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' REPLY TO FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF PRELIMINARY INJUNCTION, AND IN THE ALTERNATIVE PERMISSION TO APPEAL CONTROLLING QUESTION OF LAW INHERENT IN THE COURT'S ORDER**

Introduction

This Court understands NEPA's mandate that agencies undertake their procedural review before taking major action. *NRDC v. Vilsack*, No. 08-cv-02371-CMA, 2011 U.S. Dist. LEXIS 87120 (D. Colo. Aug. 5, 2011) (Arguello, J.):

> NEPA "require[s] agencies to consider environmentally significant aspects of a proposed action." *Utahns for Better Transp. v. U.S. Dep't of Transp.,* 305 F.3d 1152, 1162 (10th Cir. 2002). " NEPA does not, however, require agencies to elevate environmental concerns over other appropriate considerations; it requires only that the agency take a 'hard look' at the environmental consequences before taking a major action." *Krueger*, 513 F.3d at 1178 (citation and internal quotation marks omitted).

Id. at *25-26.

In fact, Defendants do not contest that they have never commenced the requisite NEPA analysis. They merely repeat this Court's statement that there has been no final

agency action, and thus the Motion for Preliminary Injunction is not ripe and should be dismissed. But if ever a court were to utilize the heavily disfavored reconsideration opportunity, this is the time. The agency has made final decisions related to the challenged Multipurpose Facility and Trails, and is proceeding so rapidly that its previous decisions are only going to be made more concrete by the passage of time. Here, 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, a commitment to a contract to provide a Multipurpose Facility and Trails is a final action. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) ("a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.") (emphasis added); 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values*….")*

1. The Agency Has Entered into an MOU to Deliver the Multipurpose Facility

Here, the agency has entered into an Memorandum of Understanding ("MOU") with the U.S. Department of Energy ("DOE") to deliver a 3,500 square foot Multipurpose Facility for the purpose of: "establishing a mutual framework governing the respective responsibilities of the parties to provide Rocky Flats National Wildlife Refuge a Multipurpose Building, to include design, construction and operation of the facility." **(Exh. 1)** p. 1 at Article I. FWS published a final Comprehensive Conservation Plan ("CCP") for the Refuge in 2005 fully describing the approved Visitor Contact Station. **(Exh. 2)**, p. 75 at ¶ 6. FWS entered into the MOU's supporting Interagency Agreement

("IAA") in August 2015 that more than tripled the approved facility's size. **(Exh. 3)** at ¶ B.6. The Service argues that it "is still evaluating the proposed trails and multipurpose facility, has not completed any final design or location determination…" Dfs'. Br. 8. However, the fact that a $524,000 design contract was awarded to MWH Americas, Inc. belies this statement. This contract commenced in March 2016 and was completely paid out as of April 2017. **(Exh. 4)**. Architectural plans have been published. Pls'. Motion for Preliminary Injunction, Exhibit 11. Several versions of maps have been created and published in various forums. **(Exh. 5)**.

Moreover, this MOU procedure was effectively a rulemaking because it has particular applicability and future effect and is designed to implement the law governing the Refuge, i.e. the Rocky Flats National Wildlife Refuge Act. 5 U.S.C. § 551(4).[1] Rulemakings, even informal ones, are considered final agency actions and properly subject to judicial review. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). "Amending a resource management plan," such as a CCP, "… is a 'major federal action' whose potential environmental impacts must be assessed under NEPA." *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683*,* 689 (10th Cir. 2009).

2. <u>Defendants' Have Entered into an IAA, which is a Binding Document that Constitutes an "Irreversible and Irretrievable" Commitment to a Predetermined Outcome.</u>

FWS entered into the IAA, which is the MOU's funding instrument, in August 2015. **(Exh. 3)**. Defendants do not counter Plaintiffs' argument that the IAA is a binding

[1] *See also,Chem Serv., Inc. v. Envtl. Monitoring Sys. Lab.-Cincinnati of U.S. E.P.A.*, 12 F.3d 1256, 1267 (3d Cir. 1993).

document.[2] Based on the monies provided through the IAA, FWS awarded a $524,000 contract to MWH Americas, Inc. for architectural services at the Refuge, and the entire amount was paid out as of April 2017. **(Exh. 4)**. In addition, the FWS "sharing sessions" included only a single Multipurpose Facility design that met the requirements outlined in the IAA agreement. Pls'. Motion for Preliminary Injunction, Exhibit 11. FWS has characterized this design as the implemention of the decision authorized by the 2005 CCP. **(Exh. 6)**. Meanwhile, the $8.3 million in funds FWS has and will receive under the IAA are being spent to design this, as yet, unanalyzed alternative – the Multipurpose Facility described in the MOU and IAA. **(Exh. 1, 3)**. These are precisely the kinds of facts found in *Forest Guardians* that compel the determination that the agency's actions are "irreversible and irretrievable." *See Forest Guardians v. FWS*, 611 F.3d 692, 714 (10th Cir. 2010).

3. A Clear Error of Law Constitutes Valid Grounds under Rule 59(e) for Reconsideration, and Plaintiffs May Reargue Their Position in Support of It

The legal requirements for reconsideration have been met. Defendants acknowledge that Rule 59(e) is applicable to correct a manifest error of law. Def. Br. p. 2-3. *See also Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) ("motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law."). A movant may even "..reargue previously articulated positions to correct clear legal error." *Hayes Family Tr. v. State Farm Fire & Cas. Co*., 845 F.3d 997, 1005 (10th Cir. 2017).

[2] A signed IAA is binding commitment. Plaintiff's Reply Brief in Support of Motion for Preliminary Injunction, Exhibit 5, ¶ B(1).

4. Substantial Ground Exists for a Difference of Opinion.

Should the Court not reverse itself, it should certify the dispute as to ripeness to the 10th Circuit. Defendants' own brief, and their filing of a concurrent Motion to Dismiss Plaintiffs' claims based on ripeness, demonstrate that a substantial difference of opinion on this issue exists.

Conclusion

Wherefore, this Court should reconsider its denial of the preliminary injunction based on ripeness, or in the alternative certify Plaintiffs' request for permission to appeal the question of ripeness under NEPA pursuant to 28 U.S.C. § 1292(b). In the event the Court reconsiders its preliminary injunction decision, a hearing is requested.

Respectfully submitted this 2nd 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 2, 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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