

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.

WILDEARTH GUARDIANS and  
ROCKY MOUNTAIN WILD

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,  
DANIEL M. ASHE, in his official capacity as Director of the United States Fish and Wildlife  
Service, and,  
STEVE GUERTIN, in his official capacity as Regional Director, Region 6, United States Fish  
and Wildlife Service,

Defendants.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; PETITION FOR  
REVIEW OF AGENCY ACTION**

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INTRODUCTION

1. The 6,240-acre Rocky Flats National Wildlife Refuge (Rocky Flats) and its surrounding lands are some of last vestiges of wide-open space along the Front Range of the Denver Metropolitan Area. Yet, Rocky Flats' lands and wildlife, recreational opportunities, views, and other Rocky Flats resources and values are increasingly being encroached upon by unchecked and shortsighted urban development. Now Rocky Flats and the surrounding habitat and open spaces face a significant threat from an unlikely source -- the U.S. Fish and Wildlife Service ("FWS").

2. On December 8, 2011, FWS decided to transfer a 2.76-mile Transportation Corridor through the eastern edge of Rocky Flats (the "Land Exchange") to the Jefferson Parkway Public Highway Authority ("JPPHA"). Within this Transportation Corridor, the

JPPHA will construct a four-lane, high-speed, toll highway through the northwest corner of the Denver metropolitan area (the “Jefferson Toll Highway” or “Jefferson Parkway”). The Jefferson Toll Highway will facilitate development in the area. The Land Exchange also anticipates the conveyance to FWS of some other lands for inclusion in Rocky Flats.

3. Plaintiffs WildEarth Guardians and Rocky Mountain Wild are organizations dedicated to the conservation of wildlife, open spaces, clean water, and clean air. Plaintiffs challenge FWS’s Land Exchange. Specifically, Plaintiffs challenge FWS’s Environmental Assessment and Finding of No Significant Impact under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4347, for, among other things, FWS’s failure to analyze, assess and minimize the significant environmental effects of the Land Exchange, including effects to wildlife, endangered and threatened species, open spaces, air quality, and water quality. Plaintiffs further challenge FWS’s Biological Opinion and Incidental Take Statement under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, wherein FWS concludes that the Land Exchange does not jeopardize the continued existence of the Preble’s meadow jumping mouse (“Mouse”) or adversely modify the Mouse’s critical habitat. Plaintiffs also challenge Defendants’ failure to comply with the Rocky Flats National Wildlife Refuge Act of 2001 (Rocky Flats Act), which requires both compliance with applicable law and that the Land Exchange’s adverse impacts to Rocky Flats are minimized. Pub. L. No. 107-107, §§ 3171–3182, 115 Stat. 1379.

4. Plaintiffs seek declaratory relief that FWS has violated the ESA, NEPA, and the Rocky Flats Act, and injunctive relief setting aside and vacating FWS’s Land Exchange, and enjoining FWS from initiating and completing the Land Exchange.

## JURISDICTION AND VENUE

5. This Court has jurisdiction under 5 U.S.C. §§ 551 et seq. and 28 U.S.C. § 1331, as well as 28 U.S.C. § 1346 because the federal government is a defendant and this action arises under the laws of the United States.

6. Venue is proper pursuant to 28 U.S.C. § 1391(e)(3) because Plaintiffs reside in this judicial district. Venue is also appropriate under 28 U.S.C. § 1391(e)(1) because FWS has offices in this district. Additionally, venue is proper pursuant to 28 U.S.C. § 1391(e)(2) because “a substantial part of the events or omissions giving rise to the claim” took place in Colorado.

## PARTIES

7. Plaintiff WILDEARTH GUARDIANS is a non-profit membership organization based in Santa Fe, New Mexico, with offices in Denver and Phoenix. WildEarth Guardians has more than 5,000 members, mostly in the Western United States, including 575 in Colorado. WildEarth Guardians and its members are dedicated to protecting and restoring the wildlife, wild places, and wild rivers of the American West.

8. Plaintiff ROCKY MOUNTAIN WILD is a non-profit membership organization based in Colorado with offices in Denver and Durango. Rocky Mountain Wild has 1,200 members, mostly in Colorado. Rocky Mountain Wild and its members are dedicated to protecting and restoring biodiversity, including imperiled species and their habitats, in the Southern Rockies and the surrounding region.

9. Both WildEarth Guardians and Rocky Mountain Wild submitted comments on FWS’s decision to approve the Land Exchange. On October 31, 2011, WildEarth Guardians and Rocky Mountain Wild independently submitted comments on FWS’s draft environmental

assessment for the Land Exchange. In commenting, both organizations sought to convince FWS to fully analyze and assess environmental effects under NEPA, particularly reasonably foreseeable effects arising from the construction of the highway and associated development, to comply with the ESA, and to generally seek to minimize the environmental impacts of the Land Exchange, or otherwise abandon its proposal.

10. Both WildEarth Guardians and Rocky Mountain Wild have members who actively and regularly utilize lands that will be impacted by the Land Exchange for recreational, conservation, and educational reasons. These members, who live in Arvada, Boulder, Broomfield, Denver, Golden, and in other nearby communities, enjoy hiking, exploring, viewing the mountains of the Front Range, and viewing wildlife within and near the Land Exchange. These members intend to return to the area in spring and summer of 2012, and beyond.

11. These members' enjoyment of the lands will be impacted and diminished as a result of the Land Exchange. The Land Exchange will result in the Jefferson Toll Highway, a four-lane, high-speed tolled highway. According to JPPHA, the Jefferson Toll Highway is intended to facilitate additional development in the area. The Jefferson Toll Highway and associated development will increase the amount of noise and air pollution, increase the amount of land disturbance, disrupt the views, and would diminish wildlife habitat in the area. The Land Transfer will cause members of WildEarth Guardians and Rocky Mountain Wild to be less likely to visit and enjoy these lands. A decision favorable to WildEarth Guardians and Rocky Mountain Wild would redress these harms by ensuring FWS complies with applicable laws, requiring FWS to ensure its actions minimize environmental impacts, and preventing the conveyance of the Transportation Corridor and the construction of the Jefferson Toll Highway.

12. Defendant U.S. FISH AND WILDLIFE SERVICE manages the National Wildlife Refuge System, including Rocky Flats. FWS is the agency responsible for issuing the Land Transfer decision. FWS is responsible for complying with the ESA, NEPA, and the Rocky Flats Act, in deciding to issue the Land Exchange. FWS is also the agency responsible for administering the ESA. Through the ESA's consultation process, FWS reviews a Federal agency's proposed action that impacts endangered and threatened species and their critical habitat and determines whether the action complies with the ESA. On November 17, 2011, FWS issued a biological opinion and incidental take statement on the Land Exchange.

13. Defendant DANIEL ASHE is sued in his official capacity as Director of the FWS. In that capacity, he is responsible for ensuring FWS actions comply with the ESA, NEPA, and the Rocky Flats Act. On December 8, 2011, Mr. Ashe approved the Land Exchange decision.

14. Defendant STEPHEN GUERTIN is sued in his official capacity as Regional Director, Region 6, of FWS. On December 2, 2011, Mr. Guertin signed a Finding of No Significant Impact, thereby authorizing the Land Exchange without further NEPA review.

## LEGAL BACKGROUND

### I. The National Environmental Policy Act

15. NEPA aims to "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. The NEPA process serves two central purposes: First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

16. Under NEPA, a federal agency must prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C)(i); 40 C.F.R. § 1501.4. In the EIS, the agency must, among other things, rigorously explore and objectively evaluate all reasonable alternatives, analyze and assess all direct, indirect, and cumulative environmental effects, and include a discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. §§ 1502.14; 1502.16.

17. The alternatives analysis is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. It “should present the environmental impacts of the proposal and the alternatives in comparative form, sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” Id. Alternatives shall be “reasonable,” shall include reasonable alternatives not within the jurisdiction of the agency,” and shall include the alternative of “no action.” Id.

18. Direct effects include those that “are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects include effects that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Id. § 1508.8(b). Cumulative effects are “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” Id. § 1508.7.

19. Under NEPA, mitigation includes “[a]voiding the impact altogether,” “minimizing impacts,” “rectifying the impact,” “reducing or eliminating the impact over time,” or “compensating for the impact.” 40 C.F.R. § 1508.20.

20. An agency may also prepare an Environmental Assessment (“EA”) to determine whether an EIS is necessary. 40 C.F.R. §§ 1501.3, 1508.9. If an agency decides not to prepare an EIS, an EA must “provide sufficient evidence” to support a Finding of No Significant Impact (“FONSI”). *Id.* § 1501.4(e). To support a FONSI, an EA is held to the same standards as an EIS. Similar to an EIS, an EA must include a discussion of alternatives and the environmental impacts of the action, including mitigation measures. *Id.* § 1508.9.

## II. The Endangered Species Act

21. The purpose of the ESA is “to provide a program for the conservation [of] endangered species and threatened species” and “to provide a means whereby the ecosystems upon which [such] species depend may be conserved.” 16 U.S.C. § 1531(b).

22. Pursuant to the ESA, the FWS has a duty to list a species as threatened or endangered solely on the basis of biological criteria and the best available scientific and commercial data. 16 U.S.C. §§ 1533(b),1533(c). A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range[.]” *Id.* § 1532(6).

23. Once a species is listed as threatened or endangered, its critical habitat must be designated. 16 U.S.C. § 1533(a)(3). Critical habitat includes areas that contain the features “essential to the conservation of the species[.]” *Id.* § 1532(5)(A)(i)(I).

24. Under section 7(a)(2) of the ESA, a federal agency cannot undertake any action that is "likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). Upon proposing to authorize, fund, or carry out an action that may affect a species or its critical habitat, the

“action agency” is required to consult with the FWS. Id. § 1536(a)(2); 50 C.F.R. § 402.2. The action agency must prepare a "biological assessment" to facilitate this consultation process. 16 U.S.C. § 1536(c). The agency preparing the biological assessment must use the best scientific and commercial data available. Id. § 1536(a)(2). In the biological assessment, the action agency must identify the proposed or listed species or designated or proposed critical habitat in the area, and evaluate the potential effects of the proposed action. Id. § 1536(a)(2); 50 CFR §§ 402.02, 402.12, 402.14(d). Where FWS is both the “action agency” and the “consulting agency,” as here, FWS engages in an “intra-Service” consultation process.

25. At the conclusion of the consultation process, FWS provides the action agency with a biological opinion as to whether "jeopardy" or "adverse modification" is likely to occur due to the action and, if so, sets forth the reasonable and prudent alternatives that could avoid such ESA violations. 16 U.S.C. § 1536(b)(3)(A). FWS must use the best scientific and commercial data available in drafting a biological opinion. Id. § 1536(a)(2). Jeopardy results when it is reasonable to expect that the action would "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Adverse modification occurs when it is reasonable to expect that the action will result in "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." Id. § 402.02.

26. FWS must analyze in its biological opinion the direct, indirect, and cumulative effects to a species from a proposed agency action, as well as “interrelated and interdependent



actions.” 50 C.F.R. § 402.02 (defining “effects of action”); § 402.14(c)(4) & (8). Direct impacts are caused by the action and occur at the same time and place. Id. § 402.02. Indirect impacts are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Id. Cumulative effects include “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” Id. FWS must also consider “interrelated and interdependent actions.” Id. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Id. Interdependent actions are those that have no independent utility apart from the action under consideration. Id.

27. The ESA prohibits take of threatened and endangered species. “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). ESA regulations further define “harm” as “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3

28. Congress created two “incidental take” exceptions to take prohibition. In addition to ESA section 10 incidental “take permits,” which do not cover federal agencies, Congress also created incidental “take statements” for federal agencies. 16 U.S.C. § 1536(o)(2). As part of the section 7 consultation process, FWS provides a “take statement” to an action agency only after making a no jeopardy and no adverse modification finding or identifying a reasonable and prudent alternative that avoids jeopardy and adverse modification. Id. § 1536(b)(4)(A). An incidental take statement must (1) specify the impacts on the species, (2) specify the reasonable and prudent measures that FWS considers necessary to minimize such impact, and (3) set forth

terms and conditions that must be complied with by the federal agency to implement these reasonable and prudent measures. Id. § 1536(b)(4). The take statement must quantify the amount of take being authorized and, if take cannot be quantified, a legally-valid surrogate must be included. Id.

### III. The Rocky Flats Act

29. In 2001, Congress passed the Rocky Flats National Wildlife Refuge Act of 2001. The Rocky Flats Act provided for the creation of Rocky Flats at the former Rocky Flats Environmental Technology Site. Pub. L. No. 107-107, §§ 3171-3182.

30. The Rocky Flats Act provided that once the United States Environmental Protection Agency certified the completion of cleanup, administration of the site would transfer from the Department of Energy (“DOE”) to the Secretary of Interior and, by delegation, FWS. Pub. L. No. 107-107, § 3175. At that point, FWS would establish a wildlife refuge at the site. Id. § 3177.

31. The Rocky Flats Act requires FWS to make up to 300 feet of land along the eastern boundary of Rocky Flats available for the sole purpose of transportation improvements along Indiana Street. Pub. L. No. 107-107, § 3174(e)(1)(A). FWS may only convey this 2.76-mile Transportation Corridor provided two specific requirements are met: (a) the transportation improvements are included in the Denver metropolitan area’s regional transportation plan, and (b) the transportation improvements “are carried out so as to minimize adverse effects on the management of Rocky Flats as a wildlife refuge.” Id. § 3174(e)(2)(B)(i) & (ii). Any conveyance of the corridor for transportation improvements “shall be taken in compliance with applicable law.” Id. § 3174(e)(1)(D). FWS has discretion to convey the Transportation Corridor under the Rocky Flats Act. FWS has discretion to condition the conveyance of the Transportation Corridor

under the Rocky Flats Act.

## FACTUAL BACKGROUND

### I. Management of Rocky Flats

32. In 1951, the U.S. government acquired a facility located in unincorporated Jefferson County, between Denver and Boulder, Colorado, to manufacture nuclear weapons. In 1975, the government purchased additional lands surrounding the facility from private landowners to create a buffer zone, increasing the size of the site to approximately 6,500 acres. This area became known as the Rocky Flats Environmental Technology Site. Manufacturing weapons at the Rocky Flats Environmental Technology Site ceased in 1992 and environmental cleanup of the site began. Despite the contamination, Rocky Flats reflects the natural environmental conditions that exist along Colorado's Front Range and stands in stark contrast to the urban sprawl on surrounding lands.

33. In 2005, in response to the Rocky Flats Act and National Wildlife Refuge System Act, FWS adopted a Comprehensive Conservation Plan (CCP) to guide management of Rocky Flats for 15 years.

34. Before approving the CCP, FWS prepared an EIS to assess the CCP's impacts and analyze management alternatives for Rocky Flats. In the CCP and EIS, FWS recognized the potential for a new highway within the Transportation Corridor. FWS did not study the effects of any particular transportation improvement project. FWS identified a number of ways in which use of the Transportation Corridor could adversely impact Rocky Flats and outlined potential mitigation measures to minimize those impacts. According to FWS, its NEPA evaluation and adoption of mitigation measures would await a specific transportation project within the Transportation Corridor.

35. In 2007, the DOE completed cleanup and closure of the site. DOE then transferred ownership and management responsibility to FWS for much of Rocky Flats.

36. DOE retained and continues to manage a portion of Rocky Flats, including the lands where nuclear weapons were manufactured in the middle of Rocky Flats.

37. DOE also continues to manage lands within the Rocky Flats acquisition boundary. These DOE-managed lands total 644 acres. The DOE-managed lands may become part of Rocky Flats once all legal property interests, including subsurface mineral interests, are acquired. The DOE-managed lands are not subject to Rocky Flats management or regulations applicable to a National Wildlife Refuge.

38. Since becoming a National Wildlife Refuge in 2007, Rocky Flats has remained closed to the public. Much of the land around Rocky Flats is protected as open space by Broomfield, Westminster, and other local governments and is open to public use.

39. Rocky Flats provides habitat for a threatened species, hundreds of acres of rare xeric tallgrass prairie, and populations of state game species such as mule deer and elk. It also is home to a variety of other wildlife species, including: black-tailed jackrabbit, black-tailed prairie dog, painted turtle, prairie rattlesnake, red-tailed hawk, northern harrier, peregrine falcon, western meadowlark, killdeer, yellow warbler, and red-winged and yellow-headed blackbird.

Rocky Flats provides an important link to existing open spaces in the Denver metropolitan area.

## II. Preble's Meadow Jumping Mouse

40. One of the imperiled species found at Rocky Flats is the Preble's meadow jumping mouse. The Mouse is a relatively small rodent with an extremely long tail, large hind feet and long hind legs. Total length of an adult Mouse is approximately 8-10 inches with more than 60 percent of its length in its tail.

41. The Mouse and its habitat are found along the foothills in southeastern Wyoming, southward along the eastern edge of the Front Range of Colorado to Colorado Springs. Typical habitat for the Mouse is comprised of well-developed plains riparian vegetation with adjacent, relatively undisturbed grassland communities, and a nearby water source.

42. In May 1998, FWS listed the Mouse as a threatened species under the ESA. FWS considered the decline in the extent and quality of Mouse habitat as the reason for listing the Mouse. FWS identified habitat alteration, degradation, loss, and fragmentation resulting from urban development, road construction, flood control, water development, agriculture, and other human land uses as adversely impacting Mouse populations and its habitat.

43. Every major waterway within Rocky Flats contains the Mouse.

44. On December 15, 2010, FWS designated critical habitat for the Mouse. A species' critical habitat is defined by those physical and biological features that are essential to the conservation of the species, known as "primary constituent elements." Mouse critical habitat includes both riparian corridors and adjacent floodplains and uplands that support the riparian corridors.

45. Rocky Flats contains Mouse critical habitat. The Transportation Corridor contains 12.4 acres of Mouse critical habitat. FWS reduced the amount of Mouse critical habitat in the 2010 final designation from its 2009 proposal. Mouse critical habitat within Rocky Flats did not change from the proposal to final designation. Mouse critical habitat within Section 16 did not change from the proposal to the final designation.

### III. FWS Land Exchange

46. On April 29, 2008, Jefferson County, the City of Arvada, and the City and County of Broomfield requested that FWS transfer ownership of the Transportation Corridor pursuant to

the Rocky Flats Act for the construction of the Jefferson Toll Highway. The Jefferson Toll Highway will connect State Highway 128 in Broomfield and State Highway 93, north of W. 58th Avenue. In May 2008, the City of Arvada, the City and County of Broomfield, and Jefferson County created JPPHA as a public highway authority under Colorado law to finance, construct, and operate the Jefferson Toll Highway.

47. A primary purpose of the Jefferson Toll Highway is to develop nearby property. The Jefferson Toll Highway will provide a transportation route for new residential and nonresidential development. The Jefferson Toll Highway will facilitate development in areas west of State Highway 93 and south of Rocky Flats. Such development will include the Flatiron Crossing/Interlocken area, the Candelas Urban Centers, the Rocky Mountain Metro Airport area, and other associated development in the Northwest Corridor Study Area.

48. On January 26, 2010, JPPHA filed a new application to purchase the Transportation Corridor from FWS. JPPHA's application did not detail how the adverse effects of the Jefferson Toll Highway would be minimized or mitigated.

49. In March 2010, JPPHA, the Colorado State Land Board ("State Land Board"), local governments, including Jefferson County, the City of Boulder and the County of Boulder, and FWS began discussions to exchange lands under state and local control for the Transportation Corridor. Section 16 is school trust land currently owned by the State of Colorado and managed by the Colorado State Land Board. Section 16 contains 640 acres and abuts the southwestern part of Rocky Flats. The Land Exchange proposes to transfer some portion of the property rights with Section 16 to FWS. The Land Exchange would include conveyance of both surface and subsurface mineral rights. The owners of the Section 16 mineral rights have conveyed those rights. The conveyance of the Section 16 mineral rights was not

dependent on FWS conveying the Transportation Corridor.

50. Section 16 does not contain Mouse critical habitat. Mouse habitat within Section 16 was not designate as critical habitat in December 2010.

51. The Land Exchange also contemplates that FWS may acquire the DOE-managed lands within the Rocky Flats boundary. The acquisition of remaining DOE-managed lands is an ongoing FWS goal as set forth in the CCP. The acquisition of DOE-managed lands is not dependent upon conveying the Transportation Corridor. The acquisition of these DOE-managed lands is uncertain to occur. Sand and gravel mining is occurring on these DOE-managed lands.

52. On May 19, 2011, the city of Golden applied to acquire the 2.76-mile Transportation Corridor from FWS for construction of a bikeway and pedestrian facilities. FWS rejected this alternative based on a finding that it does not fit into the regional transportation plan for the Denver metropolitan area. Golden's proposal is consistent with the regional transportation plan.

53. The Jefferson Toll Highway will adversely impact Rocky Flats. The Jefferson Toll Highway will destroy 12.4 acres of Mouse critical habitat within the Transportation Corridor. The Jefferson Toll Highway will adversely affect the Mouse and its critical habitat within Rocky Flats. The Jefferson Toll Highway will adversely affect the Mouse and its critical habitat on lands to the north, east, and south of the Transportation Corridor.

54. Increased traffic and vehicle speeds on the Jefferson Toll Highway will significantly increase noise within Rocky Flats. The increased noise within Rocky Flats will adversely impact ground-nesting birds and other species within Rocky Flats. The Jefferson Toll Highway will be a significant barrier to wildlife movement between Rocky Flats and open space to the east.

55. Rocky Flats contains a rare plant community known as xeric tallgrass prairie. These plants exist in fewer than 20 places globally. The Colorado Natural Heritage Program found this plant community imperiled and Rocky Flats having the largest community in North America. The Jefferson Toll Highway will adversely impact the xeric tallgrass prairie within Rocky Flats and the Transportation Corridor. The Jefferson Toll Highway will also increase noxious weeds within Rocky Flats.

56. In addition, the Land Exchange and the Jefferson Toll Highway will cause direct, indirect, and cumulative air quality impacts. The Jefferson Toll Highway will introduce ground-level ozone, nitrogen dioxide, and other air pollutants from vehicles and related urban and industrial development.

#### IV. The ESA Consultation Process

57. FWS underwent an intra-Service ESA section 7 consultation process on the Land Exchange. FWS completed “formal” consultation on the Land Exchange on November 17, 2011. Previously, in August 2011, FWS determined that “informal” consultation was sufficient because the Land Exchange was not likely to adversely affect the Mouse and its critical habitat. FWS subsequently determined that the Land Exchange was likely to adversely affect the Mouse and its critical habitat. FWS prepared a Biological Assessment documenting these adverse impacts on October 25, 2011.

58. FWS defined the Land Exchange's “action area” as including the Transportation Corridor, Rocky Flats, and all open space to the east of the Transportation Corridor. FWS did not define the “action area” to include the remainder of the Jefferson Toll Highway beyond the Transportation Corridor, or the development that will result due to the presence of Jefferson Toll Highway. The action area did not include Section 16. The action area did not include DOE-



managed lands.

59. FWS's November 17, 2011 Biological Opinion concluded that the Land Exchange would not jeopardize the Mouse or adversely modify its critical habitat. FWS's no jeopardy and no adverse modification conclusions were based on the fact that the Land Exchange conveyed an interest in land, and this conveyance will not impact the Mouse or its critical habitat. FWS's conclusions were not based on a review of the Jefferson Toll Highway's impacts on the Mouse and its critical habitat.

60. FWS's conclusions were also based on the acquisition of certain properties. These acquisitions were part of the Land Exchange. The acquisition properties include Section 16 and other DOE-managed lands within the Rocky Flats acquisition boundary, including subsurface mineral rights and leases. The Biological Opinion relies on these acquisition lands to mitigate the Transportation Corridor's adverse impacts to the Mouse and its critical habitat. FWS characterized these acquisitions as potential.

61. FWS prepared a "Preliminary Draft Recovery Plan" for the Mouse in 2003 (Draft 2003 Recovery Plan). The ESA mandates that FWS prepare recovery plans for all listed species. 16 U.S.C. § 1533(f). A FWS policy requires FWS to complete a recovery plan within two-and-a-half years of its listing. FWS relied on the Draft 2003 Recovery Plan in the Biological Opinion. FWS did not subject the Draft 2003 Recovery Plan to peer review. FWS did not subject the Draft 2003 Recovery Plan to public notice and comment. Since 2003, FWS not finalized the Draft 2003 Recovery Plan. Since 2003, FWS has not issued another draft version of a Mouse Recovery Plan.

62. FWS's Incidental Take Statement concluded that the Land Exchange will not take the Mouse. FWS reasoned that conveying the Transportation Corridor does not result in take.

FWS found construction of the Jefferson Toll Highway may result in take.

V. The NEPA Process

63. FWS undertook a NEPA process for the Land Exchange. On September 30, 2011, FWS issued its Draft Environmental Assessment (“Draft EA”). The Draft EA described the “proposed action” as the Land Exchange: conveying the Transportation Corridor and acquiring property rights in Section 16. The Draft EA only analyzed acquiring Section 16. The Draft EA did not assess or publicly disclose the impacts resulting from conveying the Transportation Corridor.

64. On October 31, 2011, both WildEarth Guardians and Rocky Mountain Wild provided extensive comments on the Draft EA. The comments asserted that FWS’s failure to analyze the impacts of the proposed uses of the Transportation Corridor, including impacts to the Mouse, Rocky Flats, open space, and air quality, violated NEPA, the ESA, and the Rocky Flats Act.

65. FWS issued its Final EA and FONSI on December 2, 2011. The purpose and need of the proposed action did not include conveying the Transportation Corridor. The purpose and need was limited to expanding the Rocky Flats boundary. FWS tiered the Final EA to the 2004 EIS for the CCP. FWS did not consider alternatives that would minimize the direct, indirect, and cumulative impacts of Jefferson Toll Highway. In the Final EA, FWS claimed the Jefferson Toll Highway was beyond the scope of the Land Exchange. The Land Exchange constitutes an irreversible and irretrievable commitment of resources.

FIRST CLAIM FOR RELIEF

(Violation of the ESA - Biological Opinion and Incidental Take Statement – Against U.S. Fish & Wildlife Service)

66. Each and every allegation set forth in this complaint is incorporated herein by

reference.

67. The Land Exchange is an agency action under ESA section 7(a)(2). The Land Exchange is likely to adversely affect the Mouse. The Land Exchange is likely to adversely affect the Mouse's critical habitat. FWS issued a Biological Opinion and Incidental Take Statement on November 17, 2011.

68. FWS's failed to consider the entire geographical and temporal scope of the Land Exchange on the Mouse and its critical habitat. FWS failed to assess the impacts of the Land Exchange on the entire "action area." FWS did not fully define the action area consistent with the Land Exchange.

69. FWS failed to analyze the Land Exchange's impacts on the Mouse and its critical habitat within the Transportation Corridor. The Land Exchange will destroy all 12.4 acres of Mouse critical habitat within the Transportation Corridor. There are no measures to minimize this destruction within the Transportation Corridor.

70. FWS failed to assess the Land Exchange's impacts on the Mouse to the east of the Transportation Corridor. FWS failed to assess the Land Exchange's impacts on the Mouse and its critical habitat within the Jefferson Toll Highway footprint, including outside the Transportation Corridor. FWS failed to assess the Land Exchange's impacts on the Mouse and its critical habitat from development facilitated by the Jefferson Toll Highway.

71. FWS relies on potential land acquisitions to mitigate the adverse effects of the Transportation Corridor on the Mouse and its critical habitat. The land acquisitions are vague, speculative, and uncertain to occur. FWS failed to consider the impact of mining within DOE-managed lands on the Mouse and its critical habitat.

72. FWS's conclusions in the Biological Opinion that the Land Exchange does not

jeopardize the mouse or adversely modify its critical habitat are unsupported by, and cannot be reconciled with, the best commercial and scientific data provided in the Biological Opinion, in the administrative record, and in prior FWS findings.

73. FWS's conclusion in the Incidental Take Statement that take will not result from the Land Acquisition violates the ESA and is not rationally supported by the best commercial and scientific data.

74. FWS's Biological Opinion and Incidental Take Statement violate the ESA and are arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2). As a result, FWS's Land Exchange is also arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2).

#### SECOND CLAIM FOR RELIEF

(Violation of NEPA - Environmental Assessment and Finding of No Significant Impact-Against U.S. Fish & Wildlife Service)

75. Each and every allegation set forth in this complaint is incorporated herein by reference.

76. In its Environmental Assessment, FWS failed to analyze and disclose to the public the direct, indirect, and cumulative effects of the Land Exchange, including the Jefferson Toll Highway and associated development. FWS failed to consider the Land Exchange's impacts on County and City Open Space, air quality, the Mouse and its critical habitat, wetlands, and Rocky Flats and its natural resources.

77. FWS's Environmental Assessment did not analyze Jefferson Toll Highway's environmental impacts within the Transportation Corridor. FWS's Environmental Assessment

did not analyze the environmental impacts of the Jefferson Toll Highway outside the Transportation Corridor. FWS's Environmental Assessment did not analyze the environmental impacts of urban development that is facilitated by Jefferson Toll Highway.

78. FWS's Finding of No Significant Impact is unsupported. The environmental impacts of the Land Exchange are significant.

79. The 2004 EIS did not analyze the Jefferson Toll Highway, or any other particular transportation project within the Transportation Corridor. FWS's analysis in 2004 EIS was limited to Rocky Flats management. FWS did not subject the Northwest Corridor Transportation Study to NEPA review.

80. FWS "No Action" alternative evaluated the impacts of conveying the Transportation Corridor. FWS's "No Action" alternative did not contemplate undertaking no Land Exchange. FWS's reasoning for not analyzing no action is contrary to the Rocky Flats Act. FWS is not required to transfer this parcel unless the project meets the requirements of the Rocky Flats Act. FWS's Environmental Assessment failed to rigorously explore and objectively evaluate alternative uses of the Transportation Corridor, including alternatives that minimize and mitigate the environmental impacts, such as Golden's bikeway proposal. The EA's "Purpose and Need" is inconsistent with the Land Exchange and violates NEPA requirements.

81. FWS's Environmental Assessment and Finding of No Significant Impact violate NEPA and are arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2). As a result, FWS's Land Exchange is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

(Violation of the Rocky Flats Act – Against U.S. Fish & Wildlife Service)

82. Each and every allegation set forth in this complaint is incorporated herein by reference.

83. Under the Rocky Flats Act, FWS must ensure that the Jefferson Toll Highway is carried out to minimize the effects on Rocky Flats management. Pub. L. No. 107-107, § 3174(e)(2)(B)(i).

84. Jefferson Toll Highway constitutes a transportation improvement along Indiana Avenue under the Rocky Flats Act. On November 23, 2011, FWS determined that the Land Exchange, and specifically the Jefferson Toll Highway, met the requirements of the Rocky Flats Act.

85. FWS claims the extent of impacts resulting from Jefferson Toll Highway is unclear. FWS claims use of the Transportation Corridor for the Jefferson Toll Highway is beyond the scope of its NEPA and ESA analyses. FWS failed to assess the impacts resulting from the Jefferson Toll Highway.

86. Because FWS asserted Jefferson Toll Highway's impacts are unclear and not analyzed, the impacts of the Jefferson Toll Highway are unknown. Absent such information and analysis of Jefferson Toll Highway's impacts, FWS could not determine whether the Jefferson Toll Highway minimized impacts to Rocky Flats in accordance with the Rocky Flats Act. FWS's finding that the Land Exchange minimized impacts to Rocky Flats is unsupported.

87. Under the Rocky Flats Act, FWS may convey the Transportation Corridor for the Jefferson Toll Highway provided such conveyance is "taken in compliance with applicable law." Pub. L. No. 107-107 § 3174(e)(1)(D). FWS's Land Exchange, including the conveyance of the Transportation Corridor for the Jefferson Toll Highway, violates the ESA and NEPA.

88. FWS's Land Exchange violates the Rocky Flats Act and its findings under the Rocky Flats Act are arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2). As a result, FWS's Land Exchange is also arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare FWS has violated the ESA, NEPA, and the Rocky Flats Act;
2. Vacate and set aside FWS's Land Decision, Biological Opinion and Incidental Take Statement, Environmental Assessment and Finding of No Significant Impact, and findings under the Rocky Flats Act;
3. Enjoin FWS from transferring, and JHPPA from accepting, the Transportation Corridor as part of the Land Exchange;
4. Award Plaintiff its costs and expenses, including reasonable attorneys' fees, as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412 and other applicable law; and
5. Grant Plaintiff such further declaratory and injunctive relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted,

February 14, 2012

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