IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01017-PAB

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;
GREG SHEEHAN, in his official capacity as Acting Director, U.S. Fish and Wildlife Service;
RYAN ZINKE, in his official capacity as Secretary of the Interior; and
DAVID LUCAS, in his official capacity as Project Leader, Region 6, U.S. Fish and Wildlife Service;

and

UNITED STATES FEDERAL HIGHWAY ADMININSTRATION;
BRANDYE HENDRICKSON, in her official capacity as Acting Administrator of the United States Federal Highway Administration; and
ELAINE L. CHAO, in her official capacity as Secretary of Transportation,

Defendants.

PLAINTIFFS' REPLY BRIEF

The first question before the Court in this matter is whether Defendant U.S. Fish and Wildlife Service ("USFWS" or "Service") can rely on a categorical exclusion under the National Environmental Policy Act ("NEPA") in its March 23, 2018 decision (the "Decision"), incorporated into an Environmental Action Statement (the "2018 EAS"), to reconfigure hiking, biking and equestrian trails (the "Public Trails") on the Rocky Flats National Wildlife Refuge (the "Refuge") and to "begin steps to allow large numbers of visitors to enjoy the Refuge." R. at 5. The second question is whether the Service's

failure to re-evaluate its Compatibility Determination ("CD") for Multi-Use Trails after ten years, as this CD expressly requires, renders its decision to open the Refuge to multi-use trails this summer arbitrary and capricious.

With respect to the NEPA question, the Defendants characterize this reconfiguration of trails as "minor" even though they have been reconfigured to traverse the previously off-limits "Wind Blown area," and over a mile through the Section 16 parcel, neither of which were subject to analysis in the 2004 CCP/EIS. Unless the Service engages in prohibited segmentation of its trails plans, these two modifications require the Service to prepare a supplemental environmental impact statement ("SEIS").

Even if no SEIS is required, an analysis of any such "land to surface-disturbing activity," coupled with the erosion events occurring in 2013 and 2015, requires the Service to prepare an environmental assessment ("EA") and a finding of no significant impact ("FONSI") before the government can engage in its Refuge opening activities. The Service is not entitled to exclude such analyses by relying on categorical exclusions ("CEs"), in light of the extraordinary circumstances which existed *at the time the CE analysis was made*, which include the highly controversial nature of the agency's action, its impacts to a wildlife refuge, and its potential impact to the Preble's Meadow Jumping Mouse and its habitat.

With respect to the expired trails CD, the Service's decision to rely on tangentially related CDs, which unnecessarily reads a conflict into the three CDs at issue, is not entitled to *Chevron* deference under the U.S. Supreme Court's recent *Epic Systems* decision. The Service should honor the "mandatory re-evaluation" language in the CD.

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I. DEFENDANTS HAVE VIOLATED NEPA

A. A Supplemental EIS is Necessary Because the Reconfiguration of the Public Trails is Part of an Ongoing Action.

USFWS is required to prepare an SEIS to the 2004 CCP/EIS before reconfiguring the trails and opening them to the public. Federal regulations *require* agencies to prepare an SEIS (or a supplemental EA) if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns," or if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise. 40 C.F.R. § 1502.9(c)(i)-(ii). This is true even if the project has received "initial approval."

> It would be incongruous with th[e] approach to environmental protection ... for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

Defendants argue that "there [was] no ongoing 'major federal action' that could require supplementation" once the CCP/EIS was approved, citing *Norton v. Southern Utah Wilderness Alliance*, 542 US 55, 73 (2004). Response at 9. However, unlike in *Norton*, the challenged decision here is an *ongoing* action. The action addressed in *Norton* was solely the issuance of a BLM land use plan that the Supreme Court found was not "ongoing."

> ...[A]lthough the "*[a]pproval* of a [land use plan]" is a "major Federal action" requiring an EIS, 43 CFR § 1601.0-6 (2003) (emphasis added), that action is completed when the plan is approved. The land use plan is the "proposed action" contemplated by the regulation. There is no ongoing "major Federal action" that could require supplementation....

Norton, 542 U.S. at 73. Thus, *Norton* would only support Defendants' position if Plaintiffs in this case were challenging just the issuance of a plan (the CCP). Here, Plaintiffs are challenging the EAS and the reconfiguration of Public Trails on the Refuge. *Marsh v. Oregon Natural Resources Council*, 490 US 360 (1989), cited in *Norton*, is much more analogous to this action.

In *Marsh*, the Supreme Court found an *ongoing* major federal action even though the Army Corps of Engineers had completed both an EIS and an SEIS related to a large dam project. After conducting these NEPA analyses, but before the dam was completed, the plaintiff non-profit groups alleged the Corps violated NEPA by failing to prepare a second SEIS. *Marsh*, 490 U.S. at 365-368. The Supreme Court in *Norton* differentiated between the facts in *Norton* and *Marsh*:

> As we noted in *Marsh,* supplementation is necessary only if "there remains `major Federal actio[n]' to occur," as that term is used in § 4332(2)(C). *Id.,* at 374. In *Marsh,* that condition was met: the dam construction project that gave rise to environmental review was not yet completed.

Norton, 542 U.S. at 73. In the instant case, while the 2004 CCP/EIS has long been completed, the EAS was just issued in March and it alters the trails plan as contained in the CCP/EIS. As in *Marsh*, the USFWS' construction of the Public Trails is "not yet completed."

Moreover, the Supreme Court in *Norton* noted that, had BLM amended or revised the land use plan at issue in that case, a NEPA analysis would be necessary. *Id.* ("...BLM *is required* to perform additional NEPA analyses if a plan is amended or revised, see §§ 1610.5-5, 5-6...."). The Tenth Circuit has also determined that "[a]mending a resource management plan is a 'major federal action' whose potential

environmental impacts must be assessed under NEPA. 42 U.S.C. § 4332(C)....” *New Mexico ex rel. Richardson v. BLM*, 565 F. 3d 683, 689 (10th Cir. 2009). The 2004 CCP/EIS has been amended, at least in part, and thus under *Norton*, *Marsh,* and *Richardson*, the agency is required “to perform additional NEPA analyses.”

1. The 2004 CCP/EIS Is Too Old.

Defendants argue that, “[u]nder the NWRSAA, a CCP is to be reviewed every 15 years ‘as may be necessary.’ 16 U.S.C. § 668(e)(1)(A)(iv).” Response at 10. USFWS confuses a CCP, which provides the overall management plan for the Refuge, with an EIS, which is a NEPA analysis of proposed actions on the Refuge. The EIS relevant to this action was combined with a CCP, but they are not the same document and serve different purposes. R. at 1343 (“The CCP will guide management of Refuge operations...for the next 15 years. The EIS evaluates and compares four alternatives to managing wildlife...[and] discloses effects of restoration and visitor use on important physical, biological, social and cultural resources.”). Defendants would have this Court believe an EIS cannot be completed without the “lengthy process” required to create a whole new CCP. This is not the case for a NEPA analysis. For instance, NEPA defines an EA as a “*concise* public document for which a Federal agency is responsible that...*briefly* provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. 1508.9 (emphasis added). EAs are often completed within months.

Thus, the Court should rely on the Forty Questions, 46 Fed. Reg. 18,026, 18,036 (March 23, 1981) to conclude that the 2004 EIS is simply too old to be used by the Service as a basis for its present actions.

2. The Agency Cannot Divide Its NEPA Analysis into Insignificant Segments to Avoid its NEPA Obligations.

As depicted in the 2018 EAS, the Public Trails will now traverse the Wind Blown area rather than avoiding it as in the past. R. at 7; R. at 1746-47 ("...the Service is aware of and sensitive to public perceptions and concerns about residual contamination on the eastern edge of the Refuge and therefore does not propose a north-south trail along the west side of the Indiana Street corridor."). Defendants do not refute that a trail through the Wind Blown area would be a new development, but assert that this new configuration can be analyzed under NEPA at a later time. Response at 11 ("The section of proposed trail in the 'Wind Blown area' complained about by Plaintiffs is not being constructed or opened at this time, and is therefore not addressed in the EAS."). This amounts to improper segmentation prohibited under NEPA.

Under NEPA, an agency must consider actions having common timing or geography in the same environmental document. 40 C.F.R. § 1508.25(a)(3).

> [A]n agency may not ''divid[e] a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'' *Thomas v. Peterson,* 753 F.2d 754, 758 (9th Cir.1985)...

Town of Superior v. U.S. Fish and Wildlife Service ("Superior"), 913 F.Supp.2d 1087, 1116 (D.Colo. 2012).

The trail through the Wind Blown area has a "common geography" with the other trails analyzed in the EAS, appearing in the same diagram outlining the other planned trails. R. 7. All of these segments must be considered together, and the agency must determine if the *collective* decision to reconfigure the trails is significant and will have a substantial impact. *See* 40 C.F.R. § 1508.25(a)(3). "If an agency is involved in several

actions which, cumulatively, have a significant impact on the environment, then these actions should be considered in the same environmental document." *Fund for the Animals v. Clark*, 27 F.Supp.2d 8, 13 (D.D.C.1998) (citing 40 C.F.R. § 1508.25(a)(2)).

The same is true of the Indiana Street crossing. Even though the Service casts doubt on whether "that proposed connection [will be] ultimately developed," Response at 12, there is no doubt that it will someday replace the now-deleted crossing in the northeast quarter of the Refuge and must be analyzed, collectively, "in the same environmental document."

> The defendants' assertion that it hopes to fulfill, or even will fulfill, its NEPA obligations in the future does not address its current failures to act and is misguided. *See, e.g.*, *Southern Utah Wilderness Alliance*, 301 F.3d at 1239 (citing *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir.1993)) ("[W]e are unmoved by the Secretary's claim that it would be futile to prepare supplemental EISs ... when its new Resources Management Plans and accompanying EISs will address all the relevant information.").

San Juan Citizens' Alliance v. Babbitt, 228 F.Supp.2d 1224, 1232 (D. Colo. 2002).

3. Documents Proffered by the Service Concerning the Acquisition of the Section 16 Parcel do not Analyze the Location of Trails.

Defendants cannot dispute that placing public trails on Section 16 would be a major decision requiring NEPA analysis.[1] *See Conner v. Burford*, 848 F.2d 1441, 1449 (9th Cir. 1988) (An "irrevocable commitment of land to surface-disturbing activity, like drilling or road building…could not be made without an EIS.") (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983)).

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[1] Defendants plan to construct about a mile of new trails on the Section 16 parcel, including "access to the historic Caprock Mine." R. at 7. Since the 2004 CCP/EIS did not address Section 16, this is a significant change from the trails configuration approved in the prior NEPA analysis.

Rather, Defendants claim that two documents satisfy NEPA's requirements for placing trails on the Section 16 parcel: a Phase I environmental survey of the parcel (R. at 1038-1055) (the "Phase I"), and a Land Protection Plan and Environmental Assessment (R. at 440-1037) (the "LPP/EA"). Response at 12-13. However, both of these documents were completed before the parcel was acquired by USFWS, and neither one relates to the placement of public trails on the Section 16 parcel. This "irrevocable commitment of land to surface-disturbing activities" is significant in its own right, but is especially so in light of the acknowledged potential contamination on the Section 16 parcel. *See, e.g.*, R. at 1047 ("Based on this site's mining history and the peculiar blue-green color of the infiltrated water present in the State Clay Mine, the USFWS opted to quantify the presence of trace metals in this water....").

An EA must "include brief discussions of the need for the proposal, of alternatives," and "of the environmental impacts of the proposed action and alternatives...." 40 C.F.R. § 1508.9(b). An EA must also "...provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1).

The proposal analyzed in the LPP/EA does not address the route of the public trails within the Section 16 parcel.[2] Likewise, this document does not address the impacts and alternatives related to any "surface-disturbing activities," i.e., trail

[2] The administrative boundary of Rocky Flats NWR would be expanded to include 617 acres of section 16....These areas would then become part of the refuge, resulting in a net gain of over 1,000 acres of refuge land. If the land exchange does not happen as proposed, the Service could consider the use of Land and Water Conservation Fund (LWCF) money to purchase fee title property or conservation easements in section 16.

R. at 450.

construction; they are strictly related to the *acquisition* of the Section 16 lands.

In fact, the LPP/EA does not address *any* of the actions at issue in the EAS. With regard to "public use," the LPP/EA only states:

> Rocky Flats NWR has been closed to the public since its establishment in 2001 due to a lack of appropriations. However, upon the availability of funding, a comprehensive network of trails and interpretive facilities will be constructed, as described in the Rocky Flats NWR CCP (USFWS 2005a).

R. at 454. This scant reference to previously considered trails in other parts of the Refuge does not substitute for a NEPA analysis of the new trails planned for the Section 16 parcel. A new NEPA analysis is required precisely because the trails are *not* being constructed as described in the CCP/EIS.[3]

4. The Service's Consideration of Potential Erosion in the CCP is not an Adequate Substitute for Consideration of the *Actual* Erosion Events that Occurred in 2013.

Defendants argue that the EAS need not address actual erosion events in "a Supplemental EIS, because the Service already considered similar information" in the CCP. Response at 13. However, the CCP/EIS only generally mentions erosion and does not and could not discuss the effects of the significant flood events which subsequently occurred on the Refuge.

In September 2013, "...up to 15 inches of rain fell in [the area of the Refuge]...causing significant flooding events that impacted surveillance and maintenance activities at the Rocky Flats Site." R. at 386. The flood had substantial

[3] Likewise, the Phase I environmental survey is not an EA. It contains *none* of the required elements of an EA because it is simply a basic environmental survey of Section 16. It does not state its purpose, i.e., why an environmental survey was needed, and it does not contain a proposal, alternatives, or a finding regarding impact. *Compare* 40 C.F.R. § 1508.9(b) *with* R. at 1038-1055.

impacts on the Refuge, such as runoff causing "high stream flows" and "fast moving water and debris of over 2-3 feet in the drainages to impact roads and embankments." *Id.* "Approximately 2 inches of water was sheet flowing across the prairie." R. at 387. Additionally, structures were damaged in the 2013 flood. At least three retaining berms of the Old Landfill "exhibited cracking and subsidence." R. at 388. The actual erosion and flooding effects in 2013 were overlooked in the 2018 EAS.

Supplementation of a prior NEPA analysis is required whenever there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts." 40 CFR 1502.9(c)(ii). *See also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372-373 (1989). The events of 2013 were significant enough to cause U.S. Congressman Jared Polis to recently ask the Service to delay opening the Refuge until the changed topography caused by the erosion on the Refuge could be analyzed. *See* **Exhibit 1** (letter from Representative Jared Polis to Ryan Zinke dated September 13, 2018).[4]

In sum, it is arbitrary and capricious for USFWS to ignore post-CCP/EIS events simply because the CCP/EIS *mentions* erosion.

5. The CCP/EIS and EAS did not Adequately Consider the Presence of Residual Plutonium on the Refuge.

The Service contends that radiation levels were addressed in the 2004 CCP/EIS, and that the EPA has determined the Refuge "is suitable for all purposes." Response at 14-15. The main problem with the agencies' analyses of safety, however, is that the methodology for determining contaminant concentrations for the Refuge involve the

[4] The Court may consider materials when the evidence coming into existence after the agency acted demonstrates that the actions were right or wrong. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985).

averaging of averages, effectively concealing "hot spot" areas with higher concentrations. "[A]verages were first calculated for 30-acre sub-areas of an [Exposure Unit ("EU")]. These averages were then combined to calculate an EU-wide average." R. at 5558. Furthermore, too few samples were taken. Only 135 samples of surface soil were taken from 66 locations in the Wind Blown EU area of the Refuge. R. at 5488. Only "586 surface soil samples [were] collected throughout the entire Refuge." R. at 875; *see also* R. at 5488. This amounts to less than one surface soil sample for every 6.5 acres of Refuge land.[5] This outlandishly small amount of sampling was far from adequate to determine if hotspots of plutonium exist to pose a risk to Refuge visitors and others, and is an issue the Service should examine in a future NEPA analysis now that definitive locations for trails have been identified.

B. The Service is Precluded from Using a CE If its Decision Invokes Exceptional Circumstances *When* It Conducts its CE Analysis.

Defendants do not argue that its decision to "begin steps to allow larger numbers of visitors to enjoy the refuge," does not "[h]ave highly controversial environmental effects." Response at 17. Rather, Defendants argue that they can ignore the current controversies regarding the Refuge because the controversies concern the opening of the Refuge which "was decided in the CCP/EIS." *Id.*

When deciding whether a decision is categorically excluded, USFWS is not strictly time-limited in its analysis, but must consider extraordinary circumstances including "incremental" impacts and "past, present, and reasonably foreseeable future

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[5] At the time of this sampling, the Refuge encompassed approximately 3,953 acres. R. at 471.

actions.”[6]

> ...[A]gencies must also provide for "extraordinary circumstances in which a normally excluded action may [have] a significant environmental effect." 40 C.F.R. § 1508.4. ...Such actions causing significant environmental effects can include routine measures, "the incremental impact of which, when added to other past, present, and reasonably foreseeable future actions . . . [have] the potential for significant environmental impact[.]" *Id.* at § 372.5(d)(1).

Colo. Prairie Initiative v. Lowney, No. 17-cv-00321-CMA. (D. Colo. Mar. 20, 2018). *See also Sierra Club v. U.S.*, 255 F.Supp.2d 1177, 1182 (D. Colo., 2002) (“In determining whether an action requires an EA or EIS, or is categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts. *See* 40 C.F.R. §§ 1508.7,1508.8.”).

NEPA regulations also require agencies to consider the impacts of “connected actions.” 40 C.F.R. § 1508.25(a)(1); 10 C.F.R. § 1021.410(b)(3). An agency “must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.” *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C.Cir. 2002).

In this case, there can be no dispute that, *as of* March 23, 2018, the Service’s decision to “begin steps to allow larger numbers of visitors to enjoy the refuge,” R. at 5, was controversial, thus implicating 43 C.F.R. § 46.215(c).[7] In other words, when the

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[6] The term “action” includes agency decisions and adoption of formal plans. “Federal actions tend to fall within one of the following categories,” such as “[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.” 40 C.F.R. 1508.18(b). *See, e.g.*, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 72-73 (2004) (approval of a land use plan is a “major federal action”); *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1051 (10th Cir. 2014) (creation of a forest service plan is a “major federal action”).

[7] The agency effectively acknowledges the controversial nature of the action. R. at 5, n.3. Moreover, the Court can take judicial notice of a fact that is not subject to

Service decided on March 23, 2018 to apply a CE for "minor" actions, it could not analyze that decision "in a vacuum" but needed to take into account its "past" decision to open the Refuge.

The rationale expressed in *Colorado Prairie* is supported by language in the Administrative Procedure Act ("APA") that requires agencies to analyze the existence of extraordinary circumstances *at the time* the analysis is made, in this case March 23, 2018. *W. Watersheds Project v. BLM*, 721 F.3d 1264, 1273 (10th Cir., 2013) (agency decision to be set aside if it "offered an explanation for its decision that runs counter to *the evidence before the agency*.") (emphasis added); *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1580 (10th Cir. 1994) ("We find the agency's action unsupported by substantial evidence in the administrative record *as it existed before the agency* and thus 'arbitrary or capricious' under APA Sec. 706(2)(A).") (emphasis added).

In short, the Service has come forward with no support for its argument that the controversial nature of its current decision should not be considered because it involves a decision (to open the Refuge) previously made. The regulations and case law demonstrate, instead, that if the decision to open the Refuge has "highly controversial environmental effects" at the time the analysis is made, the agency is precluded from invoking a CE.

As fully described in Plaintiffs' Opening Brief, there are six categorical exclusions that may apply to the agency's EAS Decision. In addition to the controversial

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reasonable dispute. Fed. R. Evid. 201(b)(1) (if generally known within the trial court's territorial jurisdiction or readily determined from accurate sources). *See* **Exhibit 2** (examples of the extensive publicity concerning the opening of the Refuge, the public spat between Defendant David Lucas and the executive director of Jefferson County Health, and the recent letter to Secretary Zinke from Representative Jared Polis).

circumstance described above, the Decision also: may "have significant impacts on…refuge lands," 43 C.F.R. § 46.215(b) (this is a national wildlife *refuge*); may "[h]ave highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks," 43 C.F.R. § 46.215(d) (potential contamination on Section 16 has been acknowledged, involving contaminants other than plutonium); and may "[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects," 43 C.F.R. § 46.215(e).[8] Finally, the Decision may "[h]ave significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species," 43 C.F.R. § 46.215(h). USFWS admits that this extraordinary circumstance exists, i.e., that "[t]he proposed action may affect...the Preble's Meadow Jumping Mouse or designated critical habitat(s) of the Preble's Meadow Jumping Mouse." R. at 10. The fact that this exception *may* apply, as acknowledged by USFWS in the EAS, "is all that is required to prohibit use of the categorical exclusion." *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir.2002).

II. DEFENDANTS' RELIANCE ON TANGENTIALLY RELATED CDS IS NOT ENTITLED TO DEFERENCE IN LIGHT OF THE EXPRESS LANGUAGE IN THE TRAILS CD REQUIRING "MANDATORY RE-EVALUATION."

Defendants acknowledge that CDs "are a step-down component of a CCP which are written determinations *required by the Refuge Act* that a particular type of activity… will not…'interfere with or detract from the fulfillment of the mission of the System or the purposes of the Refuge.'" Response at 21 (emphasis added). Defendants also

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[8] When the agency eventually decides the trail locations "not included" in the EAS, such as trails through the Wind Blown area, Response at 11-12, it is probable that USFWS will similarly rely on a categorical exclusion, again circumventing proper NEPA analysis by improperly segmenting its trails decisions.

acknowledge that the 2005 CCP "relied in part" on the Multi-Use (Equestrian, Bicycle and Foot access) Trails ("Multi-Use Trails CD"), and that "*this use* [i.e. equestrian, bicycle and foot access] is subject to mandatory re-evaluation in 10 years." *Id.* (emphasis added), *citing* AR1243. Because no such re-evaluation has occurred, the 2018 EAS authorization for equestrian, bicycle and foot access is without a basis in law, and is arbitrary and capricious.[9]

Defendants argue that other CDs for Wildlife Observation and Photography ("Wildlife Observation CD") and Interpretation and Environmental Education ("Education CD") may be substituted for the Multi-Use Trails CD, thus rendering inoperable the Multi-Use Trails CD language which mandates "re-evaluation." However, these CD's are only tangentially related to, and certainly not the major thrust of, the 2018 EAS Decision "to open the majority of these trails in the summer of 2018." AR 6.

Moreover, as Defendants conceded during the preliminary injunction hearing in response to this Court's question, there is nothing to prevent the Service from timely conducting all three evaluations, i.e., a trail re-evaluation with the mandatory 10-year period, and a photography and education re-evaluation with the specified 15-year period. Tr. (7/17/2018) 167:16-171:18 (**Exhibit 3**).[10] Thus, the "canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's

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[9] This is significant because the CCP process must "ensure an opportunity for *active public involvement* in the…*revision* of comprehensive conservation plans." 16 U.S.C. § 668dd(e)(4)(A) (emphasis added). *See also* R. at 25 (containing the Service's assurance to the undersigned's law firm of "public review and comment opportunities" during the re-evaluation of the Multi-Use Trails CD).

[10] The Service has also not come forward with any fact to suggest it didn't have enough money or resources to complete the trail compatibility assessment within the mandatory 10-year period. *See id.*

interpretive puzzle." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

Finally, the Wildlife Observation CD and the Education CD presume that the trails would be used, and thus their determinations rely on an underlying determination that trails are compatible with the purposes of the Refuge.

Because the Service has ignored the mandatory re-evaluation directive set forth in its Trails CD, it has violated the Refuge Act. It was arbitrary and capricious for the Service to authorize the use of the Public Trails in 2018, and it should be ordered to re-evaluate whether the (non-priority) trail uses are compatible with the purposes of the Refuge.

III. CONCLUSION

The Defendants have acted arbitrarily and capriciously in issuing the 2018 EAS by not adequately complying with the National Wildlife Refuge Systems Administrative Act and NEPA. Accordingly, Plaintiffs respectfully request the Court to grant the relief set forth in the Complaint's Prayer for Relief, Docket No. 1 at 36-37, and Order that the Refuge be closed until Defendants comply with these statutes.

Respectfully submitted this 21st day of September, 2018.

LAW OFFICES OF RANDALL M.
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on September 21, 2018, the foregoing, along with all exhibits thereto, 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/ Randall M. Weiner
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Counsel for Plaintiffs