No. 14-1415

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CURELAND, LLC, and
CURELAND II, LLC,

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
TOM VILSACK, Secretary of the U.S. Dept. of Agriculture,
FARM SERVICE AGENCY, and
JUAN GARCIA, Administrator of the Farm Service Agency,

Defendants - Appellees.

On Appeal From the United States District Court
for the District of Colorado
The Honorable William J. Martinez, United States District Judge
Civil Case No. 12-cv-02388-WJM (D. Colo.)

APPELLEES' ANSWER BRIEF

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September 3, 2015
Oral Argument Is Not Requested

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), counsel for Appellees states there are no prior or related appeals.

JURISDICTION

Appellants Cure Land, LLC and Cure Land II, LLC (collectively, "Cure Land"), filed suit against Appellees the United States Department of Agriculture, et al, claiming that Appellees violated the Administrative Procedures Act (APA), 5 U.S.C. § 702, and the National Environmental Policy Act (NEPA) by excluding a "Target Zone" from an amendment to a Conservation Reserve Enhancement Program (CREP). (App. at 8-19.)[1] The district court had jurisdiction under 28 U.S.C. § 1331 to consider Cure Land's claim.

After the parties filed briefs based on the administrative record, the district court affirmed Appellees' decision and dismissed the case with prejudice. (App. at 2166-81.) Final judgment was entered on August 15, 2014. (App. at 2182-83.)

Cure Land filed a timely notice of appeal on October 8, 2014. *See* Fed. R. App. P. 4(A)(1)(b). (App. at 2184-85.) This Court's jurisdiction arises under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

An agency's decision under the NEPA is arbitrary and capricious if the agency (1) fails to consider an important aspect of the problem, (2) offers an explanation for its decision that runs counter to the evidence, (3) fails to base its decision on the relevant factors, or (4) makes a clear error of judgment. Cure Land has not shown that Appellees' decision to exclude a "Target Zone" from a proposed amendment to a CREP satisfies any of these factors. Was Appellees' decision to exclude the "Target Zone" arbitrary and capricious?

[1] The government will refer to the appendix filed by Cure Land in accordance with the procedure set forth in Tenth Cir. Rule 28.1(A).

STATEMENT OF THE CASE AND THE FACTS

A. USDA and the State of Colorado enter into a CREP Agreement.

In April 2006, the U.S. Department of Agriculture (USDA), USDA's Commodity Credit Corporation, and the State of Colorado entered into a CREP Agreement concerning the Republican River in Colorado. (App. at 1391-1403.) CREP is a voluntary conservation program administered by the USDA through its Farm Service Agency (FSA), which targets high-priority conservation issues and compensates participants for removing farm land from production.[2] The main goals of CREP are to reduce soil erosion, improve water quality, and enhance wildlife habitat. (App. at 498.) One of the specific goals of the Republican River CREP is to reduce irrigation water use for agricultural purposes. (App. at 1391.)

B. A local water conservation district in Colorado proposes an amendment to the CREP Agreement.

In June 2007, Colorado's Republican River Water Conservation District (RRWCD) proposed to amend the CREP Agreement. (App. at 1250-51.) The proposed amendment included the addition of a Target Zone within which the RRWCD could purchase the water rights. *Id.* Groundwater purchased by the RRWCD in the Target Zone would then be diverted through a proposed pipeline to the Republican River. *Id.* Colorado had obligations to neighboring states, Kansas and Nebraska, under the 1942 Republican River Compact, to supply water to the Republican River. (App. at 1284-85.)

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[2] *See* Conservation Programs, USDA Farm Service Agency, http://www.fsa.usda.gov/programs-and-services/conservation-programs/index (last visited August 12, 2015).

Groundwater from the Target Zone that would be redirected through the proposed pipeline to the Republican River purported to help Colorado satisfy its obligations under this compact between the states. *Id.* Water diverted through the proposed pipeline to the neighboring states could be used for any purpose by those states. (App. at 736-37.)

C. The agency considers the proposed amendment, and raises concerns regarding inclusion of the Target Zone in the amendment.

The USDA and the FSA (collectively, "the agency"), considered the proposed amendment to the CREP Agreement. The agency noted a number of concerns regarding inclusion of the Target Zone in the proposed amendment. Correspondence between the agency and Colorado highlighted some of the agency's concerns, such as the uncertain conservation benefits for water that is diverted to other states to potentially satisfy Colorado's own obligations to its neighbors. *See, e.g.*, App. at 1285 (September 9, 2008, e-mail from Lana Nesbit, the agency's CREP Program Manager in Washington, D.C., to Tim Davis, consultant to the Colorado Division of Water Resources, stating "I am still looking for what conservation benefits would be realized by the transfer of water to help meet the Republican River Compact [obligations of Colorado]"); App. at 736-37 (Sept 19, 2008, e-mail from Tim Davis to Lana Nesbit acknowledging the agency's "concern that the water wasn't being used for environmental benefits" and that "although we [Colorado] would love it if Kansas and Nebraska would leave the water in the stream that reaches their borders, we cannot influence what they do with the water").

The agency made its concerns clear in formal correspondence to state representatives and to the state's elected officials. For instance, an October 2008 letter from the USDA to Congresswoman Musgrave stated the following:

> We have two concerns with the part of the proposed modification regarding establishing a "target zone." First, Colorado is proposing to meet its obligations under the Republican River Compact by, at least in part, using CREP. The Conservation Reserve Program (CRP)[3] is a voluntary program, and the voluntary nature of the program is inconsistent with the proposal to use CREP to meet Colorado's obligations under the 1942 Republican River Compact.
>
> Even if the first concern should be addressed, our second concern is that an environmentally beneficial use of the ground water extracted in the Basin under this proposal would not be assured. Under CRP, we have conditioned CREP benefits upon a commitment that the water made available under the CREP agreement is put to an environmentally beneficial use.

(App. at 740-41.)

In another letter from the agency to Kathyrn Radke, Program Manager of the Colorado Division of Water Resources, the agency stated its position that the "FSA does not support the use of CREP project enrollment specifically designed to help the States achieve goals which are the legal requirements of Compacts or similar court orders, settlement agreements or State/local laws." (App. at 773-74.)

Despite its concerns regarding the inclusion of a Target Zone in the proposed CREP amendment, the agency continued to consider the issue. In October 2009, the agency noted that it had received additional clarifications regarding its concerns about the Target Zone, including its concerns about whether conservation benefits will be realized

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[3] CREP is an offshoot of CRP. *See* note 2, *supra*.

if the Target Zone is included in the amendment. (App. at 796-97.) The agency stated that there are "important topics that need to be addressed and resolved" and that an Environmental Assessment (EA) would be required. *Id*.

D. The agency receives a significant number of comments from the public opposing inclusion of the Target Zone in the proposed amendment.

The agency issued in November 2010 a Final Supplemental EA, (App. at 502-87), which included the Target Zone in the proposed CREP amendment. (App. at 526-27, 541-43.) As the agency prepared the EA, it began to receive the public's opinion on the proposed CREP amendment, and in particular, the inclusion of the Target Zone in the amendment. In a number of comments, the public objected to the inequity of paying and making eligible for CREP enrollment the landowners in the Target Zone. For instance, in March 2010, the Yuma County Conservation District prepared a letter supporting the CREP amendment, but excepted the "target area" as it is "not equitable to other irrigated acres." (App. at 1778.) An April 2010 article in a local Colorado paper, the Yuma Pioneer, further noted that a "part of the proposed amendment is generating protest, in regards to the land on which the wells for the proposed pipeline sit being allowed into the CREP.... It would mean millions of more dollars to the family that already had sold the wells for the pipeline." (App. at 1720.)

In response to the public's concern about the inclusion of the Target Zone in the proposed CREP amendment, the agency noted that it is "listening," and that "in situations where a proposed amendment is highly controversial and has high local interest, the NEPA process is in place to allow the public to express their concerns." (App. at 822;

see also id. at 830 (CREP Program Manager, Lana Nesbit, noting that as she tries to "navigate this controversial proposed amendment . . . the NEPA process should provide the public a formal venue for voiceing [*sic*] their opposition to or support for the CREP").

Throughout the NEPA process, the public continued to comment on, and voiced its opposition to, the inclusion of the Target Zone in the amendment. In June 2010, a commenter objected to the Target Zone, stating that "[i]t is not fair" to pay under CREP for water that was "sold off," and CREP eligibility should be "for those who did not receive anything for the retirement of the water they owned." (App. at 853.) By October 2010, the CREP Program Manager noted that she had received "numerous landowner personal letters of protest, Conservation Districts letters rescinding previous support of the project, and a petition with over 90 signatures protesting the proposed addendum." (App. at 854.)

The controversy surrounding the potential payment to, and eligibility of, those in the Target Zone continued. In November 2010, another commenter and local rancher, Sue Jarrett, objected to the disparity in the eligibility requirements under the original CREP Agreement versus the exception made for those in the Target Zone in the proposed amendment:

> According to the first CREP program for the Republican River area in Colorado, 'All participants enrolling eligible irrigated cropland in the basin into CREP must agree to permanently retire the water associated with the land being enrolled.'
>
> The targeted area . . . does not meet the basic criteria. The water is to be used for a pipeline and not retired. There are thousands of acres that have been enrolled in the first CREP and every one of those water rights were permanently retired, capped and the pumping permit returned to the state. Now the RRWCD wants to change the rules at both the state and

> Federal level to satisfy basically one large land owner. This is a most unfair and an inequitable proposal.

(App. at 878.)

Another commenter, Milton "Bud" Mekelburg, stated in a December 2010 e-mail to the Program Manager for CREP that the "targeted" CREP debate is still "hot and heavy." (App. at 1191.) He noted that, at a public meeting held by FSA on the proposed amendment, "there was no support for the targeted CREP but support for the rest of the amendment." *Id*.

By January 2011, the agency was fully aware that the "most controversial item" in the proposed amendment was the Target Zone. (App. at 1818.) The agency also noted that "[o]riginally, the conservation districts supported the proposed CREP addendum but the majority has withdrawn their support due to the pipeline provisions within the target zone." *Id.* In addition, the agency noted that the conservation districts' "primary objection is that the water will not remain in the aquifers and will instead be redirected through the pipeline to meet the requirements of the RR [Republican River] Compact Compliance Agreement for the benefit of the State of Kansas which they believe would nullify water savings and other conservation benefits." *Id*. The agency's CREP Program Manager further clarified the potential misperception that "it's really 1 or 2 people that are generating the controversy." (App. at 1240.) She explained that she had received several letters from conservation districts within Colorado, as well as personal letters of protest and a petition with 90 signatures protesting the proposed amendment. *Id*. The

agency's CREP Program Manager assured that "the protest and controversy is much larger than 1 or 2 people." *Id.*

E. The agency prepares a draft decision memorandum, noting the public's opposition to the Target Zone based on conservation and public policy concerns.

In March 2011, the agency prepared a draft decision memorandum setting forth the various options in pursuing the CREP amendment. (App. at 1555-60.) The memorandum identified the two most controversial items in the proposed amendment as (1) the addition of the Target Zone, because ground water within that zone "would be transported through a pipeline by local water officials directly to the RR to help the State of Colorado meet its legal obligations to neighboring States under the RR Compact Compliance Agreement;" and (2) the contract between the RRWCD and the local family which transferred its water rights to the RRWCD "prior to enrollment into CREP and prior to approval of the proposed amendment to the Colorado RR CREP." (App. at 1555-56.) That "local family" is the Cure family.

The memorandum pointed out that "CREP proposals must reflect strong local support from producers and the public." (App. at 1556.) The memorandum described the lack of "local support" for inclusion of the Target Zone in the amendment as follows:

- The majority of local Colorado conservation districts had withdrawn their support for the target zone "due to the pipeline provisions within the target zone." "Their primary objective is that the water will not remain in the aquifers" but will instead be redirected to other states to meet the requirements of an interstate Compact Compliance Agreement.

- RRWCD signed a contract in 2008 to purchase ground water rights "from a local family [i.e., the Cure family] within the proposed target zone for $49 million," and then signed another contract to allow the

> local family to lease back the water rights until such time as the pipeline is completed. The local family sold their water rights to the RRWCD "with the apparent intent of enrolling the . . . land into CREP once the addendum to the CREP is approved." "Local individuals and conservation groups have raised concerns that it would appear this local family would be 'double dipping' by receiving payments from the State and the RRWCD for substantially the same water and that FSA would be giving preferential treatment to a selected landowner."
>
> - "[S]ubstantial local opposition has been expressed regarding the pipeline project and the possible eligibility of the local family's enrollment into CREP."

(App. at 1556-57.) The memorandum recommended that the agency remove the Target Zone from the proposed amendment. (App. at 1558-59.)

F. The agency issues a FONSI, excluding the Target Zone from the proposed amendment.

Ultimately, the agency issued a Finding of No Significant Impact (FONSI). (App. at 498-99.) The agency's FONSI excluded the Target Zone from the proposed amendment. *Id.*

In the FONSI, the agency explained that "[a]dditional public involvement measures were taken for this action given the high public interest in the action. Comments received throughout the project did not indicate significant concern with the environmental analysis but rather opposition to the proposed incentive payments and eligibility requirements described in the proposed Amendment to the Republican River CREP." (App. at 499.)

G. Cure Land files its complaint in the district court, challenging the FONSI; the district court rules that the agency's decision was not arbitrary and capricious.

Cure Land challenged the FONSI in its complaint. It alleged that the agency's decision in the FONSI to remove the Target Zone from the CREP Amendment violated the APA and the National Environmental Policy Act (NEPA). (App. at 17). It sought declaratory and injunctive relief. (App. at 18-19.) Following briefing by the parties,[4] the district court affirmed the agency's decision to exclude the Target Zone from the CREP Amendment, ruling that the decision was not arbitrary and capricious.

SUMMARY OF ARGUMENT

The agency's FONSI determination to exclude the Target Zone from the CREP amendment was not arbitrary and capricious. A change in the preferred alternative from an Environmental Assessment to a FONSI does not render an agency's decision arbitrary and capricious. This Court has recognized that it is within an agency's discretion to change its proposed action following an environmental analysis, including instances when the change is due to consideration of public opinion. Indeed, the NEPA process requires consideration of public opinion.

It is clear from the administrative record that public disapproval of the Target Zone in the proposed CREP amendment was widespread. The administrative record

[4] Cure Land contends that the agency admitted in briefing to the district court that "the conservation benefits realized outside the Target Zone would be similarly demonstrated within the Target Zone." Opening Brief at 16-17 (citing App. at 2125.) Nothing on page 2125 of the appendix supports Cure Land's contention, nor has the agency admitted in this case that the conservation benefits realized outside the Target Zone would be similarly demonstrated within that zone.

demonstrates that the majority of local Colorado conservation districts withdrew their support for the CREP amendment due to the inclusion of the Target Zone. The agency's CREP Program Manager also received personal letters of protest, in addition to a petition with 90 signatures opposing the inclusion of the Target Zone in the amendment.

In consideration of this public disapproval, the agency acted well within its discretion in excluding—for conservation and public policy reasons—the Target Zone from the proposed amendment. The agency issued the FONSI after careful consideration of all relevant factors regarding the proposed amendment. It provided an adequate explanation for its decision. Notably, neither the NEPA nor the APA requires the agency to consider the potential adverse effect of an agency's decision on an individual landowner's monetary gains under its own contract with another party. The agency's decision was not arbitrary and capricious, and the decision should be affirmed.

STATUTORY BACKGROUND

The NEPA "prescribes the necessary process by which federal agencies must take a 'hard look' at the environmental consequences of the proposed courses of action." *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162-63 (10th Cir. 2002) (internal quotations omitted)). Agencies fulfill the "hard look" requirement by preparing either an EA or an Environmental Impact Statement ("EIS"). *Id.* at 50–51.

"Before embarking upon any 'major federal action,' an agency must conduct an . . . EA to determine whether the action is likely to 'significantly affect[ ] the quality of

the human environment.' " *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009) (citing 42 U.S.C. § 4332(2)(C)). "If the EA indicates that the proposed action will not significantly impact the environment, the agency may make a finding of no significant impact, or 'FONSI.' " *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1214 (10th Cir. 1997) (citing 40 C.F.R. § 1501.4(e)). If a FONSI is issued, "the agency need not prepare a full EIS." *Id.*

The public's comments play an integral part of required procedure under the NEPA. "At all stages throughout the [NEPA] process, the public must be informed and its comments considered." *Richardson*, 565 F.3d at 704.

The NEPA allows the agency to make the ultimate decision. "Importantly, the statute does not impose substantive limits on agency conduct. . . . Rather, once environmental concerns are 'adequately identified and evaluated' by the agency, NEPA places no further constraint on agency actions." *Friends of the Bow*, 124 F.3d at 1213 (citing *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 350 (1989)). Indeed, the NEPA imposes a procedural, not a substantive, standard on the agency's decision-making process. "[T]he Act simply imposes *procedural* requirements intended to improve environmental impact information available to agencies and the public." *Richardson*, 565 F.3d at 704 (emphasis in original). "The Act does not require agencies to elevate environmental concerns over other appropriate considerations, however; it requires only that the agency take a 'hard look' at the environmental consequences before taking a major action." *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1207-08 (10th Cir. 2002) (citation omitted). That is, NEPA "'merely prohibits

uninformed—rather than unwise—agency action.'" *Richardson*, 565 F.3d at 704 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

Thus, "[s]o long as the record demonstrates that the agencies in question followed the NEPA procedures, which require agencies to take a 'hard look' at the environmental consequences of the proposed action, the court will not second-guess the wisdom of the ultimate decision." *Utahns for Better Transp.*, 305 F.3d at 1163.

ARGUMENT

I. Preservation and Standard of Review

Cure Land claimed below that the agency's change of position from the EA to the FONSI, by which the agency excluded the Target Zone from the proposed amendment, constituted an abuse of discretion. Cure Land raised three arguments: (1) the agency improperly changed course to exclude the Target Zone despite its prior analyses; (2) the agency improperly disregarded its own technical analyses and bowed to political pressures; and (3) the agency had no authority to exclude the Target Zone as a mitigation measure. (App. at 2172.) The district court disagreed and affirmed the agency's decision to exclude the Target Zone from the amendment. (App. at 2166-81.)

This Court reviews NEPA claims under the APA independently, giving "no particular deference to the district court's review of an agency action." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 710-11 (10th Cir. 2010) (quotation omitted). The Court evaluates "an agency's NEPA compliance to see whether it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Richardson*, 565 F.3d at 704 (citing 5 U.S.C. § 706(2)(a)).

Under the arbitrary and capricious standard, this Court's "duty . . . is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994)). Courts also "must determine whether the agency's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *Ecology Center, Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1188 (10th Cir. 2006) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

As this Court has recognized, this review is "highly deferential." *Ecology Center, Inc.*, 451 F.3d at 1188. A "presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action." *Forest Guardians*, 611 F.3d at 710–11 (quoting *Citizens' Comm. to Save Our Canyons*, 513 F.3d at 1176).

"The role of the courts in reviewing compliance with NEPA is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Utahns for Better Transp.*, 305 F.3d at 1163 (internal quotation marks omitted). "We apply a rule of reason standard (essentially an abuse of discretion standard) in deciding whether claimed deficiencies in a [final] EIS are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment." *Id.*

Courts apply a four-factor test to determine whether an agency's decision is arbitrary and capricious. In the context of a NEPA challenge, an agency's decision is arbitrary and capricious if the agency:

(1) entirely failed to consider an important aspect of the problem;

(2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise;

(3) failed to base its decision on consideration of the relevant factors; or

(4) made a clear error of judgment.

Forest Guardians, 611 F.3d at 711 (internal quotations omitted) (quoting *Richardson*, 565 F.3d at 704); *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

II. Discussion

Cure Land has not shown that the agency's decision to exclude the Target Zone was arbitrary and capricious under the four-factor test.

First, Cure Land has not shown that the agency entirely failed to consider an important aspect of the proposed CREP amendment. Indeed, Cure Land does not argue that the agency in fact failed to consider a particular issue; rather, it argues that the agency changed its position without explanation. This is not true. The agency provided an explanation for excluding the Target Zone.

Under the second factor, Cure Land has failed to show that the agency's offered explanation was implausible or ran counter to the evidence before the agency. The

evidence included the public's opinion and opposition to the proposed incentive payments and eligibility requirements pertaining to the Target Zone. The offered explanation was consistent with this evidence.

Finally, under the third and fourth factors, the agency issued the FONSI in consideration of the relevant factors, and did not make a clear error of judgment. Cure Land's attempt to color the agency's consideration of public opinion as improperly succumbing to "political heat" is unfounded. The agency properly considered, and indeed was *required* to consider, the public's opinion. Furthermore, the agency had no obligation under the NEPA, the APA, or relevant case law, to single out the Cures to solicit their personal opinion on the matter or to cater to their personal interests. The Cures, like any member of the public, had the opportunity to participate in the public comment process, but they provided no comment during this process.

Because Cure Land has failed to establish that the agency's issuance of the FONSI was arbitrary and capricious, this Court should deny Cure Land's request that this Court order the agency to include the Target Zone in the Republican River CREP amendment.

A. The agency properly considered all important aspects of the issue prior to issuing the FONSI.

Under the first factor of the four-factor test, Cure Land cannot establish that the agency "entirely failed to consider an important aspect of the problem." *Forest Guardians*, 611 F.3d at 711. In the NEPA context, important considerations include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or

health [effects], whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b). Here, the EA satisfactorily addressed the important ecological, socioeconomic, cultural, and cumulative impacts that the proposed action would likely have. *See Richardson*, 565 F.3d at 704 (noting that in the NEPA context, the court examines the NEPA document (EA or EIS) for deficiencies). The EA discussed endangered species and wildlife habitat effects, water resources, water quality and wetlands, cultural resources, environmental justice, and socioeconomic impact, including receipt of federal money and removal of land from agriculture. (App. at 502-87.)

Cure Land has not identified any additional issues that the agency should have considered in the EA. Thus, Cure Land has not demonstrated that the agency's EA decision is arbitrary and capricious under the first factor of the four-factor test.

B. The agency offered a plausible explanation that was consistent with the evidence.

Cure Land claims that the agency changed its position between the EA and the FONSI without any explanation. To the contrary, the agency explained in the FONSI the basis for its decision. That explanation was consistent with the evidence before the agency.

Under the heading "Reasons for Finding of No Significant Impact", the agency stated that "the Target Zone has been removed from the preferred alternative and a [FONSI] is being rendered. This determination is based on the following" ten enumerated reasons. (App. at 499.) Most of the listed reasons relate to the

environmental impact of the proposed amendment, but one—paragraph 4—describes public opinion, as follows:

> 4. The potential impacts on the quality of the human environment are not considered highly controversial. Additional public involvement measures were taken for this action given the high public interest in the action. Comments received throughout the project did not indicate significant concern with the environmental analysis but rather opposition to the proposed incentive payments and eligibility requirements described in the proposed Amendment to the Republican River CREP.

(App. at 499, ¶ 4.) The ten enumerated reasons were offered in explanation of the agency's decision to exclude the Target Zone and issue a FONSI. (App. at 2175.) The agency articulated in paragraph 4 of the FONSI a rational connection between the decision to exclude the challenged area and the comments received. *Id*.

This satisfied the agency's obligations. As this Court pointed out in *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088 (10th Cir. 2004), NEPA requires only that the agency "articulate 'a rational connection between the facts found and the choice made.' " *Id*. at 1096 (quoting *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)). NEPA does not specifically require an explanation for a change in course. *Id*. In *Friends of Marolt Park*, the agency changed the scope of the proposal—the "preferred option"—between the environmental evaluation document (a draft supplemental EIS) and the decision document (a Record of Decision). In the Record of Decision the agency explained that it modified the preferred option based on a lack of public support and due to additional costs. *Id.* at 1092, 1096. This Court held that (1) the explanation in the decision document provided the requisite

rational connection between the facts and the decision, and (2) the agency appropriately evaluated the environmental impact of its decision. *Id.* at 1096. *Friends of Marolt Park* supports the district court's ruling that an agency conducting an environmental review under NEPA need only articulate the required rational connection for the change. (App. at 2175 (citing *Friends of Marolt Park*, 382 F.3d at 1096).)

Cure Land argues that "the same language in item 4 was used in the draft FONSI [from 2010] prepared two years before the final FONSI that had included the Target Zone." Opening Brief at 31 (citing App. at 1887). But Cure Land does not point out that the 2010 draft FONSI was not signed by any member of the agency. (*See* App. at 1888.) Nothing in the record shows that the agency had in fact adopted the 2010 draft as the agency's official position.

Citing a number of authorities, Cure Land also argues that the agency could not abandon a previous policy or rule without providing a reasoned explanation for its reversal. Opening Brief at 24-34. But the agency did not establish a policy or rule merely by evaluating one proposed action in its EA. The EA did not demonstrate that the agency had settled on including the Target Zone in the proposed amendment. Indeed, NEPA required the agency to solicit public comment following its issuance of the EA, and to take such public comment into account before reaching a decision. *See Forest Guardians*, 611 F.3d at 717 ("The purpose behind NEPA is to ensure that the agency will only reach a decision on a proposed action after carefully considering the environmental impacts of several alternative courses of action and after taking public comment into

account."). Because NEPA requires the agency to consider public comment before reaching a decision, the agency's earlier EA did not establish a policy.

The cases Cure Land cites do not demonstrate otherwise. For example, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 37-38 (1983), concerned an agency's issuance of an operating permit in violation of a published federal standard requiring passive restraints in new vehicles. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172 (2d Cir. 2005), concerned the Environmental Protection Agency's failure to include compliance schedules with permits issued to non-compliant coal-fired power plants, in violation of federal regulations requiring such a schedule when the source is non-compliant. *Id*. at 182. In *Sierra Club North Star Chapter v. LaHood*, 693 F.Supp.2d 958 (D. Minn. 2010), the National Park Service (NPS) in 2005 issued a "Section 7" evaluation of a proposed bridge that constituted a change in position from the 1996 "Section 7" evaluation but omitted reference to the 1996 evaluation and any justification for the change in position. *Id*. at 973-74. The district court noted that NPS was not bound by its 1996 Section 7 evaluation when it issued the second evaluation in 2005, *id*. at 974, only that NPS could not wholly fail to mention, let alone distinguish, the 1996 evaluation from the 2005 evaluation. *Id*. at 978. In *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2010), the Department of Interior (DOI) amended long-standing federal regulations generally prohibiting possession of firearms in national parks. Its new regulations allowed such possession. In promulgating these new regulations, DOI did not perform an environmental assessment or

environmental impact statement pursuant to the NEPA, nor did DOI explain the reason for its change in policy.

As the district court below correctly noted, the majority of the authorities Cure Land cites "involve established policies or promulgated rules that are subsequently abandoned without explanation." (App. at 2173.) *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 29. The instant case is distinguishable, as it does not involve a policy or rule that was previously established and subsequently abandoned. Rather, "it involves a proposed amendment to expand the scope of a conservation program, and a change in the size of the proposed expansion between the environmental evaluation (the Supplemental EA) and the final decision (the FONSI)." (App. at 2173-74.) The district court properly found that "[a] case involving 'the revocation of an extant regulation', wherein '[r]evocation constitutes a reversal of the agency's former views as to the proper course', does not inform the instant case, where the initial proposal was not formally promulgated." (App. at 2174.)

Even if the agency's prior determination to include the Target Zone in the amendment was more than just a proposal, the agency did acknowledge in the FONSI its prior position in the EA, and it set forth in the FONSI the bases for its change in position:

> *In consideration of the analysis documented in the Supplemental EA* and in accordance with Council on Environmental Quality regulations 1508.27, FSA has determined that the preferred alternative would not constitute a major State or Federal action affecting the human and natural environment if the Target Zone was eliminated from the preferred alternative. Therefore, the Target Zone has been removed from the preferred alternative and a Finding of No Significant Impact is being rendered.

(App. at 499 (emphasis added).) Thereafter, the agency set forth the ten bases for its determination. *Id*.

Cure Land argues that "the only explanation of the removal of the Target Zone from the FONSI is the suggestion that including it would 'constitute a major State or Federal action affecting the human and natural environment.' " Opening Brief at 31 (quoting App. at 499). The FONSI contained no such "suggestion." To the contrary, the FONSI asserted that "eliminat[ing]" the Target Zone from the proposed amendment "would *not* constitute a major State or Federal action affecting the human and natural environment. . . ." (App. at 499 (emphasis added).)

It is important to note that an agency's change in the preferred action following an EA does not render an agency's decision arbitrary and capricious. Its decision is not predetermined by the EA. A change in position from an earlier environmental document (such as an EA), to a final decision document (here, a FONSI), is permissible as long as the agency articulates "a rational connection between the facts found and the choice made." *Friends of Marolt Park*, 382 F.3d at 1096. This Court in *Friends of Marolt Park* reasoned that since "NEPA does not guarantee a particular result . . . the Agency was not required to select the preferred option indicated in the final EIS. . . ." *Id.*

In the present case, the agency's decision document, the FONSI, adopted a course of action that differed from Cure Land's preferred action in the environmental document, the EA. This change alone, however, does not signify that the agency did not consider the issues in the EA, nor does the change render the agency's decision arbitrary and capricious. The agency stated that it determined to exclude the Target Zone based on

"[c]omments received throughout the project [declaring] opposition to the proposed incentive payments and eligibility requirements described in the proposed Amendment to the Republican River CREP." (App. at 499, ¶ 4.)

This opposition is well documented in the administrative record by e-mails, formal correspondence, editorials in local newspapers, and direct comments by local groups and individuals. *See*, *e.g.*, App. at 1719-20 (April 15, 2010, article in a local Colorado paper, the Yuma Pioneer, discussing the public controversy surrounding the Target Zone); App. at 878-79 (comment from a local rancher that the government "should not increase spending for a program that is controversial and that does not meet its own criteria for overall CREP funding."); App. at 1780 (letter from the Yuma County Conservation District to the RRWCD expressing concern that "the additional monies . . . for the target area is not equitable to other irrigated acres beyond 3 miles of the 3 rivers. The board believes all irrigated cropland in the basin should be considered equitable.").

Public opposition was also based on the lack of a conservation benefit if the Target Zone were included in the proposed amendment. In its March 2011 draft decision memorandum, the agency noted that the majority of local Colorado conservation districts had withdrawn their support for the Target Zone, because water in the Target Zone would not remain in the aquifers but would instead be piped to other states "to meet the requirements of an interstate Compact Compliance Agreement." (App. at 1556.)

The agency did not ignore the public outcry over the inclusion of the Target Zone. As required under the NEPA process, the agency carefully considered the public opposition and controversy surrounding the Target Zone. For instance, an internal

agency e-mail specifically detailed a conversation with a member of the public who criticized the inclusion of the Target Zone on the grounds that those who have sold their water rights for Colorado's compact compliance should not also receive compensation under the CREP. (App. at 853.) As noted in the e-mail, the public opinion was that the program should help only those "who did not receive anything for the retirement of the water they owned." *Id.* It is well-settled that NEPA does not require an agency to consider only, or principally, environmental factors in its decision making. *See, e.g.*, *Utah Shared Access Alliance*, 288 F.3d at 1207 ("[NEPA] does not require agencies to elevate environmental concerns over other appropriate considerations"); *cf. Friends of Marolt Park*, 382 F.3d at 1092 (modifying a proposed action based on public opinion and cost considerations).

Cure Land also argues that the district court mischaracterized the impact of the Target Zone on the overall proposal. Opening Brief at 32. And it contends that NEPA required the agency to invite public comments on the possibility of excluding the Target Zone from the amendment. *Id*. at 33. Cure Land is wrong on both counts.

First, the district court did not mischaracterize the impact of the Target Zone. The portions of the record Cure Land cites—in particular, App. at 608-610, 819, and 1440-1449—do not show that the Target Zone was one of the focus areas of the proposed amendment. The proposed amendment would (1) increase the program enrollment goal by 20,000 acres for a total of 55,000 acres, (2) open enrollment in parts of Washington and Lincoln counties, (3) increase total program funding by approximately $36 million, (4) increase the duration of temporary irrigation from 12 to 24 months, and (5) add

additional incentive areas. (App. at 604, Part 1.2; *see also id*. at 608, Part 2.1.) There were two incentive areas: one was a three-mile corridor of the Arikaree River, the other was the Target Zone (referred to as "an area north of Wray"). (App. at 610.) The record shows that the Target Zone was simply one of many suggested pieces of the proposed amendment.

Second, NEPA did not require the agency to invite public comment on the specific possibility of excluding the Target Zone from the amendment. Cure Land has not cited any case to support its contention that an agency may not choose to implement a portion of a proposed action unless it has specifically identified that portion as a separate alternative before soliciting comments. Moreover, as the district court correctly noted, the public *was* given ample opportunity to comment on any and all aspects of the proposed amendment, including the Target Zone: "Additional public involvement measures were taken," including holding a public meeting to receive verbal as well as written comments. (App. at 2176, *see also id*. at 499, 882- 938.) A great number of these comments concerned inclusion of the Target Zone in the amendment. *Id*. The public had meaningful information on which to comment, and a meaningful opportunity to comment. Indeed, the public submitted a significant number of comments on the proposed Target Zone.

In short, the agency acted well within its authority when it approved an amendment that excluded the Target Zone. It offered an explanation for its decision in the FONSI based on the evidence before it, thus satisfying the requirements under the

NEPA and the APA. Cure Land has failed to demonstrate that the agency's decision is arbitrary and capricious under the second factor of the four-factor test.

C. The agency's decision was based on consideration of the relevant factors.

Cure Land appears to argue that, for two reasons, the agency's decision was not based on consideration of the relevant factors. It contends that the agency intended the exclusion of the Target Zone in the FONSI as a mitigation measure that would avoid any significant environmental impact. Opening Brief at 34-38. It also contends that the agency disregarded its own technical evaluation and instead based its decision on public opinion, specifically, local hostility against the Cures. *Id*. at 38-43. Neither contention has merit.

1. Nothing in the record suggests that the agency intended exclusion of the Target Zone to be a mitigation measure.

Cure Land argues that the exclusion of the Target Zone in the FONSI suggests that the agency intended it as a mitigation measure that would avoid any significant environmental impact. Opening Brief at 34-38. Nothing in the record suggests the agency intended the exclusion of the Target Zone to be a mitigation measure. (App. at 2179-80.)

NEPA requires an agency to discuss possible mitigation measures designed to avoid adverse environmental impacts. 42 U.S.C. § 4332(C)(ii); 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b)(3). A mitigation measure may only be used to mitigate environmental impacts. 42 U.S.C. § 4332(C)(ii)

Cure Land is incorrect that the agency excluded the Target Zone as a mitigation measure. The agency made clear in its Supplemental EA that no significant impacts on the environment would result from the proposed amendment, even if the amendment included the Target Zone. (App. at 508, 550.) Because the proposed amendment would not significantly impact the environment, there was no need for the agency to mitigate any environmental impacts, whether by excluding the Target Zone or otherwise. (App. at 550 (noting "no expected long term significant negative impacts associated with implementation of the Proposed Amendment"); App. at 577 ("The findings of the EA did not result in significant impacts and no mitigation measures are required.").) Therefore, there was no need for the agency's decision to meet the requirements for a mitigation measure.

Cure Land also argues that the agency used the NEPA process to "mitigate" the concerns of individuals who thought it unfair for the Cure family to receive CREP benefits in the Target Zone. Opening Brief at 36-37. But, as noted above, mitigation measures may only be used to mitigate environmental impacts. 42 U.S.C. § 4332(C)(ii). The record does not show that the agency used "mitigation measures" in this technical sense with regard to the Target Zone.

In addition, Cure Land argues, without citation to the record, that the agency's FONSI "necessarily found that inclusion of the Target Zone would have a significant impact on the environment. . . ." Opening Brief at 38. As noted above, the FONSI indicated only that eliminating the Target Zone from the amendment "would *not*

constitute a major State or Federal action affecting the human and natural environment. . . ." (App. at 499 (emphasis added).)

2. The agency could properly base its decision on public opinion.

Cure Land contends the agency disregarded its own technical evaluation and instead based its decision on local hostility against the Cures. But the agency was permitted to consider public opinion in determining whether to include the Target Zone in the amendment. Under NEPA, public input is a relevant factor which the agency must consider. *Friends of Marolt Park*, 382 F.3d at 1096. In the instant case, the agency properly considered public input in altering the preferred alternative, from including the Target Zone in the EA to excluding it in the FONSI. As recognized in *Friends of Marolt Park*, it is within the agency's discretion to alter its ultimate decision after considering the public's input. *Id*.

Cure Land contends that the agency's decision was motivated by a desire to avoid "political heat." Opening Brief at 39-43. In support, it relies on cases that are not on point. In *Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342 (11th Cir. 1994), the Navy "cooked the books" to make sure an American company that was deemed unqualified would receive a contract rather than a qualified French company. In *D.C. Fed'n of Civil Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1972), the Secretary of the Department of Transportation decided to build a bridge, in disregard of statutory factors, because certain members of Congress strongly supported the bridge project. Finally, in *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009), the Food and Drug Administration (FDA) imposed a minimum age requirement to obtain a contraceptive due

to pressure from the White House. In so doing, the FDA rejected its own internal recommendation that no age restriction be imposed.

But here, the agency's consideration of public comments was consistent with its statutory and regulatory obligations. *See Richardson*, 565 F.3d at 704 ("At all stages throughout the [EA] process, the public must be informed and its comments considered."). Nothing in the record shows that the agency abandoned its own policies or violated its statutory or regulatory scheme in considering public opinion and controversy about the Target Zone. Nor is there any evidence in the record to show that the agency acted out of bias or bad faith in excluding the Target Zone from the amendment. To the contrary, the agency considered many forms of public opposition to the Target Zone, including concerns that including the Target Zone would not provide any conservation benefits. As noted above, the agency was informed prior to issuance of the FONSI that the majority of local Colorado conservation districts had withdrawn their support for the Target Zone because water in the Target Zone would not remain in the aquifers, but would instead be piped to other states to be used for any purpose by those states. (App. at 1556.)

The agency made its decision in consideration of the relevant factors. Cure Land fails to demonstrate that the agency's decision is arbitrary and capricious under the third factor of the four-factor test.

D. The agency's decision did not constitute a clear error of judgment.

The clear error standard focuses on the substantive aspect of an agency's decision. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). Cure Land

must allege facts sufficient to show that the agency's "decision was so substantively lacking as to meet this standard." *Richardson*, 565 F.3d at 714 n. 38. Cure Land has not demonstrated that the agency's FONSI was so substantively lacking as to constitute a clear error of judgment. The agency provided a rational, substantive explanation for its decision to remove the Target Zone. (App. at 499.)

The fact that the agency's decision could have a potentially adverse financial impact on the Cures—under a contract to which the agency was neither a party nor involved in its negotiations—does not render the agency's decision clearly erroneous. Indeed, whether or not the Cures may have accepted an allegedly lower price for their water rights under their contract with another party, or prematurely closed on the contract in violation of its own terms, is irrelevant under this Court's analysis of the agency's decision under the NEPA and the APA. The agency's decision was based on public comments and controversy over the payments to and eligibility of those in the Target Zone who had already sold their water rights to another party. The agency's decision did not constitute a clear error in judgment. Cure Land fails to demonstrate that the agency's decision is arbitrary and capricious under the fourth factor of the four-factor test.

E. The agency should not be ordered to include the Target Zone in the CREP amendment.

Finally, Cure Land requests that this Court order the agency to include the Target Zone in the FONSI and the CREP amendment. Opening Brief at 43-48. That request should be denied. As the agency has shown in this answer brief, its decision in the FONSI to exclude the Target Zone from the amendment was not arbitrary and capricious.

Nevertheless, should this Court find that the decision was arbitrary and capricious, the Court should remand the matter to the agency for further explanation, rather than order the agency to include the Target Zone in the amendment as Cure Land suggests.

CONCLUSION

For the foregoing reasons, the agency's decision should be affirmed.

Respectfully submitted this 3rd day of September, 2015.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

(1) all required privacy redactions have been made;

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s/Dorothy Burwell
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, I electronically filed the foregoing using the CM/ECF system which will send an electronic notification to the following e-mail addresses:

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