IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ROCKY MOUNTAIN PEACE & JUSTICE CENTER; CANDELAS GLOWS/ROCKY FLATS GLOWS; ROCKY FLATS RIGHT TO KNOW; ROCKY FLATS NEIGHBORHOOD ASSOCIATION; and ENVIRONMENTAL INFORMATION NETWORK (EIN) INC., Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE; JAMES KURTH, in his official capacity as Acting Director of the United States Fish and Wildlife Service; and RYAN ZINKE, in his official capacity as Secretary of the Interior; Defendants.	Case No. 1:17-cv-01210-CMA **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.**

Introduction

Defendants hope to make their planning and fiscal decisions regarding the Multipurpose Facility and Trails unreviewable by arguing that the case is not ripe until construction commences. However, when construction begins, they will certainly argue that the case is moot. This Court should not countenance an approach that makes Defendant's actions effectively unreviewable, especially where there is no otherwise discernable administrative decision-making process underway that could be expected to lead to the issuance of a final agency decision. Here, commitments to contracts to provide a Multipurpose Facility and Trails, and the expenditure of funds to do so, is a final action that meets the two-part *Bennett* test for "finality."

Facts

Defendants' recitation of the facts ends with the transfer of jurisdiction of the Rocky Mountain Refuge (the "Refuge") property from the Department of Energy ("DOE")

to the Fish and Wildlife Service ("FWS") in July 2007. This overlooks the Service's more recent actions taken to open the Refuge to the public, which form the basis for the current lawsuit.

1. <u>The Multipurpose Facility</u>

When FWS took jurisdiction over the Refuge in July 2007, it had a blueprint for management of the site: the 2005 Comprehensive Conservation Plan ("CCP"). U.S. Fish & Wildlife Sevice, Rocky Flats National Wildlife Refuge Final Conservation Plan (April 2005). The CCP's approved map ("Visitor Use Map") was the product of an environmental assessment of specific locations, configurations and uses of a visitor center ("Visitor Contact Station") **(Exh. A)**. Access was approved from an existing dirt road on the West side of the Refuge, and the Visitor Contact Station was characterized as a seasonally staffed small (approximately 750 to 1,000 square feet) meeting ground. **(Exh. B)**.

In August, 2015 FWS entered into a Memorandum of Understanding ("MOU") with DOE to build the 3,500 square foot Multipurpose Facility. **(Exh. C)**. The MOU sets forth the responsibilities of the parties "to provide Rocky Flats National Wildlife Refuge [with] a Multipurpose Building, to include design, construction, and operation of the facility." *Id*. p.1, Article I. This MOU was funded with a binding $8.3 million Interagency Agreement ("IAA") also dated in August 2015. **(Exh. D)**. The IAA terms provide a detailed description of the size, configuration, use and operation of the Multipurpose Facility. *Id*. p. 5, B.6. The IAA documents that "[t]he parties also agree to share equally in the long-term (6-75 years after project completion) operation and maintenance of the multi-purpose facility." *Id*. p. 1, A.4.c. Under the terms of the IAA, the entire $8.3 million

will have been paid out by September 2017. *Id*., p. 7, B.12.[1]

In March 2016, FWS entered into a $524,000 design contract for the 3,500 square foot Multipurpose Facility **(Exh. F)**. FWS' maps published since 2016 place the Multipurpose Facility in a new location on the North side of the Refuge. **(Exh. G)**. The Multipurpose Facility now requires construction of a paved access road from Route 128 and a large parking lot. *Id.* at p. 3. The design contract was paid out in April 2017, **(Exh. F)**, and architectural plans have been published. **(Exh. H)**.

2. <u>The Rocky Mountain Greenway</u>

The 2005 CCP also provided a specific description of the size, location, amenities and operations of the Trails, resulting from an environmental assessment of specified locations within the Refuge. **(Exh. A)**. The portion of the CCP addressing the Trails requires that "changes …require additional evaluation under (NEPA), a new Compatibility Determination, and a new Intra-Service Section 7 Consultation." **(Exh. I)**.

In February 2013, an application by the Rocky Mountain Greenway ("Greenway") partnership, including the FWS, to the Federal Transit Administration's Transit in Parks Program was approved, resulting in a $1.7 million grant for developing trails that run, in part, through the Refuge in locations different than those analyzed in 2005. **(Exh. J)**.[2]

On April 18, 2016, the Department of Transportation confirmed the decision to route the Greenway through the Refuge and provided a design and construction schedule. **(Exh. K)**. FWS' Lucas confirmed the trails decision at the April 2016 Rocky

[1] To date the IAA/MOU has not been published publicly, rather it was obtained in September 2016 only through a response to a Freedom of Information Act request, further demonstrating the need for a public process for the FWS plans. **(Exh. E)**.
[2] The new Trail configuration has not been the subject of a compatibility determination, and the trails pass through wetlands. ECF No. 11, ¶¶ 100-102.

Flats Stewardship Council meeting and announced that public input about building the trails was not needed. **(Exh. L,** at 15**)**. In May, 2016, the Refuge partnered with six local communities and applied for $5 million in Federal Lands Access Program funds for the construction of highway crossings to support the Greenway route through the Refuge. **(Exh. M)**.

3. The Refuge Remains Contaminated

Since the transfer of jurisdiction of the Refuge to FWS in 2007, there have been numerous developments suggesting that plutonium has not been contained in the DOE-managed Central Operable Unit, but has migrated to the Refuge and beyond. Such developments highlight the need for appropriate environmental reviews before opening the Refuge to the public.

Two recent federal decisions found that plutonium had migrated to the "buffer zone" where the Refuge is located. *See WildEarth Guardians v. U.S. Fish and Wildlife Service*, 784 F.3d 677, 681 (10th Cir. 2015) ("As a result of the weapons work, some of the land became polluted by various hazardous materials, including plutonium."); *Town of Superior, et al. v. U.S. Fish and Wildlife Service*, 913 F. Supp.2d 1087,1099 (D.Colo. 2012) ("… over the course of forty years, manufacturing activities, spills, fires, and waste disposal released plutonium and other radionuclides, which were dispersed by wind and rain into the soil and water systems in the buffer zone.").

Such migration may be linked to the massive amount of plutonium that went missing during the years the Rocky Flats plant was producing nuclear triggers. *See Cook v. Rockwell Int'l Corp.,* 580 F. Supp. 2d 1071, 1145–46 (D.Colo. 2006) ("It is undisputed that the cumulative MUF [material unaccounted for] during Defendants'

operation of Rocky Flats is more than 2,600 pounds.").

Significantly, a jury found that plutonium from Rocky Flats' operations had contaminated a wide area of land beyond Rocky Flats' borders, and that such plutonium would "continue to be present" on these neighboring properties "indefinitely." *Cook v. Rockwell International Corporation, etc.*, Civ. 90-cv-181-JLK (Jury Verdict Form, Feb. 14, 2006) at ¶¶ A(1-3) and B(1-3); ECF 11, ¶ 44. (**Exh. N).** The jury found the plaintiffs would suffer "increased risk of health problems as a result of this exposure." *Id*. at C(1) and D(1). The jury awarded damages totaling into the hundreds of millions of dollars. *Id*. at pp. 15, 24-27. A settlement was achieved between the parties in 2016 for $375,000,000. *Cook v. Rockwell International Corporation, etc.*, Civ. 90-cv-181-JLK (Settlement Agreement, May 18, 2016) at p. 4. (**Exh. O**).

As demonstrated by it facts section, FWS relies exclusively on the 2007 environmental reviews for its current actions despite the new developments concerning plutonium.

Standard of Review

Contrary to their arguments, Defendants have not challenged any facts Plaintiffs have asserted. Rather, Defendants' "factual attack" on jurisdiction under the APA is actually an attack on Plaintiffs' claim that the undisputed facts constitute grounds for ripeness as a matter of law. Defendants' procedural claim under Rule 12(b)(1) is thus a facial attack because it does not "challenge the facts upon which subject matter jurisdiction depends." *Holt v. U.S.*, 46 F.3d 1000, 1002-03, (1995). Thus, the Court "must accept the allegations in the complaint as true" in considering Defendants' Motion to Dismiss *Id*. at 1002.

Even if the Court determines that there is a factual challenge, it

> … is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. *Id.* at 259; *see also Redmon v. United States,* 934 F.2d 1151, 1155 (10th Cir.1991). The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case. *Wheeler,* 825 F.2d at 259.

Id. at 1003.

As in a facial attack under Rule 12(b)(1), under 12(b)(6) the Court must grant the usual deference to Plaintiffs' asserted facts in the complaint when considering this Motion to Dismiss.

Argument

1. The Court has Jurisdiction under the APA Because there is Final Agency Action.

The APA review provisions are applicable to "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704. The Supreme Court has established a two-part test for determining if an agency action is "final:" (1) "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted).

A. The MOU and IA are the "consummation" of the agency's decision making process.

FWS has taken actions that consummate decisions to build a Multipurpose Facility. First, the agency has entered into an MOU with the DOE to deliver a 3,500 square foot "Multipurpose Building, to include design, construction and operation of the

facility." **(Exh. C)** p. 1 at Article I. While Defendants argue that this binding commitment to construction and operation of the facility merely provides partial funding of preliminary designs and engineering, it actually consummates internal decisions that apportion the rights and obligations of the two agencies for up to 75 years after completion of the project. *See Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1068 (10th Cir. 2012) ("… planning for an event (through future plans to negotiate and support) and committing to its realization (through acquisitions and the verifiable letting of contracts) are not the same thing.").

This approach was confirmed by the Tenth Circuit in a previous case involving agency action involving Rocky Flats. In *Sierra Club v. DOE*, 287 F.3d 1256, 1264 (10th Cir. 2002), the agency argued that despite granting an easement through Rocky Flats, construction would not commence "without [DOE's] prior approval," and thus the environmental group's claims were not ripe. In rejecting this argument, the court found the "failure to conduct a NEPA analysis before granting the easement" made the issue ripe for adjudication. *Id.* at 1264, 1266. Here, entering into the contracts to provide a Multipurpose Facility and Trails, and expending funds therefore, is equivalent to DOE's granting of an easement and makes the issue ripe for adjudication.

Second, in designing this Multipurpose Facility, the Service entered into a $524,000 design contract with MWH Americas, Inc. This contract commenced in March 2016 and was completely paid out as of April 2017. **(Exh. F)**. Even the architectural plans have been published. **(Exh. H)**. FWS' maps published since 2016 place the Multipurpose Facility on the North side of the Refuge, in a different location than examined in the 2005 CCP. Rather than the small (750 to 1,000 square feet) Visitor

Contact Station and dirt road access approved in the 2005 CCP, the Multipurpose Facility now requires construction of a paved access road and large parking lots. **(Exh. G)**, p.3.

It is unrealistic to call these steps "preliminary." An agency does not fully contract with a sister agency and commit itself to building a specific facility, and proceed to spend transferred funds on designing that facility to a specific size in a specific location, unless the agency has "completed its decision making process" with respect to that facility. *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (To determine when an agency action is final, we have looked to, among other things, whether its impact "is sufficiently direct and immediate" and has a "direct effect on ... day-to-day business."); *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (If an agency has issued a "definitive statement of its position, determining the rights and obligations of the parties," the agency's action is final notwithstanding "[t]he possibility of further proceedings in the agency"). The fact that all contracts for the road/parking lot have not been entered into does not change the fact that the primary decision, to build the Multipurpose Facility and operate it for 75 years, has been cast in stone. *See Bennett*, 520 U.S. at 177-78 (underlying decisions are final even if ancillary decisions have yet to be made); *Cables*, 509 F.3d at 1329.

With respect to the trails the Service argues under *Bennett* that it has yet to make any final decisions related to the location internal trails, or trail crossings. In reality, the February 2013 acceptance of the $1.7 million FTA Transit in Parks grant by the Rocky Mountain Greenway partnership intended to connect the Refuge to the Greenway, of which FWS is an integral partner, is a final decision. FWS' Lucas

confirmed the decision at a Rocky Flats Stewardship Council meeting and announced that public input about building the trails was not needed. **(Exh. L**, at 15**)**. It is hard to conceive of a more final pronouncement on the Trails, especially where there is no otherwise discernable administrative decision-making process underway.

On April 18, 2016, the Department of Transportation confirmed the decision to route the Greenway through the Refuge, and $5 million was sought to fund the design and construction of two ancillary highway crossings. **(Exh. M)**.

FWS' actions to accept, expend, and apply for significant funds to incorporate the Greenway trails into the Refuge are a consummation of its decision making process. *See Bennett,* 520 U.S. at 177-78 (underlying decisions are final even if ancillary decisions have yet to be made).

B. <u>The IAA, which binds the Service to building the Multipurpose Facility, is a determination of rights and obligations from which legal consequences will flow.</u>

The second part of the *Bennett* test is whether the final action is one by which rights or obligations have been determined, or legal consequences flow." *See Bennett,* 520 U.S. at 178. Here, FWS entered into the IAA in August 2015. **(Exh. D)**. The IAA is the MOU's funding instrument. **(Exh. C)** p. 1, Article II, ¶ 2. The DOE's commitment under the IAA is binding based on its cited authority of the Economy Act of 1932. 31 U.S.C. 1535 ("An … agreement made under this section obligates an appropriation of the ordering agency or unit.") FWS' own finance policies make the IAA binding for FWS. **(Exh. P)** ¶ B(1) ("Th(e) agreement is binding when the Service Contracting Officer signs it"). Defendants have never contested this fact.

The MOU and IAA memorialize "the mutual framework governing the respective responsibilities of the parties to provide (the) Refuge a Multipurpose Building, to include design, construction and operation of the facility." **(Exh. C)** p. 1, Article I (emphasis added). The agencies have agreed to their rights and obligations for operations up to 75 years after the project is completed **(Exh. D)** p. 1, A.4.c.

In *Bennett,* the Court determined an underlying Biological Opinion ("BO") issued by FWS during a Bureau of Reclamation ("BOR") project was final even though the BOR had not reached final decisions on many detailed aspects of the entire project, some dependent on the BO. *Bennett*, 520 U.S. at 177-78. BOR was required to comply with additional "prescribed conditions" in the legally binding BO as it executed the larger aspects of its project. *Id.* at 178. Because the BO "altered the legal regime to which the (Agency) is subject" and had direct and appreciable legal consequences, the Court found the issuance of a BO to be a final agency action. *Id*.

Most notably, the MOU/IAA apportions rights and obligations between DOE and FWS for the design, construction and long-term (more than 75-year) operations of visitor access on the Refuge that were not contemplated in the 2005 CCP. By imposing additional legally binding prescribed conditions, the MOU/IAA agreement, like the BO in *Bennett,* has "altered the legal regime" FWS is subject to for its management of the Refuge. *Bennett*, 520 U.S. at 178.

2. The Service has Made an Irretrievable Commitment of Resources.

The Service acknowledges that an agency's NEPA obligations mature once it reaches a "critical stage of a decision which will result in irreversible and

irretrievable commitments of resources to an action that will affect the environment." Defs Br. At 12, citing *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009). By entering into the IAA and MOU, the Service has made such "irreversible and irretrievable commitments." As of the end of September, the Service will have received all $8.3 million from the DOE to consummate the building of the Multipurpose Facility, and the agency has received or applied for its funding for the Trails. **(Exh. D, Exh. J, & Exh. M)**.

The Service cites cases purporting to say that the simple expenditure of monies does not make an action "final." However, the expenditure of funds may be evidence of such finality since "[a]fter major investment of both time and money, it is likely that more environmental harm will be tolerated." *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979) (not allowing a delay in preparing an EIS). *See also WildWest Inst. V. Bull*, 547 F.3d 1162,1169 (9th Cir. 1971) ("… a financial commitment can, in some instances, constitute an irretrievable commitment. For example if an agency spent most or all of its limited budget on preparation useful for only one alternative, it may well have taken action '[l]imit[ing] the choice of reasonable alternatives.'").

And even if the expenditure of monies does not make the commitment irretrievable, the entering into the contract with DOE did so. Indeed, in *Metcalf v. Deley*, 214 F.3d 1135, 1143-44 (9th Cir. 2000), a federal agency made an "irreversible and irretrievable commitment of resources," when it entered into an agreement with an Native American tribe for whale hunting. The court found that the agency failed to

comply with NEPA when it entered into contracts and "worked to effectuate the agreement:"

> The "point of commitment" in this case came when NOAA signed the contract with the Makah in March 1996 and then worked to effectuate the agreement. It was at this juncture that it made an "irreversible and irretrievable commitment of resources." As in *Save the Yaak*, the "contracts were awarded prior to the preparation of the EAs …. These events demonstrate that the agency did not comply with NEPA's requirements concerning the timing of their environmental analysis, thereby seriously impeding the degree to which their planning and decisions could reflect environmental values."

Id. See also Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1987).

Defendants cite *Hawaii County Green Party v. Clinton*, 124 F. Supp. 2d 1173 (D. Haw. 2000) to show that financial expenditures are not always proof of an irreversible and irretrievable commitment. In *Hawaii*, monies were spent for research that was admittedly "useful for other pursuits." *Id.* at 1196. By contrast, the monies spent on a Multipurpose Facility and Trails at the Rocky Flats Refuge will have no other use if the NEPA analysis does not support construction of these facilities. Therefore, the monies FWS has accepted and expended under the auspices of the MOU/IAA constitute an irreversible and irretrievable commitment of resources.

3. <u>Plaintiffs' Claims could not be any Riper.</u>

The Service simultaneously argues that Plaintiffs' challenge is not ripe <u>prior to construction</u> (Defs Br. p. 9) (emphasis added), and that it "will conduct any required environmental reviews prior to issuing () decisions" regarding the construction of the trails and multipurpose facility (Defs Br. p. 15). Defendants imply that there may be no environmental review beyond what was completed in the 2005 CCP, and they reserve the right to make that decision unilaterally. (Defs Br. p. 15). Indeed, FWS has described the

current activities as simply its execution of the 2005 CCP decisions, and therefore exempt from further environmental review. **(Exh. Q)**. Thus, there is no administrative decision-making process underway that could be expected to lead to the issuance of a final agency decision. Indeed, no announcement has been made of a supplemental EIS action, nor any process to revise the 2005 CCP as required by the National Wildlife Refuge Systems Act. *Id*. See also 16 U.S.C.A. § 668dd (C). At any point during the past two years, the Service could have used the $1.0 million in funding from the August 2015 MOU/IAA agreement to incorporate NEPA into its planning process. The Service admits it has failed to do so.

FWS' refusal to describe as final its contractual commitments for the Multipurpose Facility and Trails is not dispositive of the reviewability of these binding commitments. *Her Majesty the Queen ex rel. Ontario v. Envtl. Prot. Agency,* 912 F.2d 1525, 1531 (D.C.Cir.1990) ("... the absence of a formal statement of the agency's position, as here, is not dispositive..."). The binding MOU/IAA establishes that, for the next 75 years, FWS "... cannot unilaterally change its mind…. For the term of the contract, it is an 'irreversible and irretrievable commitment of the availability of resources.'" *Envtl. Def. Fund, Inc. v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979). *See also* 42 U.S.C. § 4332(C). This requirement for an EIS echoes the FWS' own finding in the 2005 CCP that any changes to the approved uses "will require additional evaluation under (NEPA), a new Compatibility Determination, and a new Intra-Service Section 7 Consultation. **(Exh. I)**.

As the culmination of its internal and inter-agency decisionmaking process, FWS' commitment to the binding MOU/IAA triggered a requirement to comply with NEPA, and

its ongoing failure to do so means Plaintiffs "may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998).

Conclusion

Wherefore, this Court should deny Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Respectfully submitted this 14th day of August, 2017.

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UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on August 14, 2017, the foregoing will be electronically filed with the Clerk of the Court via the CM/ECF system, which will generate automatic service upon all Parties enrolled to receive such notice, including:

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