<sup>57</sup>

The key question, in practice, often becomes at what level of generality the relevant factors are defined.<sup>58</sup> The more broadly the factor is defined, the more likely it is that the agency will have considered it in some fashion; conversely, if the factor is defined more narrowly, the likelihood increases that the agency will not have considered it specifically.

## Demonstrating That the Agency Considered Impermissible Factors

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Courts also consider extra-record evidence to determine if an agency considered factors left out of the administrative record.<sup>59</sup> There are relatively few decisions discussing this issue. The reason may be that this issue often arises in situations where it is alleged that the agency’s explanation for its action is pretextual, and this issue is subsumed in the analysis of whether the agency acted improperly or in bad faith (a topic discussed below).

One district court ruled that plaintiffs had failed to make a sufficient showing of agency bad faith or improper behavior to warrant discovery, but concluded that they had sufficiently alleged that the agency considered an impermissible factor—political pressure—to potentially warrant limited discovery and supplementation of the record on that basis.<sup>60</sup>

Note that politics is not always an impermissible factor in agency decision-making. The Supreme Court recently ruled that “[a] court may not reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons” and “may not set aside an agency’s policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration’s priorities.”<sup>61</sup>

Nonetheless, the “impermissible factor” analysis may apply in situations where, for example, a plaintiff seeks to introduce or develop evidence that an agency considered factors that Congress had precluded. Further, many administrative actions do not involve making policy and should not be influenced by political considerations. “Decisions of administrative agencies may . . . be challenged if unlawful factors, including improper political considerations, have tainted the agency’s exercise of its discretion.”<sup>62</sup>

## **Discovery to Assess Agency Bad Faith or Improper Behavior**

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Discovery is permitted into “the mental processes of administrative decisionmakers” only when it is supported by a “strong showing of bad faith or improper behavior” by the agency.<sup>63</sup> The Supreme Court recently addressed this issue in the course of deciding whether a question about citizenship status could be included in the 2020 census. The Court concluded that discovery into the decision-makers’ mental processes was justified in that case because “the sole stated reason” for the Secretary’s action had been “contrived.”<sup>64</sup> But the Court added that this conclusion could only be reached after reviewing some 12,000 pages of internal materials that were produced by the government to supplement the original administrative record. It noted that the district court “should not have ordered extra-record discovery when it did. . . . At that time, the most that was warranted was the order to complete the administrative record.”<sup>65</sup>

Cases permitting discovery of agency decision-makers based on a showing of bad faith or improper behavior are relatively few and far between. “What constitutes a strong preliminary showing of bad faith or improper behavior . . . is a matter that the courts have been reluctant to define, preferring in the main simply to declare that on the facts of a given case, the showing has not, or occasionally has, been made.”<sup>66</sup> For example, one court found that a sufficient showing had been made to permit plaintiffs to depose an agency official where the evidence suggested that the agency’s actions were predetermined and influenced by factors not relevant to its consideration of the application before it.<sup>67</sup>

It is difficult to develop evidence that an agency has acted improperly or in bad faith in a particular matter. Notably, one district court has opined that “[a] showing that the agency purposefully excluded from the record documents which were relevant and adverse to the agency’s decision may be sufficient to present a prima facie case of agency bad faith or improper conduct.”<sup>68</sup> Thus, a useful starting point for a plaintiff assessing the viability of a bad faith/improper conduct claim is to examine whether there are any deliberate omissions in the administrative record and how significant they are.

## Conclusion

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In most Administrative Procedure Act cases, there is no issue about the completeness of the administrative record. The basis for the agency’s action is fully disclosed in the record that it produces. And when an administrative record is incomplete, the matter can sometimes be resolved through discussions between counsel. Litigation over expanding the administrative record is unusual. But it can be vital to the outcome of the case.

## Notes

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\* Steven D. Gordon, a partner in the Washington, D.C., office of Holland & Knight LLP, is a litigator who has been lead counsel in more than 100 trials and has argued appeals in most of the federal circuits and the U.S. Supreme Court. He may be contacted at [steven.gordon@hklaw.com](mailto:steven.gordon@hklaw.com).

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3. Florida Power & Light Co. v. Lorion, 470 U.S. at 744.
4. In re United States, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from grant of stay).
5. NVE Inc. v. HHS, 436 F.3d 182, 195 (3rd Cir. 2006).
6. Department of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019).
7. Bazzi v. Gacki, No. 19-cv-484, 2020 WL 5653599, at \*6 (D.D.C. Sept. 23, 2020).
8. San Luis & Delta-Mendota Water Authority v. Locke, 776 F.3d 971, 992 (9th Cir. 2014) (internal quotation marks and citations omitted); *see also* Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (listing exceptions).
9. *See* IMS, P.C. v. Alvarez, 129 F.3d 618, 624 (D.C. Cir. 1997).
10. Calloway v. Harvey, 590 F. Supp. 2d 29, 38 (D.D.C. 2008) (internal quotation and citation omitted).
11. 5 U.S.C. § 706.
12. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).
13. Bar MK Ranches v. Yeutter, 994 F.2d 735, 739 (10th Cir. 1993).
14. *See* GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs, 212 F. Supp. 3d 1348, 1352 (N.D. Ga. 2016); Amfac Resorts, LLC v. U.S. Dep't of Interior, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).
15. Tafas v. Dudas, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008).
16. *See* Tafas v. Dudas, 530 F. Supp. 2d at 794; *see also* Outdoor Amusement Business Ass'n, Inc. v. Dep't of Homeland Security, No. ELH-16-1015, 2017 WL 3189446, at \*8-9 (D. Md. July 27, 2017) (collecting cases).
17. Oceana, Inc. v. Ross, 920 F.3d 855, 865 (D.C. Cir. 2019).
18. *See* Save the Colorado v. Spellmon, No. 18-cv-03258, 2023 WL 2402923, at \*4 (D. Colo. March 7, 2023).
19. Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., No. 2:19-CV-14243, 2020 WL 2732340, at \*5 (S.D. Fla. May 26, 2020); accord *Save the Colorado v. Spellmon*, 2023 WL 2402923, at \*5.
20. New York v. U.S. Immigration and Customs Enforcement, 438 F. Supp. 3d 216, 218 (S.D.N.Y. 2020).
21. Sierra Club v. Zinke, No. 17-CV-07187, 2018 WL 3126401, at \*3 (N.D. Cal. June 26, 2018); Lower San Pedro Watershed Alliance v. Barta, No. CV-19-00048, 2020 WL 8020085, at \*3 (D. Az. Nov. 30, 2020).
22. *See* Yellowstone to Uintas Connection v. Bolling, No. 4:20-cv-00192, 2021 WL 5702158, at \*5 & nn. 4 & 5 (D. Idaho. Dec. 1, 2021).
23. *See* 28 U.S.C. 1391(e).
24. Hill Dermaceuticals, Inc. v. FDA, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam).
25. *See* Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir. 1982) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)).
26. *Id.* at 794.
27. San Luis & Delta-Mendota Water Authority v. Locke, 776 F.3d at 993.

28. *Id.*
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32. *Id.*
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34. *Florida v. Food and Drug Admin.*, No: 8:22-cv-1981, 2023 WL 2561380, at \*4-5 (M.D. Fla. March 17, 2023).
35. *Public Power Council v. Johnson*, 674 F.2d at 794; *see also Tafas v. Dudas*, 511 F. Supp. 2d 652, 662-63 (E.D. Va. 2007).
36. One example is *Arkla Exploration Co. v. Texas Oil Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984), where supplementary evidence was admitted to provide background information for facts considered, and educate the court concerning scientific, technical, and economic data used by the agency.
37. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).
38. *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (citations omitted).
39. *Fort Sill Apache Tribe v. NIGC*, 345 F. Supp. 3d 1, 10 (D.D.C. 2018).
40. *Fund for Animals v. Williams*, 249 F. Supp. 2d 49, 55 (D.D.C. 2003) (citations omitted).
41. *Ohio v. U.S. Army Corps of Eng'rs*, No. 1:15 CV 679, 2015 WL 7575935, at \*2 (N.D. Ohio Nov. 25, 2015).
42. *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007); accord *Stand Up for California! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 117 (D.D.C. 2014).
43. *See Bar MK Ranches v. Yuetter*, 994 F.2d at 739-40.
44. *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D.D.C. 2005) (internal quotations omitted).
45. *Fort Sill Apache Tribe v. NIGC*, 345 F. Supp. 3d at 9.
46. *Id.* (quoting *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 78-79 (D.D.C. 2018)).
47. *Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 76 (D.D.C. 2008).
48. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2019 WL 2028709, at \*3 (D.D.C. May 8, 2019).
49. *See Univ. of Colorado Health at Memorial Hosp. v. Burwell*, 151 F. Supp. 3d 1, 19 (D.D.C. 2015).
50. *See McDonnell Douglas Corp. v. National Aeronautics & Space Admin.*, 981 F. Supp. 2d, 14 (D.D.C. 1997), *rev'd on other grounds*, 180 F.3d 303 (D.C. Cir. 1999); *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555-56

(9th Cir. 1989); *Sierra Pacific Industries v. U.S. Dept. of Agriculture*, No. CIV S-11-1250, 2011 WL 6749837, at \*2 (E.D. Cal. Dec. 22, 2011).

51. *See Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *Bar MK Ranches v. Yuetter*, 994 F.2d at 740.

52. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 419 (quoting 5 U.S.C. § 706).

53. *Fort Sill Apache Tribe v. NIGC*, 345 F. Supp. 3d at 9.

54. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985).

55. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

56. *Oceana, Inc. v. Ross*, 454 F. Supp. 3d 62, 70 (D.D.C. 2020) (internal quotation and citation omitted).

57. *See id.* at 71-73.

58. *See id.* at 70.

59. *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007).

60. *Skull Valley Band of Goshute Indians v. Cason*, No. 07-cv-0526, 2009 WL 10689787, at \*7 (D. Utah. March 2, 2009).

61. *Department of Commerce v. New York*, 139 S. Ct. at 2573.

62. *Fallini v. Hodel*, 725 F. Supp. 2d 1113, 1118 (D. Nev. 1989) (citing *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984)).

63. *Id.* at 2573-74 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 420).

64. *Id.* at 2575.

65. *Id.* at 2574.

66. *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006) (collecting cases).

67. *See New York v. Salazar*, 701 F. Supp. 2d 224, 243 (N.D.N.Y. 2010).

68. *Mulligan v. Huber*, No. 7:05CV5005, 2005 WL 8175783, at \*10 (D. Neb. Dec. 9, 2005).