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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

As the Federal Defendants established in their opening brief regarding dismissal of Plaintiffs' claims for lack of subject matter jurisdiction, the Court must dismiss Plaintiffs' claims because the U.S. Fish & Wildlife Service ("Service") has not yet issued final decisions regarding the construction of a multipurpose facility or the construction of trails on the Rocky Flats National Wildlife Refuge ("Refuge"). Plaintiffs' response brief falls far short of establishing otherwise. Dismissal of Plaintiffs' claims remains necessary, because as a result of the Service's continuing consideration of the potential construction of trials and the multipurpose facility, there is no final agency action subject to review under the APA, and Plaintiffs' claims are not ripe for adjudication.

I. Plaintiffs Fail to Show that There Is a Final Agency Action before the Court

Plaintiffs' claims are pursuant to the Administrative Procedure Act ("APA"). The APA limits judicial review of an agency action limited to "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704. Here, the Service has not yet

issued final decisions as to (1) the construction of multipurpose facility, or (2) trails on the Refuge and Plaintiffs fail to show otherwise.

A. There Has Been No Final Decision to Construct The Proposed Multipurpose Facility

Plaintiffs argue that a Memorandum of Agreement ("MOA") (ECF No. 28-3) and Interagency Agreement ("IA") (ECF No. 28-4) (together "MOA/IA") between the Service and U.S. Department of Energy ("DOE") "consummates" the Service's decision making process to build a multipurpose facility on the Refuge, and thus constitutes a final agency action. Pls.' Br. 6-7. The MOA/IA does not constitute a final decision by the Service to construct a multipurpose facility on the Refuge.

First, the MOA/IA does not constitute a "binding commitment" on the part of the Service to construct and operate a multipurpose facility on the refuge as Plaintiffs' allege. *See id.* Instead, the MOA sets forth a framework by which the DOE is able to work with and provide funding to the Service through IAs to study, design, and then potentially construct and operate a multipurpose facility. *See* ECF No. 28-3. The IA then established the ceiling of funds that could be expended for reimbursement at $8,315,000 million. *See* ECF No. 24-4 at 10. The IA does not require the DOE to expend the entire amount of those funds. No funds have been obligated for construction purposes. Lucas Decl. ¶ 10 (ECF No. 20-1).

The MOA divides tasks into two Phases. It provides that the Service "shall provide a conceptual design of the building and displays, cost estimate (including highway and utility improvements), and schedule for construction as a portion of Phase I to [DOE] for approval prior to commencement of Phase II construction." ECF No. 28-3 at Art.V.A.8; *see also id.* at Art.V.A.9 (The service "shall provide a Final Design for the

facility, including displays/exhibits to [DOE] for approval prior to commencement of construction."). The MOA specifies that it is "neither a fiscal nor a funds document. Nothing in this MOA authorizes or is intended to ***obligate*** the parties to expend, exchange or reimburse funds, services, or supplies, or transfer or receive anything of value." *Id.* at Art. XII.D (emphasis added). Importantly, the MOA states that "[e]ither party may terminate this MOA by providing written notice to the other party 30 calendar days prior to cancellation." *Id*. at Art. XIII.

The IA also provides that it "may be terminated upon thirty (30) calendar days written notice by either party." ECF No. 28-4 at A.13. The IA sets forth "Projected Milestones" in section B.7 in the same two Phases as the MOA, and specifies that "all dates for projected milestones are approximate." *Id*. It specifies that the DOE will pay the Service for such work on a "reimbursable basis." *Id.* at B.8. Phase I includes building site planning and conceptual design, and Phase II includes "public consultation" prior to issuance of the "final design" and "start of construction." *Id.* at B7.

None of the provisions in the MOA/IA binds the Service to construct a multipurpose facility in any specific location or in a specific manner, or even to build a facility at all. Indeed, as discussed above, the Service can terminate MOA/IA with appropriate notice.

Plaintiffs' reliance on *Sierra Club v. U.S. Department of Energy*, 287 F.3d 1256 (10th Cir. 2002) is misplaced. In *Sierra Club*, the 10th Circuit held that an environmental group's NEPA and Endangered Species Act ("ESA") claims were ripe, because they challenged the DOE's issuance of an easement to a mining company for a road to be used in a proposed mine expansion without following NEPA and ESA

procedure. *Id.* The Tenth Circuit held that that the plaintiff "need only show that, in making its *decision* without following the NEPA and ESA procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm." *Id*. at 1265 (emphasis added). The court determined that the plaintiff had "presented sufficient facts to show that the easement granted by the DOE is a necessary step in the construction of a road to advance the expansion of the mining project, which has the potential of harming the environment. This is sufficient to establish an increased risk of environmental harm. In that case, the decision to grant the easement was the final agency action challenged by the plaintiff." *Id.* Here, the Service has not yet issued a similar final decision construct the multipurpose visitor facility. *See* Decl. Lucas ¶¶ 9-13.

Unlike the granting of the easement in *Sierra Club*, here, the funds that the Service has received for the multipurpose facility project do not bind the Service to carry out the project in any specified location or in any specific manner. Lucas Decl. ¶ 10. The Service has utilized the funds for such projects as preliminary design work and examination of potential sites, but has not obligated any funds for purposes of construction. *Id*. The Service has yet to fully examine potential designs and locations of the visitor center and its road/parking lot, and will ultimately make a decision about construction of a visitor facility at the Refuge, but has not done so yet. *Id*. ¶ 13.

Second, the MOA between the Service and the DOE, and the design and planning work conducted by contractor MWH Americas, Inc. for the Service, does not show that the Service has "completed its decision making process" as Plaintiffs' allege. Pls.' Br. 8. At most, Plaintiffs' allegations suggest that the Service has a preference for a Build alternative rather than a No Build alternative, and is conducting the planning and

design work it has determined is needed to inform its ultimate final decision as to construction of a multipurpose facility. That is not a violation of NEPA. There is nothing unlawful in an agency having a preference among the alternatives in a NEPA process; in fact, the NEPA regulations require identification of a preferred alternative. 40 C.F.R. § 1502.14(e). Nor does NEPA require "subjective impartiality" of an agency undertaking a NEPA analysis. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 ("An agency can have a preferred alternative in mind when it conducts a NEPA analysis"). Consequently, it is not unlawful for an agency to anticipate the possible outcome of the NEPA process by conducting such planning and design work the Service contracted MWH Americas to complete here. *Id*. at 715.

The cases cited by Plaintiffs are not to the contrary. In *Center for Native Ecosystems v. Cables*, the Tenth Circuit held that Annual Operating Instructions ("AOIs") for grazing in a national forest constituted consummation of the Forest Service's decision making process, because they identified when grazing may begin, when it will end, which pastures may be used at particular times, and because no further agency action was required to make the AOIs binding on grazing permittees. 509 F.3d 1310, 1329 (10th Cir. 2007). In contrast, the purpose of the MOA is merely "establish a mutual framework governing the respective responsibilities of the parties to provide Rocky Flats National Wildlife Refuge a Multipurpose Buildings." ECF No. 28-3 at 1. Unlike the AOIs in *Cables*, the MOA/IA does not does not specify how particular land on the Refuge may be used. The funds that the Service has received for the multipurpose facility project do not bind the Service to carry out the project in any

specific location or in any specific manner, or even construct a facility at all. Lucas Decl. ¶ 10.

Likewise, in *Bennet v. Spear*, 520 U.S. 154 (1997), the Biological Opinion ("BiOp") issued by the Service in that case is distinguishable from the MOA/IA entered into between the Service and DOE here. In *Bennet*, the Service issued a BiOp which concluded that the long term operation of the Klamath Irrigation Project was likely to jeopardize the continued existence of certain species of suckers. *Id*. at 159. The BiOp identified "reasonable and prudent" alternatives the Service believed would avoid jeopardy of the species, which included the maintenance of minimum water levels on Clear Lake and Gerber reservoirs. The Bureau of Reclamation ("BOR") notified the Service that it intended to operate the project in compliance with the BiOp. *Id.* Importantly, Court concluded that the BiOp's Incidental Take Statement constitutes a permit authorizing the action agency (in this case the BOR) to "take" the endangered species so long as it respects the Service's "terms and conditions." *Id*. at 171. The BiOp was therefore a final agency action because it was not merely tentative, and was a decision from which "legal consequences will flow" – it authorized the BOR to take the listed species if it complies with prescribed conditions. *Id*. at 178 (citation omitted). In contrast, here the MOI/IA merely provides a funding mechanism for planning, constructing, and operating a proposed multiuse facility. The MOA/IA does not actually authorize the construction of the facility. Only the Service can make that decision, and it has not yet done so. Lucas Decl. ¶ 13.

Metcalf v. Deley, 214 F.3d 1135 (9th Cir. 2000) also supports the Federal Defendants' position. In *Metcalf,* NOAA entered into a written agreement with the

Makah Native American Tribe which provided in part that "[a]fter an adequate statement of need is prepared [by the Makah], NOAA, through the U.S. Commissioner to the [International Whaling Commission ("IWC")], will make a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe" prior to initiating the NEPA process. *Id*. at 1139. The court held that if NOAA "found after signing the Agreement that allowing the Makah to resume whaling would have a significant effect on the environment, the Federal Defendants would have been required to prepare an EIS, and they may not have been able to fulfill their written commitment to the Tribe. As such, NOAA would have been in breach of contract." *Id*. at 1444. In contrast, here the Service can terminate the MOA/IA with thirty-days' notice, thus it would not be in breach of any agreement if it ultimately decides not to construct the multipurpose facility. Additionally, as discussed above, the MOA/IA is divided into phases, with the planning and construction phases separated and requiring DOE approval. This further illustrates that the MOA/IA is not equivalent to a final decision by the Service to construct the multi-purpose facility.

B. There Has Been No Final Decision To Construct Proposed Trails

Plaintiffs argue that there has been a final decision as to the construction of proposed trails on the Refuge for two reasons: (1) the February 2013 acceptance of the 1.7 million FTA Transit in Parks grant by the Rocky Mountain Greenway partnership constitutes a final decision; and (2) Mr. Lucas's alleged statements at a Rocky Flats Stewardship Council meeting show the Service has made a final decision. Pls. Br. 8-9. First, the Rocky Mountain Greenway is a federal, State, local, and stakeholder partnership to expand on the Denver/Front Ranch metropolitan area's existing

infrastructure to create an uninterrupted trails/transportation link connecting the area's trail systems with the three area National Wildlife Refuges and Rocky Mountain National Park. Lucas Decl. ¶ 6. The grant does not specify where trails must be constructed on the Refuge, or if trails are required to be constructed on the Refuge at all, and Plaintiffs do not argue as much. The Service will ultimately make the decision whether or not to allow the construction of trail crossings, the specific location of any crossings, and the design of any crossings. Lucas Decl. ¶ 7. Indeed, any funding for construction of trails is not anticipated until October 2018 at the earliest. *Id.*

Second, Plaintiffs' take Mr. Lucas's statements at the Rocky Flats Stewardship Council meeting out of context.[1] Mr. Lucas did not state "that public input about building the trails was not needed." Pls.' Br. 9. Instead, Mr. Lucas stated that there may be documents that require public review during upcoming activities at the refuge. ECF No. 28-12 at 4. Further, in response to a question asking if an Environmental Assessment would be done regarding trail development, Mr. Lucas stated that they would comply with all federal laws and guidelines, and that NEPA requirements would depend on the scope of the project. *Id.* at 5.

II. Plaintiffs Fail to Show that Their Claims Are Ripe

Plaintiffs mischaracterize the Federal Defendants' Motion to Dismiss to argue that their claims do not require construction to begin to become ripe. Pls.' Br. 12. The Federal Defendants do not argue that construction is required to begin in order for Plaintiffs' claims to ripen. Instead, Federal Defendants argue that Plaintiffs' claims are

[1] The Federal Defendants also object to the meeting minutes as inadmissible hearsay under Federal Rule of Evidence 801.

not ripe until the Service has issued final decisions regarding the construction of the multi-purpose facility and trails. Def. Br. 15. The Service has not issued final decisions yet, and will conduct any required environmental reviews prior to issuing those decisions. Lucas Decl. ¶¶ 9, 13.

III. Plaintiffs' Factual Allegations Regarding Contamination on the Refuge are Immaterial to the Determination as to Whether There Has Been a Final Agency Action and Whether Plaintiffs' Claims Are Ripe

Plaintiffs attempt to cloud the issue of whether or not the Court has jurisdiction to hear their claims by presenting arguments regarding alleged contamination on the Refuge. *See* Pls.' Br. 4. First, such arguments are irrelevant to determine whether there has been a final agency action that is reviewable by this Court under the APA. Second, the Federal Defendants note that the DOE issued its "Fourth Five-Year Review Report for the Rocky Flats Site in June of 2017.[2] On August 2, 2017, the U.S. Environmental Protection Agency ("EPA") issued a letter to the DOE stating that the EPA "in consultation with the State of Colorado concurs with your assessment that the remedy at this site is protective of human health and the environment." *Id.* at Letter from Betsy Smidinger, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, EPA to Scott Surovachak, Rocky Flats/LM Site Manager, US Department of Energy, Office of Legacy Management. Thus, Plaintiffs' statement that the Service "relies exclusively on the 2007 environmental review for its current actions despite the new developments concerning plutonium" is false. *See* Pls.' Br. 5.

[2] This report is available at https://www.lm.doe.gov/Rocky_Flats/Regulations.aspx (last visited August 28, 2017).

IV. Conclusion

For the reasons set forth above, Plaintiffs' Amended Complaint should be dismissed.

Respectfully submitted this 28th day of August 2017,

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/s/ Jessica M. Held

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CERTIFICATE OF SERVICE

I certify that on August 28, 2017, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon all Parties enrolled to receive such notice.

/s/ Jessica M. Held

Jessica M. Held