No. 14-1415

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CURE LAND, LLC and CURE LAND II, LLC,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; FARM SERVICE AGENCY, an Agency of the United States Department of Agriculture; and JUAN M. GARCIA, in his official capacity as Administrator of the Farm Service Agency,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado

The Honorable Judge William J. Martinez
USDC Case No. 1:12-CV-02388-WJM

APPELLANTS' REPLY BRIEF

Respectfully submitted:

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE RULES

FEDERAL REGULATIONS

Plaintiffs Cure Land, LLC, and Cure Land II, LLC (collectively, "Cure Land"), through undersigned counsel, respectfully submit this reply brief, stating as follows:

I. INTRODUCTION

The Answer Brief of Defendants/Appellees (collectively referred to herein as the Farm Service Agency of the United States Department of Agriculture, or "FSA") emphasizes – as would be expected in a National Environmental Policy Act ("NEPA") appeal – the deference typically afforded agency decisions. But FSA strains to explain how it could reverse a publicized 2009 policy decision on non-environmental grounds by using NEPA as a cloak. NEPA is supposed to provide transparency to governmental decision-making that could affect the environment, not obscure it.

FSA admits that the only reason for its about-face was the public perception regarding benefits that would be available to the Cures, the family who happened to own land in the Target Zone. Whether motivated by jealousy or based on a misunderstanding of the relevant facts, this was not a valid reason for FSA to conclude that there was a Finding of No Significant Impact ("FONSI") only if the Target Zone is excluded. FSA contends that public sentiment alone is a valid substitute for actual evidence under NEPA. But FSA's rationale would allow a federal agency to completely supplant scientific or technical analyses with public

opinion in conducting an environmental assessment. Affirming here would establish dangerous precedent and turn the purpose of NEPA on its head.

Moreover, using NEPA as the mechanism to try to "fix" local disputes unrelated to environmental impact hijacks the local processes that would ultimately provide a community resolution. That problem is especially apparent here, as the Republican River Conservation Reserve Enhancement Program ("RR CREP") is a state-federal partnership administered by the Republican River Water Conservation District ("RRWCD") as delegated by the State of Colorado ("State"). Instead of respecting the RR CREP partnership, FSA ignored the State's and RRWCD's roles and used NEPA to circumvent the state and local political process.

In sum, FSA's actions were arbitrary and capricious, and not in accordance with law. The district court's judgment affirming the agency's decision must be reversed.

II. RESPONSE TO FSA'S STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Cure Land responds to several erroneous or incomplete references in the FSA's Statement of Facts:

Role of State of Colorado And RRWCD

In implying that FSA has unilateral authority to shape the RR CREP, FSA's answer brief gives short shrift to the role of the State of Colorado and RRWCD in the RR CREP. (Aple. Br. at 2.) CREP is not a federal program, but instead a

"federal-state program that was created by a Memorandum of Agreement between the United States Department of Agriculture (USDA), the Commodity Credit Corporation, and the State of Colorado…" (Aplt. App. at 949.) "The primary partners in the Republican River CREP are USDA-FSA, USDA-Natural Resource Conservation Services (NRCS), the Republican River Water Conservation District-Water Activity Enterprise (RRWCD-WAE), the Colorado Division of Water Resources (CDWR), the Colorado Division of Wildlife (CDOW), The Nature Conservancy (TNC), and the Colorado State Extension Service (CSES)." (*Id.*) The 2006 RR CREP Agreement lists 12 federal responsibilities over a page and a half; in contrast, it identifies 18 state responsibilities over four pages. (*Id*. at 1395-1400.)

RRWCD "review[s] and provide[s] irrigation eligibility determination" on offers for acreage enrollment. (Aplt. App. at 949.) CDWR provides staff and commissioner oversight. (*Id.* at 950.) RRWCD also "provide[s] assistance to producers, determine[s] eligibility, select[s] and design[s] projects, and administer[s] the appropriate non-federal contract with producers. (*Id.*) RRWCD-WAE "provided funds to hire a CREP Coordinator, Water Engineer, and Legal Council [*sic*] to assist with all aspects of the Colorado Republican River CREP." (*Id*.) The non-federal match for the RR CREP is almost exclusively funding raised by the RRWCD. (*Id*. at 952.)

RRWCD was established by Colorado Senate Bill 04-235 in 2004. (Aplt. App. at 2001.) The board of directors for RRWCD is comprised of representatives of the seven counties and seven ground water management districts in the Republican River Basin, as well as the Colorado Ground Water Commission. *See* C.R.S. §§ 37-50-101, 37-50-104. RRWCD was established "for the conservation, use, and development of the water resources of the Republican river, its tributaries, and that portion of the Ogallala aquifer underlying the district to cooperate with and assist this state to carry out the state's duty to comply with the limitations and duties imposed upon the state by the Republican river compact and given such powers as may be necessary to safeguard for Colorado all waters to which the state is equitably entitled." C.R.S. § 37-50-101.

October 21, 2009 FSA Decision Letter Sent To State

FSA states that the October 21, 2009 letter from Deputy Under Secretary Michael Scuse to the State of Colorado (Aplt. App. 796-797), "noted that it had received additional clarifications regarding its concerns about the Target Zone," and that "there are 'important topics that need to be addressed and resolved'." (Aple. Br. at 4-5.) FSA's effort at painting this letter as pre-decisional fails due to both the addressees – which included the Office of the Colorado Attorney General and members of Congress representing Eastern Colorado -- and the letter's content.

The USDA Secretary previously had raised two concerns about the Target Zone in an October 6, 2008 letter to then-Representative Musgrave: first, that Colorado would be using CREP to meet its Compact obligations, and second, "that an environmentally beneficial use of the ground water extracted in the Basin under this proposal would not be assured." (Aplt. App. at 740-41.) FSA officials' discussions amongst themselves and with RRWCD and the State continued into 2009. Finally, top FSA officials decided to "proceed forward with the CO CREP." (*Id*. at 782; *see also* 791, 794.)

The October 21, 2009, letter from Deputy Under Secretary Michael Scuse specifically addresses those "two remaining concerns" and accepts proposed language for the RR CREP Amendment which would allow CREP participation when the pipeline uses ground water to increase stream-flow in the Republican River Basin as long as the state or RRWCD expenses relating to the pipeline did not count toward the 20 percent local cost-share. (Aplt. App. at 796.)

Accordingly, the October 21, 2009 letter states, in relevant part:

> At a meeting with you and representatives of the Republican River Water Conservation District held on July 15, 2009, we were able to discuss the ***two remaining concerns*** regarding the above proposed pipeline language which included a target zone within the proposed amendment to the Colorado Republican River CREP project area. Our discussion and your July 27, 2009, follow-up letter ***adequately addressed and provided clarifications to our concerns***. We accept your language…..In addition, ***you have addressed our concern that the conservation benefits realized outside the Target Zone will be similarly demonstrated within the Target Zone***.

> ***Based on those clarifications, FSA generally supports*** your proposed Addendum to the CREP Agreement, which seeks to increase project enrollment from 35,000 to 70,000 acres… Although there are important topics that need to be addressed and resolved as we work together on finalizing the details, ***we are anxious to move forward*** on amending the Colorado Republican River CREP Agreement…

(*Id*. at 796-797, emphasis added.)[1]

Concerns Regarding "Equity"

FSA also spends numerous pages detailing concerns of some members of the public that the Target Zone payments would be "inequitable." But FSA fails to acknowledge that the RRWCD board, "[p]ursuant to public comments received about the equity of the Target Zone," voted to change the proposed RR CREP Amendment to reduce the Target Zone incentive from $189 to $100 per acre to achieve greater equity among payments in the program. (Aplt. App. at 881-883.) The difference between those two payment levels was proposed to be redistributed in other areas covered by the RR CREP. (*Id.*) The State of Colorado informed FSA of this development through Alexandra Davis, the Director of Interbasin Compact Compliance at the Colorado Department of Natural Resources. (*Id.*) There is no record evidence suggesting that the FSA ever considered this

[1] Although FSA denies that it ever represented that "the conservation benefits realized outside the Target Zone will be similarly demonstrated within the Target Zone" (Aple. Br. at 10 n.4), the October 21, 2009 letter – which Cure Land correctly cited in page 7 of its Opening Brief – says exactly that.

information in deciding to issue a FONSI on the basis of public concerns surrounding equity.

March 2011 Draft Internal Decision Memorandum

FSA describes a March 2011 draft internal decision memo (Aplt. App. at 1555-1560) as highlighting the lack of "local support" for inclusion of the Target Zone. (Aple. Br. at 8-9.) This draft memo – which conspicuously omits any reference to the October 21, 2009 letter Deputy Under Secretary Scuse already had signed and sent to the State of Colorado – actually states that the public concerns "were largely outside the EA's [Environmental Assessment's] scope." (Aplt. App. at 1557.) The draft memo did not validate the "public concerns" but instead identified them as mere "[p]ublic perception." (*Id.* at 1558.) FSA points to no evidence that this draft memo was ever finalized.

III. ARGUMENT

A. FSA's Recitation Of The Applicable Legal Standards Is Erroneous

FSA posits that there is a "four-factor test" that applies to NEPA challenges. (Aple Br. at 16.) The suggestion that Cure Land must satisfy all four "factors," or for that matter, any of the four "factors," is inaccurate.

"As with other challenges arising under the APA, we review an agency's NEPA compliance to see whether it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Forest Guardians v. U.S. Fish &*

Wildlife Serv., 611 F.3d 692, 711 (10th Cir. 2010). *Forest Guardians* relies on 5 U.S.C. § 706(2)(A) for that standard of review. The opinion goes on to state: "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." *Id.* (citations omitted, emphasis added).

Thus, the recitation of the so-called four-factors is in the alternative, such that ***any one*** of those four rationales demonstrates a NEPA violation. But more importantly, nothing in *Forest Guardians* holds that those four ways of demonstrating an arbitrary and capricious decision are the ***only*** ways to meet the arbitrary and capricious standard, much less that those four examples constitute a "test."

Accordingly, this Court should not apply the "four-factor test" urged by FSA, and instead determine whether the district court erred in holding that the FSA's decision was not arbitrary and capricious.

B. Excluding The Target Zone Based Purely On Public Opinion Was Impermissible, Not Consistent With The Evidence Before FSA, And Improperly Highjacked The Local Political Process

FSA contends that its decision and explanation concerning exclusion of the Target Zone was "consistent with the evidence before the agency." (Aple. Br. at 17.) That is correct only if FSA can label as "evidence" unsupported public opinion and prejudicial comments regarding the Cure family. Under FSA's approach, an agency could reject any scientific or other objective evidence of environmental impact on the basis of public opinion simply by giving the public's emotional response the same evidentiary weight afforded scientific analyses or technical studies. FSA's argument cannot withstand scrutiny under NEPA.

FSA admits that the decision to exclude the Target Zone as a condition of issuing a FONSI rests on "public opinion." (Aple. Br. at 18.) Indeed, that is the only reasonable inference from FSA's "explanation" of its decision, namely that "[c]omments 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." (*Id.* (citing Aplt. App. at 499, ¶ 4)). According to FSA, paragraph 4 of the FONSI nonetheless "satisfied the agency's obligations" by establishing a "rational connection between the decision to exclude the challenged area and ***the comments received***." (*Id.*, emphasis added.)

FSA relies on *Friends of Marolt Park v. U.S. Department of Transportation*, 382 F.3d 1088 (10th Cir. 2004), for the proposition that merely noting a lack of local support can meet the "rational connection" requirement. But FSA points only to a connection to the "comments received," and *Friends of Marolt Park* did not somehow allow an agency to blindly rely on "the comments received." Instead, *Friends of Marolt Park* held that "NEPA requires the Agency to articulate a rationale connection between ***the facts found*** and the choice made." 382 F.3d at 1097 (emphasis added). *Friends of Marolt Park* does not stand for the proposition that the agency can abdicate its own fact-finding.

In any event, *Friends of Marolt Park* illustrates the inherent flaws to FSA's approach. There, the agency approved two different "action" alternatives – a phased approach and a non-phased approach – to a transit improvement project. 382 F.3d at 1091. The plaintiffs sought to declare one of the two approvals improper. *Id.* The agency had found that either of the agency's action alternatives "require[d] further action by the local electorate," i.e., local voter approval for either a right-of-way transfer or construction funding. *Id.* at 1093. This Court affirmed that there was no NEPA violation because the record of decision explained that it was important to have a phased approach in case local support or financing for the non-phased approach was lacking. *Id.* at 1096. In other words, by approving ***both*** alternatives, the agency's NEPA decision in *Friends of Marolt*

Park actually ***preserved*** the ability of the local electorate and local government to choose the option that best met local needs, rather than circumventing the local political process with a unilateral agency decision. And in doing so, the agency did not presume the validity or accuracy of public comments, but instead maintained both options for the locality to choose.

FSA could have followed the example in *Friends of Marolt Park*, and approved both Target Zone and non-Target Zone alternatives in the Environmental Assessment ("EA"), allowing the local political process to determine whether the State as a partner and signatory to the RR CREP Agreement would eventually approve the inclusion of the Target Zone in the RR CREP. Doing so would have been consistent with 7 C.F.R. § 1410.50(b), which provides for state-federal agreements to implemental local CREPs, as well as the prior October 21, 2009 agency decision. But instead, FSA hijacked that local and state process and unilaterally decided to exclude the Target Zone as a condition of issuing a FONSI, using NEPA as a cloak when the basis for exclusion had nothing whatsoever to do with the environment or other NEPA-recognized factors.

FSA likewise fails to address in its briefing two important pieces of objective evidence that should have precluded FSA from simply relying on comments from the public. First, FSA continues to ignore the fact that RRWCD, in response to public concerns over "equity" in payments in the Target Zone, voted

to change the proposed RR CREP Amendment to reduce the Target Zone incentive from $189 to $100 per acre to achieve greater equity among payments in the program, and to redistribute the difference in other areas. (Aplt. App. at 882-883.) A representative of the State informed FSA that RRWCD took this action at a November 18, 2010 special meeting. (*Id.*) Given FSA's acknowledgment that the decision to exclude the Target Zone turned on "opposition to the proposed incentive payments and eligibility requirements" (Aplt. App. at 499), FSA cannot defend its failure to consider the RRWCD's and State's response to concerns regarding equity in the incentive payment proposal.

Second, FSA has not considered RRWCD's dual role both as an advocate for the Target Zone and the entity that procured certain of the Cures' water rights. In deciding to exclude the Target Zone, FSA relied heavily on perceptions of "double dipping" by the Cures. (Aple. Br. at 9, citing Aplt. App. at 1556-57.) But in doing so, FSA disregarded RRWCD's and the State's support of the proposed Target Zone. RRWCD never stated that it considered its prior purchase of water rights and the possibility of CREP eligibility for the Cures to create the opportunity for "double dipping," even when RRWCD would actually fund much of the incentives in the Target Zone. (*See, e.g.*, Aplt. App. at 1198, 1210-1213 [RRWCD director discussing lease with Cures that expressly contemplated CREP eligibility].) In this context, it was arbitrary and capricious for FSA to rely

exclusively on public commenters' unsupported and prejudicial allegations that contradicted RRWCD's support for the Target Zone. FSA likewise had an obligation to investigate the facts before making such allegations dispositive.

FSA also claims that "[n]othing 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." (Aple. Br. at 29.) That is incorrect. FSA's own NEPA staff cautioned FSA officials that the "equity" and pipeline issues should not be part of the NEPA EA process. (Aplt. App. at 1239.) Then Trudy Kareus, FSA director for Colorado, refused to sign a FONSI that included the Target Zone, and instead insisted on a complete environmental impact statement ("EIS"). (Aplt. App. at 1194.) Matthew Ponish – FSA's National Environmental Compliance Manager – rejected the idea, because there was no proper justification for an EIS, and one or more "partners" could sue on that basis. (Aplt. App. at 1239.) But Kareus refused to allow the issuance of a FONSI unless it excluded the Target Zone, and held up finalization of the Supplemental EA for over a year. These significant departures from FSA NEPA procedure give rise to an inference of a lack of good faith. *See, e.g., Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994) (agency's violation of procurement regulations was evidence of improper agency behavior), *Tummino v. Torti*, 603 F.Supp. 2d 519, 547 (E.D.N.Y. 2009) (evidence of lack of

good faith shown when agency departed from its normal procedures for evaluating over-the-counter applications).

While public input is part of the NEPA process, NEPA does not allow federal agencies to disregard objective evidence and instead make public opinion dispositive.[2] Doing so would allow an agency to disregard evidence of adverse environmental consequences in the face of local public opinion that desires a particular federal project, or to stop a federal project on the basis of public concerns over environmental harm that is very unlikely to occur. There is no point of having a NEPA regime if the agency is permitted to reject technical analyses altogether in favor of public comments, regardless of whether objective evidence supports those public perceptions. FSA's FONSI and the exclusion of the Target Zone should be rejected on this basis alone.

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[2] FSA's suggestion that perhaps there were environmental reasons to exclude the Target Zone from the FONSI (Aple. Br. at 8, reciting commenter concerns that "the water [used in the pipeline] will not remain in the aquifers but will instead by redirected to other states") is belied by the Supplemental EA, which concluded that "[w]ithin the 'Target Zone' north of Wray, some of the groundwater withdrawal historically used for irrigation would be used to directly increase streamflows in the North Fork of the Republican River. While some of this water would be lost to evaporation, the diversion would ultimately increase surface water quantity thereby improving local and downstream habitats for aquatic species." (Aplt. App. at 542.)

C. FSA's Decision Is Arbitrary And Capricious As An Inexplicable Change Of Course

FSA claims that there never was a change of course as to the Target Zone that required justification. But FSA's conspicuous refusal to acknowledge the impact of the October 21, 2009 decision letter underscores that FSA's decision to abandon a prior policy decision announced to its RR CREP partners has never been explained or justified, and cannot stand.

As noted in Cure Land's opening brief, "the agency must show that there are good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). An "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," but "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.*

The October 21, 2009 letter on its face demonstrates that FSA's decision was the culmination of many discussions and communications with the State and RRWCD. (Aplt. App. at 796.) Tim Davis, representing RRWCD, had extensive communications with FSA regarding the environmental benefits of the proposed expansion of the RR CREP, including an explanation that the ground water put into the pipeline would be about the same temperature as the surface water in the

Republican River, and would be as good or better water quality as the water in the River. (Aplt. App. at 1284-85.) Katie Radke, representing the Colorado Division of Water Resources, explained to FSA that not all water in the Target Zone would go into the pipeline, and instead some "would go directly back to the system and therefore achieve water conservation just like any other retired irrigated acre in the … District." (*Id*. at 1077.) The record shows that agency officials also discussed amongst themselves both the environmental benefits of the pipeline as well as the legality of a CREP participant signing away its water rights to RRWCD. (*Id*. at 779-782, 791-794.)

FSA then came to a decision resolving these issues. The agency announced on October 21, 2009, that it would proceed with the proposal to allow the use of a pipeline in the RR CREP area and allow the Target Zone in that pipeline area. Specifically, the letter assured the State that it had "adequately addressed and provided clarifications" to the FSA's two remaining concerns about the proposed pipeline and the Target Zone. (Aplt. App. at 796.) FSA also told the State, "you have addressed our concern that the conservation benefits realized outside the Target Zone will be similarly demonstrated within the Target Zone." (*Id.* at 797.) FSA could have left open a final decision pending the EA, but instead informed the State: "Based on those clarifications, FSA generally supports your proposed

Addendum to the CREP Agreement, which seeks to increase project enrollment from 35,000 to 70,000 acres…" (*Id.*)

This was a policy decision that the State and RRWCD relied on, as revealed by the slowing communications with FSA after the October 21, 2009, letter and the issuance of the draft Supplemental EA in December 2010. Nothing about that October 21, 2009 letter indicated that the finality of FSA's decision would hinge on public perceptions and comments about the Cure family and their land in the Target Zone. Yet, the FONSI reversed that 2009 decision by excluding the Target Zone, and doing so based on public comments about the Cures.

In fact, the FONSI itself demonstrates that FSA was asserting a "new policy rest[ing] upon factual findings that contradict those which underlay its prior policy," *Fox Television Stations, Inc.*, 556 U.S. at 515, because the FONSI suggested that including the Target Zone would "constitute a major State or Federal action affecting the human and natural environment," when both the draft Supplemental EA and the final Supplemental EA attached to the FONSI found only environmental benefits to including the Target Zone. (Aplt. App. at 543.)

FSA implies that only changes to permitting decisions or the issuance of regulations require an explanation by the agency. (Aple. Br. at 20.) But FSA cites no authority supporting such a limited application of the general rule that an agency must explain its reasons for reversing course. FSA's position would permit

unexplained reversals in policy through alternative agency communications, especially in a program such as CREP. There are no codified federal regulations for the RR CREP because, consistent with 7 C.F.R. § 1410.50(b), it is governed by a federal-state memorandum of agreement in which the State of Colorado is a signatory. (Aplt. App. at 1391-1403.) Accordingly, FSA cannot unilaterally issue codified regulations for the RR CREP and instead its policy decisions are appropriately communicated to the State by letter for eventual incorporation in the agreement. The October 21, 2009 letter to the State of Colorado by the FSA Deputy Under Secretary reflects just that.

FSA also contends that the draft Supplemental EA issued in 2010 was never adopted as the agency's official position. (Aple. Br. at 19.) However, the body of the draft Supplemental EA was in fact adopted nearly verbatim in the final version (Aplt. App. at 506), and in any event, the draft is not the sole point of reference. Instead, the draft EA reflected the same policy decision announced in the FSA's October 21, 2009 letter to the State of Colorado and as such incorporated an agency official position.

In sum, FSA does not rebut the many judicial decisions holding that when a federal agency has previously announced a policy or regulatory decision, it must explain a later reversal in position. FSA failed to do so here.

D. FSA's Plan To Exclude The Target Zone Needed To Be Presented As A Separate Alternative In The Supplemental EA

FSA disputes that it was required to inform the public in the NEPA process that it was considering an option that would exclude the Target Zone. While NEPA may not require presentation to the public of every version of an alternative, it does require an agency to provide "meaningful information" about the "major impacts" of an alternative under consideration. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) ("A public comment period is beneficial only to the extent the public has meaningful information on which to comment…Informed public input can hardly be said to occur when major impacts of the adopted alternative were never disclosed."). FSA makes no effort to distinguish the *New Mexico* decision of this Court.

Here, the public did not have "meaningful information" about the impact of excluding the Target Zone through the NEPA process, because FSA did not explain to the public that (1) FSA in 2009 had reviewed the legal implications and the environmental benefits of using a pipeline for water delivery and had concluded it was satisfied with these issues, (2) RRWCD had already voted to reduce and redistribute incentive payments to address concerns of equity, (3) in contrast to certain public comments, RRWCD had never complained that the "local family" was "double-dipping," and (4) eliminating the Target Zone could reduce the environmental benefits of the project. FSA likewise points to nothing in the

record showing that FSA attempted to educate the public at large about the "pros" and "cons" of excluding the Target Zone.

NEPA requires an agency to affirmatively provide relevant information to the public about the issue at hand if the agency plans to make that issue a consideration in the FONSI or EA. Under such circumstances, an analysis of an alternative based on proposed exclusion of the Target Zone was necessary to comply with NEPA.

E. FSA Cannot Explain How Excluding The Target Zone Would Avoid A "Significant Impact" Under NEPA

FSA admits that excluding the Target Zone as a condition of issuing the FONSI cannot constitute a permissible mitigation measure under NEPA, since a mitigation measure may only be used to mitigate environmental impacts, and the Supplemental EA concludes that the Target Zone would not have a significant environmental impact. (Aple. Br. at 26.) Given that legal constraint and FSA's own admission, FSA has no reasonable way to construe the FONSI.

The opening paragraph under the heading "Reasons for Finding of No Significant Impact" states:

> ***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.

(Aplt. App. at 499, emphasis added.)

FSA glosses over the "if" and "therefore" as though these words were not part of the agency's FONSI. Instead, these words show that eliminating the Target Zone was a condition of the FONSI ("if"), and "therefore" FSA eliminated the Target Zone so that "the preferred alternative would not constitute a major State or Federal action affecting the human and natural environment." (*Id.*) *See MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1263 (10th Cir. 2006) (noting that the word "if" is "indicative of the creation of a condition precedent").[3]

Given that FSA concedes it could not exclude the Target Zone from the FONSI as a mitigation measure, and yet FSA required the exclusion of the Target Zone in order to find that the proposed RR CREP Amendment would not create a significant impact on the human and natural environment, FSA's FONSI necessarily was arbitrary and capricious and/or not in accordance with law.

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[3] Indeed, Kareus asked that the phrase "[t]herefore, the Target Zone has been removed from the preferred alternative" be added to the draft FONSI. (Aplt. App. at 2074.) She wrote that the added language "makes the point more directly than the preceding sentence alone." (*Id*.)

F. The Proper Remedy In This Case Is An Order To Include The Target Zone In The RR CREP Amendment

FSA contends that if this Court reverses, a remand to the agency for further review is appropriate, rather than a court order to include the Target Zone. But FSA provides no rationale or even any authorities in support of that argument. FSA also does not dispute its own findings that environmental benefits would be associated with the Target Zone. Accordingly, upon remand to the district court, FSA should be ordered to issue an unconditional FONSI and approve an RR CREP Amendment that includes the Target Zone. *See CBS Corp. v. F.C.C.*, 663 F.3d 122, 170 (3d Cir. 2011) ("Of course, remand is not required where a proper application of the correct standard could yield only one possible result."); *Woods Petroleum Corp. v. Department of Interior*, 47 F.3d 1032, 1041 (10th Cir. 1995) (ordering reinstatement of lower agency approval when remand to agency would be "fruitless").

IV. CONCLUSION

For all of the reasons stated above, Cure Land requests reversal of the district court's decision, with instructions upon remand that the district court order the FSA to include the Target Zone in the Supplemental EA and RR CREP Amendment, and to enjoin the FSA from taking any other action that categorically excludes properties in the Target Zone from CREP participation.

Dated: October 5, 2015

SNELL & WILMER L.L.P.

s/ *Jessica E. Yates*

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 5,169 words. I relied on my word processor to obtain the count and it is MSWord 2010. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Jessica E. Yates
Jessica E. Yates

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and these digital submissions have been scanned for viruses with the most recent version of 2015 Microsoft System Center Endpoint Protection, Antimalware Client Version: 4.8.204.0, last updated on October 5, 2015, and, according to the program, are free of viruses.

s/Jessica E. Yates
Jessica E. Yates

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2015, a copy of the foregoing **APPELLANTS' REPLY BRIEF** was served via CM/ECF on the following:

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