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ORAL ARGUMENT NOT SCHEDULED
Case No. 12-5095

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, RURAL UTILITIES SERVICE; THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; JONATHAN ADELSTEIN, in his official capacity as Administrator, Rural Utilities Service, United States Department of Agriculture,

Defendants-Appellees,

and

SUNFLOWER ELECTRIC POWER CORPORATION,

Defendant-Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Columbia (1:07-cv-01860-EGS)

APPELLANT'S BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

The following parties appeared before the United States District Court for the District Columbia:

1. Sierra Club, as Plaintiff;
2. United States Department of Agriculture, Rural Utilities Service, as a Defendant;
3. Thomas J. Vilsack, in his official capacity as Secretary of Agriculture, as a Defendant;
4. Jonathan Adelstein, in his official capacity as Administrator of the Rural Utilities Service, as a Defendant; and
5. Sunflower Electric Power Corporation, as Intervenor-Defendant.

The following parties appear before this Court in the instant appeal:

1. Sierra Club, as an Appellee;
2. United States Department of Agriculture, Rural Utilities Service, as an Appellee;
3. Thomas J. Vilsack, in his official capacity as Secretary of Agriculture, as an Appellee;
4. Jonathan Adelstein, in his official capacity as Administrator of the Rural Utilities Service, as an Appellee; and
5. Sunflower Electric Power Corporation, as Appellant.

No amici appeared in the district court proceedings. At the time of this filing, to the best of Counsel's knowledge, no amici or intervenors have appeared in the instant appeal.

B. Rulings Under Review

The following rulings of the District Court (Honorable Emmet G. Sullivan) are at issue in this Court:

1. March 29, 2011 Order (denying Sunflower's Motion to Dismiss Sierra Club's Amended Complaint as Moot, granting Sierra Club's Motion for Summary Judgment, denying the federal defendants' Cross-Motion for Summary Judgment, and denying Sunflower's Cross-Motion for Summary Judgment) (Dist. ct. Dkt. No. 111, JA ◆ and the accompanying Memorandum Opinion (Dist. Ct. Dkt. No. 112 – Sealed, PJA ◆ (Dist. ct. Dkt. No. 114 – Public, JA ___ reported at 777 F. Supp. 2d 44 (D.D.C. 2011)); and

2. January 31, 2012 Order (entering a declaratory judgment, enjoining the Rural Utilities Service, and remanding the matter to RUS) (Dist. Ct. Dkt. No. 121, JA ◆ and the accompanying Memorandum Opinion (Dist. Ct. Dkt. No. 122, JA ___ reported at 841 F. Supp. 2d 349 (D.D.C. 2012)).

C. Related Cases

The instant case was before the United States District Court for the District of Columbia, Case No. 1:07-cv-1860-EGS, and has not been before any other court. To the best of Counsel's knowledge, there are no other related cases.

D. Corporate Disclosure Statement

The following are Sunflower Electric Power Corporation's "parent companies," as that term is defined in Circuit Rule 26.1(b):

1. Lane-Scott Electric Cooperative, Inc.;

2. Pioneer Electric Cooperative, Inc.;

3. Prairie Land Electric Cooperative, Inc.;

4. Victory Electric Cooperative, Inc.;

5. Western Cooperative Electric Association, Inc.; and

6. Wheatland Electric Cooperative, Inc.

No publicly held company has a 10% or greater ownership interest in Sunflower.

Sunflower Electric Power Corporation's primary mission is to provide wholesale electric generation and transmission services.

Dated: October 29, 2012

Respectfully submitted,

/s/ Sharon M. Mattox
Sharon M. Mattox

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GLOSSARY

APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
CFC	National Rural Utilities Cooperative Finance Corporation
CoBank	CoBank, ACB
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
HCF	Holcomb Common Facilities, LLC
MW	megawatt
NEPA	National Environmental Policy Act
REA	Rural Electrification Administration
RUS	Rural Utilities Service
SNDA	Subordination Non-disturbance and Attornment Agreement

JURISDICTIONAL STATEMENT

As discussed in greater detail below in Part II of the Argument, pages 21-31, the District Court lacked jurisdiction because Sierra Club's claims were moot as a matter of law at the time they were filed.

This Court has jurisdiction over this appeal because the District Court's January 31, 2012 order is a final decision appealable under 28 U.S.C. § 1291. Alternatively, the District Court's January 31, 2012 order is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1) because it clearly granted an injunction. The Court's appellate jurisdiction is addressed in greater detail below in Part I of the Argument, pages 15-21.

INTRODUCTION

In 1980, the Rural Electrification Administration ("REA") loaned money to Sunflower Electric Cooperative, Inc. ("Old Sunflower") to partially fund a coal-fired power plant near Holcomb, Kansas. Since that time the agency, now known as the Rural Utilities Service ("RUS"), has managed the loan, but has not provided a single additional dollar in federal funding to Old Sunflower or Sunflower Electric Power Corporation ("Sunflower" or "New Sunflower"), the company that now owns Old Sunflower's assets. Sunflower has continued to generate and transmit electricity to supply the citizens of its member cooperatives.

Repayment of the federal loan has been slow and the debt has been restructured on more than one occasion. Sierra Club, as part of its "war on coal," has falsely painted RUS 's administration of the 1980 loan as controlling involvement in a potential new coal-fired generating facility, thus requiring an EIS by RUS covering the new coal plant. This potential new facility, while located at Holcomb, will be built, financed, and owned by a third party that is not part of this case. The 2002 loan restructuring and the 2007 loan contract and mortgage approvals issued by RUS simply do not require RUS to prepare an EIS.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court lack jurisdiction because Sierra Club 's claims were moot when filed?

2. Did the District Court err by granting summary judgment to Sierra Club and denying Federal Defendants' and Sunflower's summary judgment motions because:

   a. the RUS actions challenged by Sierra Club were "[a]pprovals provided by RUS pursuant to loan contracts" and, thus, exempt from National Environmental Policy Act ("NEPA") review under 7 C.F.R. § 1794.3; and

   b. RUS 's involvement in the possible future construction of new generating units at Sunflower's Holcomb site (the "Holcomb

Expansion Project") did not amount to "major federal action" under NEPA?

3. Did the District Court err by enjoining RUS?

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in an Addendum of Statutes and Regulations attached hereto.

STATEMENT OF THE FACTS AND THE CASE

I. Statement of Facts

A. The initial Holcomb loan and Holcomb 1 construction

In 1980, the REA-the predecessor agency to RUS-granted a direct loan of $3,585,000 and loan guarantees of $539,438,000 to Old Sunflower specifically for the construction of a new 316 megawatt ("MW") coal-fired generating station ("Holcomb 1") near Holcomb, Kansas. AR 3866, JA __. Pursuant to NEPA, REA prepared an Environmental Impact Statement ("EIS") analyzing the environmental effects of and alternatives to Holcomb 1 and associated transmission facilities before granting the loan and loan guarantees. AR 3622, JA __. Holcomb 1 began operation in 1983.

B. The 1987 restructuring

By 1987, Old Sunflower was unable to satisfy its debt obligations. AR 3880, JA __. On June 30, 1987, Old Sunflower entered into a Debt Restructure, Override Agreement and Amended and Restated Credit Agreement ("DRA") with

REA and other creditors. AR 3871-3988, JA . Under the DRA, Old Sunflower issued three classes of promissory notes, known as the DRA A Notes, DRA B Notes, and DRA C Notes, to REA and other creditors. AR 168-69, JA .[1]

The DRA included certain terms designed to protect the creditors' investment. For example, Old Sunflower could not create or assume certain liens on its property, incur certain additional debt, merge with or acquire other businesses, dispose of substantially all of its assets, make certain capital expenditures, or make certain investments without first obtaining the written consent of a "Specified Majority" of the DRA creditors. AR 3952-58, JA ; see also AR 3893-94, JA (defining "Specified Majority"). None of these provisions, however, gave Old Sunflower's creditors the authority to deny or condition their approvals based on environmental considerations.

c. The 2002 restructuring

Following the 1987 debt restructuring, Old Sunflower satisfied its fixed payment obligations under the DRA A Notes, but did not generate sufficient cash flow to pay down its debt on the DRA B and C Notes. Therefore, Old Sunflower negotiated another set of loan restructuring transactions ("2002 Restructuring") with its creditors, including RUS. See AR 4-11, JA .

[1] For greater detail on the terms and conditions of these notes, see Dist. Ct. Dkt. No. 94-3, ♦ 5, JA .

1. RUS approval

The DRA required Old Sunflower to obtain the approval of a "Specified Majority" of its creditors before proceeding with the 2002 Restructuring. See AR 3952-58, JA __; see also AR 4, JA __ ("The consents to the [2002 Restructuring] will be given pursuant to that certain [DRA]."). RUS and other of Old Sunflower's creditors executed an Agreement and Consent to Sunflower Restructuring, AR 216-66, JA __, which "set forth the terms and conditions on which they w[ould] consent to" the 2002 Restructuring, AR 222, JA __; AR 229, JA __. The 2002 Restructuring closed on November 26, 2002, AR 519, JA __, at which time RUS 's consent to the transactions became effective. See AR 222, JA __.

2. Mechanics of the Transaction

To facilitate the 2002 Restructuring, Old Sunflower's member cooperatives formed a new entity, SEP Corporation ("New Sunflower" or "Sunflower"), which is now known as Sunflower Electric Power Corporation, and is the appellant in this case. AR 4, JA __. Old Sunflower transferred most of its assets, including Holcomb 1, to New Sunflower. AR 226-27, JA __; AR 229, JA __. Old Sunflower's remaining assets were divided into three groups: (1) the Retained Infrastructure, which includes a gas pipeline, rail spur, and access road, AR 1095, JA __; (2) the Common Facilities, which includes the coal handling and storage facilities, a solid waste landfill, and a sewage treatment plant, AR 464-472, JA __;

and (3) the HCF!Unit 2 Site, which includes certain real property where a new generating unit ("Holcomb 2") could be constructed. AR 224, JA __. Old Sunflower transferred the Common Facilities and HCF!Unit 2 Site to Holcomb Common Facilities, LLC ("HCF"), a newly created, wholly owned subsidiary of Old Sunflower. AR 224, JA __; AR 229, JA __. Old Sunflower kept the Retained Infrastructure. See AR 225, JA __.

New Sunflower purchased Old Sunflower's assets with cash and by issuing five classes of notes to the holders of Old Sunflower's DRA A, B, and C Notes, including RUS: (1) SEP Secured A Notes;[2] (2) SEP Unsecured A Notes; (3) Secured Surrogate B Notes, (4) SEP Residual Value Notes, and (5) SEP Holcomb 3 Notes. AR 232-33, JA __.[3] RUS credits all payments made by New Sunflower on these notes as equal payments on certain of Old Sunflower's DRA notes.

Old Sunflower's DRA A, B, and C Notes were not cancelled or modified as a result of the 2002 Restructuring. AR 182, JA __. Therefore, none of Old Sunflower's debt held by RUS or any other creditor under the DRA notes was written off, forgiven, reduced, or otherwise modified. See id.

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[2] In 2004, Sunflower prepaid the SEP Secured A Notes in full. AR 8712-24, JA __.

[3] For greater detail on the terms and conditions of these notes, see Dist. Ct. Dkt. No. 94-3, ¶¶ 16-20, JA __.

RUS and Old Sunflower's other secured creditors, the National Rural Utilities Cooperative Finance Corporation ("CFC") and CoBank, ACB ("CoBank"), released their existing lien on the assets transferred to New Sunflower. AR 231, JA __; AR 267-75, JA __. New Sunflower, however, simultaneously executed an agreement in which it granted RUS, CFC, and CoBank a new lien on substantially all of its assets, including Holcomb 1, to secure certain of the new notes. AR 1610-12, JA __.

RUS, CFC, and CoBank did not release their existing lien on the Retained Infrastructure, Common Facilities, or HCFIUnit 2 Site. They agreed, however, to release their lien on those facilities in the future upon satisfaction of certain conditions if and when a new unit ("Holcomb 2") is developed at the Holcomb site, and even provided the form of release they would sign. AR 231-32, JA __; AR 276-83, JA __; AR 1097, JA __.

3. The2003 RUS Loan Contract

As part of the 2002 Restructuring, New Sunflower and RUS executed a Loan Contract, AR 1767-92, JA __, which was amended on June 1, 2003, ("2003 RUS Loan Contract") to reflect New Sunflower's name change to Sunflower Electric Power Corporation. AR 4371-97, JA __. Importantly, Section 5.14 of the 2003 RUS Loan Contract provides that Sunflower will not "enter into any agreement or other arrangements, whether or not in writing, for the development of

[Holcomb 2] without the prior written approval of RUS," AR 4391, JA __, and Section 5.15 provides that Sunflower will not "enter into any agreement or arrangements, whether or not in writing, (1) for Holcomb Site Development;[4] or (2) for other use of the Holcomb Unit 1 site, the fair market value of which would exceed $1 million annually; without the prior written approval of RUS ." Id. Both section 5.14 and 5.15 further provided that "[a]ny RUS approval will be on such terms and conditions as RUS, in its sole discretion, may require at such time." Id.

D. The 2005 and 2006 RUS approvals

Sunflower began negotiating with other entities, including Tri-State Generation and Transmission Association, Inc. ("Tri-State"), Golden Spread Electric Cooperative, Inc. ("Golden Spread") and Midwest Energy, Inc. ("Midwest"), regarding the possible development of new generating units at Holcomb. See AR 4574, JA __; AR 8482A.1, JA __. Consistent with the 2003 RUS Loan Contract, Sunflower sought and obtained RUS approval before entering into agreements with these other companies. See AR 4574, JA __; AR P8473A.1-5, PJA __; AR P4614A-15A, PJA __; AR 8482A.I-2, JA __; AR 8488A.I-2, JA __; AR P7726A, PJA __.

[4] The agreement defines "Holcomb Site Development" as "development of any type of generating unit, including but not limited to a coal or gas generating unit, that [Sunflower], [Old Sunflower] or any other entity develops, owns or operates or will be owned or operate on the same site as, or in proximity to Holcomb Unit 1, or that shares or will share any common facilities." AR 4377, JA __.

E. The 2007 RUS approvals

By two letters dated May 1, 2007 and May 2, 2007, Sunflower submitted a formal request for RUS 's consent to a binding Purchase Option and Development Agreement ("PODA") and other related agreements with Tri-State for the development of up to two new generating units at the Holcomb site. AR 4719-21, JA __; AR 7703-09, JA __. On July 26, 2007, RUS delivered three letters to Sunflower and Tri-State (the "2007 Approvals"), which collectively provided RUS 's approval for Sunflower to enter into definitive agreements with Tri-State.

In the first letter (the "Consent Letter"), RUS granted its consent for Sunflower to enter into the PODA and other related agreements with Tri-State. See AR 8047-49, JA __. Sunflower and Tri-State executed the PODA the same day. By executing the PODA, Sunflower, among other things, sold to Tri-State the exclusive option to develop, build and own two pulverized coal-fired electric generating Units at the Holcomb site.[5] AR 5636, JA __.

The second RUS letter dated July 26, 2007, ("the Development Account Letter") concerns the Development Account, which is used to hold certain funds

[5] At the same time, HCF and Tri-State executed two leases, under which Tri-State leased the real estate needed for two new generating units. AR 5636, JA __. Each of the leases includes the option for Tri-State to purchase for consideration of $1.00, "the underlying parcels of real property in fee simple" on certain defined dates in the future. AR 5654, JA __. Tri-State is entitled to purchase this real estate "free and clear of liens." Id.

paid to Sunflower "from prospective participants in and prospective owners . . . of all or any part of the Holcomb Expansion Project." AR 8209, JA __.

The third July 26, 2007 letter ("the Additional Consideration Letter") provided RUS 's consent to a number of additional transactions. See AR 8218-26, JA __. For example, RUS approved (1) the transfer of the Retained Infrastructure from Old Sunflower to HCF, (2) Sunflower's purchase of HCF from Old Sunflower, and (3) Sunflower's purchase of the right to receive rental revenue that would be paid to HCF in the future by owners of potential new generating units at the Holcomb site. AR 8219-22, JA __. Sunflower purchased HCF and the right to receive future rental revenues by issuing new promissory notes (the "Holcomb 2 Notes") to each of Old Sunflower's secured creditors-RUS, CFC, and CoBank-and by issuing additional promissory notes (the "Holcomb 3-B Note" and "Holcomb 4 Note") to RUS. Id. [6]

RUS agreed that these promissory notes satisfied the conditions specified in the 2002 Restructuring for releasing its lien on the Common Facilities, HCFIUnit 2 Site, and the Retained Infrastructure, see AR 231-32, JA __, and, thus, that it would release its lien no later than the time when "Sunflower is obligated, pursuant to the [PODA] , to convey certain property [to Tri-State] free of liens." AR 8220,

[6] For greater detail on the terms and conditions of the Holcomb 2 Notes, Holcomb 3-B Note, and Holcomb 4 Note, see Dist. Ct. Dkt. No. 94-3, ◆◆ 53-54, JA __.

JA __. Significantly, RUS further agreed that "no additional forms of consideration . . . will be required by RUS for providing . . . consents in the future for the Holcomb Expansion Project" pursuant to the 2003 Loan Contract. AR 8222, JA __.

Tri-State has not exercised, but continues to possess, the exclusive right to develop the Holcomb Expansion Project.

II. Procedural History

Sierra Club filed suit against the Federal Defendants on October 16, 2007, alleging that RUS violated NEPA by failing to prepare an EIS evaluating the Holcomb Expansion Project prior to approving the 2002 Restructuring, the 2007 Approvals, and the other consents and approvals provided by RUS in 2005 and 2006. Dist. Ct. Dkt. No. 1, JA __. On January 31, 2008, the Federal Defendants filed a motion to dismiss Sierra Club's complaint for failure to state a claim, Dist. Ct. Dkt. No. 12, JA__, which the District Court denied on July 18, 2008. Sunflower intervened on April 7, 2008. Dist. Ct. Dkt. No. 17, JA __; Dist. Ct. Dkt. No. 22, JA __. Sierra Club filed an amended complaint on September 8, 2008. Dist. Ct. Dkt. No. 32, JA __.

On March 3, 2009, Sunflower filed a motion to dismiss Sierra Club's amended complaint as moot. Dist. Ct. Dkt. No. 51, JA __. Following a hearing on October 21, 2009, the District Court took Sunflower's motion under advisement.

On March 29, 2011, after cross-motions for summary judgment, the District Court granted Sierra Club's motion for summary judgment, denied the Federal Defendants' and Sunflower's motions for summary judgment, and denied Sunflower's motion to dismiss the case as moot. Dist. Ct. Dkt. No. 111, JA __; Dist. Ct. Dkt. No. 112 (sealed), PJA __;[7] Dist. Ct. Dkt. No. 114 (public), JA __; Sierra Club v. RUS, 777 F. Supp. 2d 44 (D.D.C. 2011).

After supplemental briefing, on January 31, 2012, the District Court issued a final remedial order. Dist. ct. Dkt. No. 121, JA __; Dist. Ct. Dkt. No. 122, JA __; Sierra Club v. RUS, 841 F. Supp. 2d 349 (D.D.C. 2012). The District Court (1) declared that "RUS violated NEPA by failing to prepare an EIS prior to providing approvals and financial support for the Holcomb Expansion Project;" (2) enjoined RUS from "issu[ing] any approvals or consents for agreements or arrangements directly related to the Holcomb Expansion Project, or tak[ing] any other major federal actions in connection with the Holcomb Expansion Project, until an EIS is complete;" and (3) remanded to RUS "to determine what further action, if any, is necessary or appropriate in light of the Court's opinion." Dist. Ct. Dkt. No. 121, JA __. Sunflower timely filed a notice of appeal on March 30, 2012. See Dist. Ct. Dkt. No. 123, JA __.

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[7] The District Court sealed its March 29, 2011 memorandum opinion because it contained confidential information protected by the District Court's January 29, 2009 protective order. See Dist. Ct. Dkt. No. 43, JA __.

SUMMARY OF ARGUMENT

The District Court made several critical and reversible errors. First, the District Court erred by denying Sunflower's motion to dismiss Sierra Club's amended complaint as moot. Under the particular facts and circumstances of this case, it was impossible for the court to craft an effective retrospective or prospective remedy. Indeed, the prospective relief the District Court ultimately granted does not even attempt to remedy the alleged NEPA violations.

The District Court also erred by failing to defer to RUS's reasonable interpretation of its own regulation, 7 C.F.R. § 1794.3, which provides that "[a]pprovals provided by RUS pursuant to loan contracts" are not subject to NEPA review. The District Court should have instead concluded, as RUS did, that § 1794.3 validly applied to the actions challenged in this case, and no EIS was required.

The District Court also incorrectly ruled that RUS's involvement in the Holcomb Expansion Project amounted to "major federal actions" under NEPA. RUS lacked control and responsibility over the Holcomb Expansion Project through any of the challenged agency actions. Further, RUS did not provide significant financial assistance to the Holcomb Expansion Project through any of the challenged actions. Accordingly, the District Court should have granted summary judgment to the Federal Defendants and Sunflower.

The District Court also erred by enjoining RUS. Remanding the case to RUS was a sufficient remedy. Moreover, the District Court's prospective injunction is vague and overly broad, fails to remedy the alleged NEPA violation, and improperly enjoins future agency action.

STANDARD OF REVIEW

This Court reviews de novo the District Court's denial of Sunflower's motion to dismiss Sierra Club's complaint as moot because it relates to the District Court's subject matter jurisdiction. See Del Monte Fresh Produce Co. v. United States, 570 F.3d 316, 321 (D.C. Cir. 2009).

Likewise, this Court reviews de novo the grant of summary judgment in favor of Sierra Club based on the administrative record, applying the same standard applicable to the District Court. See Forsyth Mem'l Hosp., Inc. v. Sebelius, 639 F.3d 534, 537 (D.C. Cir. 2011). This Court "review[s] the administrative record directly to determine whether the agency violated the Administrative Procedure Act by taking action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or is 'unsupported by substantial evidence.'" Forsyth Mem'l Hosp., Inc., 639 F.3d at 537 (citing 5 U.S.C. § 706(2)). Sierra Club, as the plaintiff, bears the burden to demonstrate that RUS acted contrary to NEPA. See Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1148 (D.C. Cir. 2001) (holding that the plaintiff "fails

to show that" the agency's determination that its actions did not trigger NEPA was contrary to law).

This Court reviews the District Court's decision to grant an injunction for abuse of discretion. See Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011); Conclusions of law underlying the injunction, however—including those conclusions of law central to the merits of the plaintiff's claim-are subject to de novo review. Id.

ARGUMENT

I. This Court has jurisdiction over Sunflower's appeal.

The District Court's January 31, 2012 order is a final decision appealable under 28 U.S.C. § 1291. Alternatively, the District Court's January 31, 2012 order is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1) because it clearly granted an injunction.

A. The District Court's January 31, 2012 order is a final decision appealable under 28 U.S.C. § 1291.

1. The January 31, 2012 order is final because there is nothing for RUS to do on remand.

When there is nothing substantial for the agency to do on remand, appellate courts have concluded that remand orders are effectively final and, therefore, appealable under 28 U.S.C. § 1291. In Ringsby Truck Lines, Inc. v. United States, the Tenth Circuit held that an order remanding an Interstate Commerce

Commission ("ICC") rate order to the agency "for such further proceedings as may be appropriate" was final and appealable by the non-agency plaintiff under § 1291. 490 F.2d 620, 624 (10th Cir. 1974). The ICC had not and would not take any further action on remand because the remanded order had been superseded by another agency order. Id. Giving § 1291 a practical reading, the court of appeals concluded that the district court's order was effectively final and therefore appealable. Id.

Similarly, in Skagit County Public Hospital District No. 2 v. Shalala, the Ninth Circuit had jurisdiction over a hospital's appeal from a remand order where the agency was not going to take any action on remand. 80 F.3d 379, 384 (9th Cir. 1996). Because any proceeding before the agency on remand would be "meaningless" and the hospital would not pursue such a proceeding, the court of appeals considered the district court's order final "as a practical matter" and exercised appellate jurisdiction under § 1291. Id.

In this case, there is nothing that RUS must do on remand. As in Ringsby Truck Lines, the District Court provided RUS with no specific task to carry out on remand, but merely directed the agency "to determine what further action, if any, is necessary or appropriate in light of the Court's opinion." Dist. Ct. Dkt. No. 121, JA __. Additionally, like the appellant in Skagit County, Sunflower has no present reason or intention to return to RUS to ask it to revisit any of the past agency

actions challenged in this case. See Skagit County, 80 F.3d at 384. In fact, Sierra Club and the Federal Defendants asked the District Court to order Sunflower to seek new approvals from RUS, but the court declined to do so. Dist. ct. Dkt. No. 122 at 14-15, JA ___.[8] Thus, it is not at all clear what action RUS could take on remand that Sunflower could subsequently challenge in court. Accordingly, "[t]o deny jurisdiction here would effectively signal the end of appellants' cause of action without any judicial review." Ringsby Truck Lines, 490 F.2d at 624. Therefore, the District Court's January 31, 2012 order is final for all practical purposes and appealable under 28 U.S.C. § 1291.

2. The January 21, 2012 order is a final appealable order under the "collateral order" doctrine.

Remand orders may also be appealable under 28 U.S.C. § 1291 pursuant to the collateral order doctrine. See Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 329 (D.C. Cir. 1989). Decisions appealable under the "collateral order" doctrine include those district court decisions that (1) conclusively determine the disputed question, (2) resolve an important issue separate from the merits, and (3) would render the issue effectively unreviewable on appeal from final judgment in the underlying action. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); Occidental Petroleum Corp., 873 F.2d at 329.

[8] All citations to documents filed in the District Court refer to the CM/ECF assigned page numbers.

The January 31, 2012 order easily meets the first two factors. The first factor is present because the District Court has conclusively ruled that certain types of RUS actions qualify as major federal actions under NEPA, and require an EIS. Thus, as in Occidental Petroleum, the District Court has conclusively established "the applicable legal standard" that will be applied in any future RUS action. 873 F.2d at 331-32. The second factor is present because the District Court's final remedial order leaves the challenged RUS actions-i.e., the agency's approval of the 2002 Restructuring and the 2007 Approvals---completely undisturbed. Instead, the District Court has merely prescribed the legal standard for RUS to apply in evaluating future actions, if any. Thus, the District Court's rulings challenged on appeal involve "important issue[s] completely separate from the merits of the action." Id. at 331 (internal quotation omitted).

The third factor is satisfied because Sunflower's interests "will be irretrievably lost in the absence of an immediate appeal." Id. at 329 (internal quotation omitted). In Occidental Petroleum, this Court held that an agency may appeal from a district court remand order under the collateral order doctrine. Id. at 331-32. In subsequent cases, this Court has denied private party litigants an appeal from remand orders. E.g., Lake Pilots Ass'n, Inc. v. U.S. Coast Guard, 359 F.3d 624, 625 (D.C. Cir. 2004); Am. Hawaii Cruises v. Skinner, 893 F.2d 1400, 1403 (D.C. Cir. 1990). But the denial of the right to appeal is based on the conclusion

that non-agency litigants, unlike agencies, are able to obtain appellate review after the completion of the agency proceeding on remand. E.g., Lake Pilots Ass'n, Inc., 359 F.3d at 625; Am. Hawaii Cruises, 893 F.2d at 1403.

Critically, Sunflower will not have a future opportunity to pursue appellate review of the District Court's initial rulings. First, as explained above, there is nothing RUS must do on remand, so there will be no final agency action on remand that Sunflower may subsequently challenge. Second, should Sunflower request a new action from RUS relating to the Holcomb Expansion Project, that action will likely qualify, under the District Court's erroneous rulings and injunction, as an "approval[] or consent[] for agreements or arrangements directly related to the Holcomb Expansion Project" or as a "'major federal action' in connection with the Holcomb Expansion Project." Dist. Ct. Dkt. No. 121, JA __. Thus, "proceed[ing] under the legal standard imposed by the district court," Occidental Petroleum Corp., 873 F.2d at 332, RUS would be required to prepare an EIS before it could complete the requested action, rendering moot any future Sunflower appeal of the District Court's rulings below. Accordingly, the order from which Sunflower appeals satisfies all three parts of the collateral order test and is appealable under 28 U.S.C. § 1291.

B. Alternatively, the District Court's January 31, 2012 order is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1) because it granted injunctive relief.

Federal appellate courts have jurisdiction of appeals from "[i]nterlocutory orders of the district courts . . . granting . . . injunctions." 28 U.S.C. § 1292(a)(1). If a district court order "clearly grant[s] or den[ies] a specific request for injunctive relief . . . it falls within the plain text of § 1292(a)(l) and is appealable without any further showing." Salazar ex reI. Salazar v. District of Columbia, 671 F.3d 1258, 1261 (D.C. Cir. 2012). Although § 1292(a)(1) "is typically invoked to appeal preliminary injunctions, it can be invoked to appeal permanent injunctions that are interlocutory in nature." Nat'l R.R. Passenger Corp. v. Express Trak, L.L.c., 330 F.3d 523, 527 (D.C. Cir. 2003).

In this case, both the Sierra Club and the Federal Defendants requested injunctive relief. See Dist. Ct. Dkt. No. 115 at 11, JA ___; Dist. Ct. Dkt. No. 117 at 13-14, JA ___. The District Court did not grant all of the injunctive relief requested, but indisputably granted an injunctive order against RUS. See I.A.M Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc., 789 F.2d 21, 24 (D.C. Cir. 1986) (defining injunction). See Dist. Ct. Dkt. No. 121, JA ___. Accordingly, the District Court's January 31, 2012 order is appealable as of right under § 1292(a)(1).

Once the Court's jurisdiction under § 1292(a)(I) is established, the scope of the Court's review is broad. "[R]eview quite properly extends to all matters inextricably bound up with the remedial decision. . . . The scope of review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment." Hartman v. Duffey, 19 F.3d 1459, 1464 (D.C. Cir. 1994). See also ExpressTrak, L.L.C., 330 F.3d at 527.

Here, the Court's review should include not only the injunction granted by the District Court on January 31, 2012, but also all of the underlying rulings of the District Court upon which the injunction is predicated, including the District Court's decisions on summary judgment and on Sunflower's motion to dismiss. See Hartman, 19 F.3d at 1464 (Court's review included not only the interlocutory injunction, but also the district court's rulings on class certification and the merits of plaintiffs' claim, upon which the injunction depended). Accordingly, all of the issues raised by Sunflower in this appeal are within the scope of the Court's jurisdiction under § 1292(a)(I).

II. Sierra Club's claims were moot when flied because it was not possible for the District Court to grant effective relief.

The District Court reasoned that the case was not moot because it had the theoretical ability to undo past completed transactions-a remedy it subsequently declined to utilize-or otherwise formulate some form of effective prospective

relief. Dist. Ct. Dkt. No. 112 at 14-15, PJA ___. Based on the specific facts and practicalities presented here, effective relief was simply not possible.

A. The mootness analysis is practical and fact-specific.

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70 (1983). In the NEPA context, a case is moot if "[i]t is 'impossible for the court to grant any effectual relief whatever'" with respect to the agency action allegedly taken in violation of the law. Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 22 (D.C. Cir. 2006).

A court's inquiry into whether effective relief can be granted is practical and fact-specific. In Fund for Animals, this Court concluded that, once the challenged wild horse gathers had been completed, it was impossible for the Court to grant any effective relief with respect to those gathers. Id. The Court considered what was practical in light of the facts of the case; notably, the Court did not contemplate the "theoretical" possibility that the gathered horses could be released into the wild.

Likewise, in Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1298-99 (D.C. Cir. 2007), this Court concluded that effective relief was not feasible with respect to a grant from the Tennessee Valley Authority ("TVA") to a private company. The challenged grant had already been disbursed, and the plaintiff failed

to show any way that "TVA actually has authority-whether by statute, regulation, contract, or otherwise-to impose mitigation measures upon" the company. Id. at 1298. The Court did not speculate about its theoretical ability to unwind or recall the already disbursed funds. Instead, the case was moot because there was no practical, effective remedy available under the circumstances. See also Citizens Alert Regarding the Envt. v. Leavitt, 355 F. Supp. 2d 366, 369-70 (D.D.C. 2005) (no effective remedy available because EPA had already disbursed a grant to recipient sewer authority, contract in place between EPA and sewer authority did not give EPA authority to prospectively impose mitigation, and court could not "retroactively revisit" the contract).

B. The District Court erred by holding it could formulate effective retroactive relief.

A summary assertion that the court can theoretically grant retroactive relief is not enough to avoid mootness. Had the District Court actually attempted to do so, rescinding the challenged RUS approvals would not have provided effective relief.

1. The District Court misapplied Lemon.

The District Court rejected Sunflower's mootness argument in part because this Court held in Lemon v. Geren, 514 F.3d 1312 (D.C. Cir. 2008), that a past agency action taken in violation of NEPA may, "under certain circumstance," be rescinded or unwound, Dist. ct. Dkt. No. 112 at 15, PJA __. In Lemon, this Court

held that a NEPA challenge to the Army's conveyance of property to a private party for future development was not moot even though the land transfer had already occurred because the district court had the power to "unravel[] the transfer if necessary." 514 F.3d at 1315. The Lemon court, however, indicated that unwinding the land transfer was only possible because "all the parties to the transaction [were] before the court." Id. [9]

The District Court recognized Lemon's limitations on its power to unwind past transactions, noting that it could, at most, unwind the subset of challenged approvals and transactions to which "RUS and Sunflower were the only two parties." Dist. Ct. Dkt. No. 112 at 15 n.6, PJA ___. The District Court, however, took its analysis no further. The court merely asserted its theoretical power to undo an unnamed subset of RUS's past consents and approvals and concluded that, consequently, the case must not be moot.

If the theoretical assertion that a court can undo past action were enough to avoid mootness, then virtually no case would be moot. This Court's precedent therefore requires a fact-specific analysis regarding whether a potential remedy will actually be effective. See Karst, 475 F.3d at 1298-99; Fund for Animals, 460

[9] The District Court also cited a Ninth Circuit case for the proposition that a case is not moot because the court can void a completed transaction. See Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 815 (9th Cir. 1999). Notably, in Muckelshoot, as in Lemon, all parties to the disputed transaction were before the court.

F.3d at 22. Here, the District Court failed to engage in such an analysis. In fact, when the District Court later considered the practicalities of implementing a retroactive remedy, it declined to do so in part because of the difficulties and disruptions such a remedy would cause. Dist. Ct. Dkt. No. 122 at 29-30, JA __. As the court discovered, retroactive relief was never really a viable option.

2. Vacating past RUS consents and approvals, even if possible, would not provide effective relief

Sierra Club challenged six RUS consents and approvals. Dist. Ct. Dkt. No. 32, ¶ 149, JA __. The first-RUS's consent with respect to the 2002 Restructuring-came in the form of the September 30, 2002 Agreement and Consent to Sunflower Restructuring, a complex agreement among Sunflower, Old Sunflower, HCF, RUS and numerous other non-federal creditors. AR 216-66, JA __. Only two of those parties-Sunflower and RUS-were before the District Court. It was therefore beyond the District Court's power to unwind this years-old executed agreement. See Lemon, 514 F.3d at 1315. Moreover, even if the District Court could somehow vacate RUS's consent to the 2002 Restructuring, it is unclear what practical effect it would have had. Millions of dollars of assets, cash, and promissory notes changed hands upon the closing of the 2002 Restructuring, and Sunflower had been making payments on the notes issued in 2002 for years.[10]

[10] In fact, Sunflower paid over $210 million in 2004 to prepay the Secured A Notes in full. AR 8712-25, JA __.

In reality, there was nothing the District Court could have done to reverse or undo the 2002 Restructuring.

The 2007 Approvals also involved other parties not before the District Court. Specifically, the Consent Letter stated that "Tri-State is authorized to rely on the contents of this letter as if Tri-State were an original addressee," AR 8049, JA __, and the Development Account Letter was addressed to Sunflower and CFC. AR 8208, JA __. Under Lemon, the District Court's ability to rescind these letters was therefore questionable, at best. See Lemon, 514 F.3d at 1315. Furthermore, even if the District Court did vacate the 2007 Approvals, the transactions carried out in reliance upon them would not, as a practical matter, have been affected. Because RUS was not party to the PODA or the other related agreements, the Court could not vacate or set those agreements aside. See 5 U.S.C. § 706(2) (giving a reviewing court power to "set aside agency action" (emphasis added)).

The four remaining RUS consents and approvals challenged by Sierra Club were letters from RUS to Sunflower. See AR 4574, JA __; AR 8482A.1-2, JA __; AR 8488A.1-2, JA __; AR P7726A, PJA __. Two of these consent letters---dated November 9, 2005, and May 9, 2007-related to Sunflower's preliminary dealings with Tri-State leading up to the 2007 Approvals. See AR 4574, JA __; AR P7726A, PJA __. Because Sunflower and Tri-State's negotiations have culminated in the execution of the PODA, vacating those two preliminary consents would not

have any apparent effect. RUS 's November 8, 2006 consent also related in part to agreements with Tri-State. AR 8482A.1-2, JA _ . Thus, to the extent related to Tri-State, the November 8, 2006 consent was superseded by the 2007 Approvals.

The November 8, 2006 consent also related in part to Sunflower's dealings with Midwest and Golden Spread. Id. Likewise, RUS 's April 16, 2007 consent involved Midwest and Golden Spread. See AR 8482A.1-2, JA __; AR 8488A.1-2, JA . As with the other RUS consents, the actions authorized by these consents have already been carried out. Sunflower executed letters of intent with Midwest and Golden Spread, and accepted $2.8 million from them, all in reliance on RUS 's consents. See AR 8488A.1-2, JA __. Vacating RUS 's past consents would change nothing. In summary, the District Court could not have formulated a retroactive remedy that would actually change the status quo or give RUS another opportunity to make a different decision once informed by a NEPA analysis.

C. The District Court erred by holding it could formulate effective prospective relief.

The District Court also decided the case was not moot based on a false presumption that it could somehow formulate effective prospective relief.

1. The District Court erred by accepting as true all assertions in Sierra Club 's amended complaint regarding RUS 's present authority over the Holcomb Expansion Project.

An agency's present and ongoing level of authority over a project is clearly critical to the effectiveness of any prospective remedy. For example, in Karst, the

D.C. Circuit concluded the plaintiff's claim that the TVA had violated NEPA was moot because the plaintiff failed to show that "TVA actually has authority . . . to impose mitigation measures" on the private party that had accepted a development grant from the agency. Karst, 475 F.3d at 1298. See also Citizens Alert, 355 F. Supp. 2d at 370-71 (concluding case was moot because agency had no authority to prospectively impose environmental conditions on grant recipient).

Sunflower and the Federal Defendants agreed that RUS lacked the authority-statutory, regulatory, contractual or otherwise-to control or mitigate the environmental impacts of the Holcomb Expansion Project on a prospective basis. See Dist. Ct. Dkt. No. 51-2 at 26-30, JA __; Dist. Ct. Dkt. No. 61 at 12-13, JA __. Sierra Club disagreed. Instead of settling the dispute, however, the District Court accepted Sierra Club's allegations at face value. Specifically, the District Court stated that "plaintiff has sufficiently alleged that RUS has maintained authority over Sunflower," Dist. Ct. Dkt. No. 112 at 18, PJA __ (emphasis added), and that "plaintiff also adequately alleges that RUS maintains the same level of authority over Sunflower as existed in 2007 when it granted the approvals challenged by plaintiff." Id at 19, JA __ (emphasis added).

Accepting Sierra Club's disputed allegations regarding the extent of RUS's prospective ability to control the Holcomb Expansion Project was clear error. "Because subject-matter jurisdiction focuses on the court's power to hear the

claim, . . . the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." El-Hadad v. United States, 377 F. Supp. 2d 42, 46 (D.D.C. 2005). When a defendant challenges the asserted basis for subject matter jurisdiction, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant." Phoenix Consulting Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000). "Instead, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." Id. See also Herbert v. Nat'l Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992) ("[W]here necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.").

Instead of looking to the record to determine whether RUS had any future ability to exercise control over the Holcomb Expansion Project, the District Court merely took Sierra Club's word for it. See Dist. Ct. Dkt. No. 112 at 19, PJA __. This was error. Contrary to Sierra Club's unsubstantiated assertions, RUS lacked the authority to prospectively impose mitigation measures on the Holcomb Expansion Project.

2. RUS had (and still has) no authority to impose environmental conditions on the Holcomb Expansion Project.

RUS never had authority-statutory, regulatory, contractual, or otherwise-to impose environmental conditions on the Holcomb Expansion Project via the challenged RUS actions. See infra Part I1I.B.l; Dist. Ct. Dkt. No. 51-2 at 26-30, JA __; Dist. Ct. Dkt. No. 91 at 22-32, JA_; Dist. Ct. Dkt. No. 94-1 at 19-25, JA __. Moreover, even if RUS did have such authority when it issued the challenged approvals, RUS no longer had it by the time Sierra Club filed suit. In granting the 2007 Approvals, RUS explicitly bargained away any contractual authority that it may have otherwise had to prospectively impose environmental conditions on new generating units. See AR 8222, JA __ (RUS could not require "additional forms of consideration . . . for providing . . . consents in the future for the Holcomb Expansion Project").

Moreover, under the PODA-an agreement to which RUS is not a party-it will be Tri-State, not Sunflower, that would construct and own any new generating unit. See AR 5636, JA __. Therefore, even if RUS had some prospective contractual authority to impose conditions on Sunflower, it has no such authority over Tri-State. In sum, RUS 's inability to prospectively control the environmental impacts of the Holcomb Expansion Project further establishes that the case was moot when filed. See Karst, 475 F.3d at 1298; Citizens Alert, 355 F. Supp. 2d at 370-71.

3. The District Court's prospective relief does not effectively remedy the past NEPA violation.

In a NEPA case, an injunction is only effective if it "remed[ies] the particular violations that have taken place." Alaska v. Andrus, 580 F.2d 465, 485 (D.C. Cir. 1978), vacated in part on other grounds sub nom. W. Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978). An injunction only remedies past NEPA violations if it "ensures that there will be at least a 'possibility' that the agency will 'change its plans in ways of benefit to the environment.'" Id. at 485 (emphasis added) (quoting Jones v. D.C. Land Redevelopment Agency, 499 F.2d 502, 513 (D.C. Cir. 1974)).

The District Court's prospective remedy does not address the alleged past NEPA violations. Moreover, the remedy does not-and cannot-ensure that RUS will have a possibility to change its plans with respect to the Holcomb Expansion Project. If Tri-State exercises its exclusive option under the PODA to develop a new unit RUS will not have a significant prospective role in the Holcomb Expansion Project. The case was moot when filed and should have been dismissed.

III. RUS did not violate NEPA.

NEPA did not apply to the challenged RUS actions. RUS was not required to prepare an EIS, and Sierra Club's claims are without merit. The District Court made several critical missteps in concluding otherwise.

A. The District Court erred when it concluded that the challenged RUS actions were not exempt from NEPA review under 7 C.F.R. § 1794.3.

In consultation with the Council on Environmental Quality ("CEQ"), RUS promulgated revisions to 7 C.F.R. § 1794.3 in 1998 to make clear that "[a]pprovals provided by RUS pursuant to loan contracts and security instruments" are not actions subject to NEPA. 7 C.F.R. § 1794.3. RUS's determination that the challenged approvals fall within this category of exempt actions is not only worthy of judicial deference, but is also independently supported by the record, and is a valid application of the regulation that complies with NEPA.

1. The District Court should have given substantial deference to RUS's reasonable interpretation of 7 C.F.R. § 1794.3.

Courts must defer to an agency's interpretation of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997). RUS reasonably interpreted its own regulation and determined that the approvals challenged by Sierra Club fit within the exemption. The District Court, however, ruled that RUS's determination was merely a litigating position and, as such, was unworthy of any deference. Dist. ct. Dkt. No. 112 at 51-52, PJA __.

The District Court's failure to grant any deference to RUS's interpretation of its own regulation violates the factors articulated in Auer, 519 U.S. at 462, and this Circuit's application of those factors:

> There are at least three preconditions for applying this so-called Auer deference. First, the language of the regulation in question must be ambiguous, lest a substantively new rule be promulgated under the guise of interpretation. Second, there must be 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.' Finally, the agency's reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself.

Drake v. FAA, 291 F.3d 59, 68 (D.C. Cir. 2002) (internal citations omitted). Sunflower agrees with the District Court that the first condition is satisfied. See Dist. Ct. Dkt. No. 112 at 51, PJA ___. The District Court erred, however, when it found that the second and third factors were not satisfied.

The District Court's entire analysis under the second factor was that "defendants point to no evidence in the record that the agency itself evaluated whether NEPA applied to its actions." Id. at 51, PJA ___. In other words, the District Court required some affirmative action on RUS 's part in order to meet this prong, but this is not required under this Circuit 's precedent. In Bigelow v. Department of Defense, this Court interpreted this Auer factor as "not requir[ing] an agency to demonstrate affirmatively that its interpretation represents its fair and considered judgment." 217 F.3d 875, 878 (D.C. Cir. 2000) (emphasis added). Rather, there must simply be an absence of an indication that the agency's position does not reflect its fair and considered judgment. Two examples of such

indications are that "appellate counsel's interpretation may not reflect the views of the agency itself" or that the interpretation was "developed hastily, or under special pressure, and is not the result of the agency's deliberative processes." Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (internal quotation omitted).

No such indications are present here. Neither the Sierra Club nor the District Court identified any evidence that RUS has ever adopted a different interpretation of the regulation or contradicted its position on appeal. See id.; Everett v. United States, 158 F.3d 1364, 1368 (D.C. Cir. 1998) (upholding an agency interpretation in part because the agency "has never established a regulatory position that contradicts the interpretation it now relies upon"). This is not a case "where the agency itself has articulated no position on the question." See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988). Neither is RUS's interpretation an "unfair surprise" that represents a departure from its past enunciations of policy or its past practices. See Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166-67 (2012) (declining Auer deference where applying the agency's interpretation would impose liability without clear notice). Rather, the manner in which RUS revised § 1794.3 in consultation with CEQ in 1998 supports the view that RUS's interpretation actually has been the agency's

long-standing position and practice.[11] See also 63 Fed. Reg. 68,648, 68,650, 68,659-60 (Dec. 11, 1998) (deleting categorical exclusion for "routine" approvals and replacing with new exemption in § 1794.3 and not limiting the exemption to "ministerial" approvals as initially proposed).

The District Court also erred in determining that RUS did not meet the third factor. RUS 's reading of the regulation is "fairly supported by the text of the regulation itself . . . ." See Drake, 291 F.3d at 68. The District Court discounted RUS 's conclusion that the challenged RUS actions fell within the exception because, in conjunction with RUS' s grant of approval, RUS entered into new agreements. See Dist. Ct. Dkt. No. 112 at 52-53, PJA __. As discussed in depth in Part III.A.2 below, the District Court read § 1794.3 too narrowly.

RUS 's interpretation of § 1794.3 meets the Auer factors. It is not a post hoc rationalization. Because it is a fair and considered interpretation, the Court should afford RUS 's interpretation and application of its regulation substantial deference.

[11] See AR S17, JA __ (discussion of the federal handle on RUS 's servicing and administrative actions); AR S280-82, JA __ (record of meetings and draft-sharing with CEQ) ; AR S55, JA __ (discussion of the exercise of RUS approval rights with CEQ); AR S186, JA __ (CEQ conclusion that final version of rule is "consistent with the requirements for agency NEPA procedures").

2. The District Court erred when it found that the challenged RUS actions were not "[a]pprovals provided by RUS pursuant to loan contracts."

Independent of any deference to RUS, the Administrative Record amply supports the conclusion that RUS's approvals fit within the § 1794.3 exemption. The District Court ruled that because some of the challenged approvals created new agreements and promissory notes, and were sometimes made among new parties, they were something more than approvals pursuant to loan contracts. It is true that the 2002 Restructuring was a transaction that resulted in new agreements and promissory notes, albeit still dealing with the original 1980 debt. But the only relevant question, according to a plain reading of the regulation, is whether RUS's actions were approvals pursuant to a loan contract. The Administrative Record clearly shows that they were.

For the 2002 Restructuring, the starting point for analysis is the 1987 DRA, which is clearly a loan contract. This agreement expressly addressed the approvals procedure Old Sunflower needed to follow to undertake the types of actions involved in the 2002 Restructuring. See AR 3952-58, JA __ ("Section 5.02 Negative Covenants" in the DRA). The DRA signatories identified which actions Old Sunflower could take, including the very type of disposition activities undertaken in the 2002 Restructuring that required written consent from a "Specified Majority." See AR 3956, JA __. The September 30, 2002, Agreement

and Consent to Sunflower Restructuring embodied RUS 's consent for the restructuring, given pursuant to the 1987 DRA. See AR 216-66, JA ___.

Three points are salient. First, the 1987 DRA contemplates the possibility of the activities involved in the 2002 Restructuring. Second, the DRA provided a mechanism for these activities to occur. Last, RUS granted its approval for the 2002 Restructuring in the September 2002 agreement. It is inconsequential that the activities taken pursuant to section 5.02(f) of the 1987 DRA led to the creation or existence of new agreements or promissory notes, or included additional parties. Indeed, it is only logical that the corporate changes and asset transfers allowed under the DRA would involve new parties and new notes, particularly in light of RUS 's and other lenders' interests in ensuring maximum recovery of their loans. Quite simply, RUS 's approval for the 2002 Restructuring was done "pursuant to [a] loan contract[]." In concluding otherwise, the District Court ignored the terms of the original 1987 DRA. [12]

As with the 2002 transactions, the District Court ruled that the new 2007 agreements and promissory notes, although again aimed solely at repayment of the 1980 debt, could not co-exist with an approval that fit within the § 1794.3 exemption. This is wrong. The only determinative factor is whether an approval is

[12] The Federal Defendants' Motion to Dismiss provides greater context to the justification for § 1794.3 coverage for each challenged letter and agreement. Dist. Ct. Dkt. No. 12 at 35-43, JA ___.

made pursuant to a loan contract. The 2007 Approvals were made pursuant to sections 5.14 and 5.15 of the 2003 RUS Loan Contract, see AR 4391, JA __; AR 8218, JA __; therefore, the § 1794.3 exemption applies.

3. The District Court erred when it found that section 1794.3 is invalid as applied in this case.

Applying the § 1794.3 exemption to RUS's approval of the 2002 Restructuring or to the 2007 Approvals is not, as the District Court held, invalid or in conflict with NEPA or CEQ's implementing regulations. First, the District Court's conclusion that the regulation, as applied to the transactions, is invalid under NEPA is only correct if RUS's role in the transactions independently triggers NEPA. Here, there was no NEPA trigger because, as explained in Part III.B below, there was no major federal action.

Moreover, RUS's determination promulgated in § 1794.3-after consultation with CEQ[13]-that approvals provided pursuant to loan contracts are not actions subject to NEPA is entitled to substantial deference. See Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 399-400 (9th Cir. 1989) (NEPA regulations developed in consultation with CEQ are entitled to deference). The District Court should have deferred to RUS and CEQ's determination that

[13] See supra note 11 and accompanying text.

exempting this type of action from NEPA review is consistent with NEPA and CEQ's implementing regulations.

B. The District Court erred when it concluded that RUS's cumulative involvement in the Holcomb Expansion Project amounted to "major federal action."

The District Court erred by analyzing all of the challenged RUS actions collectively instead of discretely. "In the NEPA context, the 'final agency action' required by the APA must also be a 'major federal action' under NEPA." Karst, 475 F.3d at 1295 (citing Found. on Econ. Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991)). This rule is consistent with the fundamental tenet of APA review that requires courts to consider each challenged agency action individually "based on the full administrative record that was before the [agency] at the time [it] made [its] decision." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). This legal requirement is also sound policy. Neither RUS, nor its borrowers, can conduct business when years later a series of minor approvals can become the trigger for an EIS, or pose a risk that completed transactions may be undone.

Here, the District Court erroneously viewed all of the challenged agency actions holistically, concluding that "RUS's involvement in the Holcomb Expansion Project constituted a major federal action." Dist. Ct. Dkt. No. 112 at

26, PJA .[14] This Court has expressly rejected this sort of "federalization" analysis. Karst, 475 F.3d at 426. The idea that a collective level of "federal involvement in a nonfederal project may be sufficient to 'federalize' the project for purposes of NEPA," Macht v. Skinner, 916 F.2d 13, 18 (D.C. Cir. 1990), "lacks vitality today" in light of this Court's decisions "reiterating the requirement that NEPA claims must be brought under the APA and allege final agency action." Karst, 475 F.3d at 426. Thus, the District Court erred by holding that RUS 's collective involvement in the Holcomb Expansion Project was a major federal action.

c. No single RUS action was a "major federal action."

The District Court did not, and on the record could not, identify a single RUS action as a major federal action. RUS lacked responsibility and control over the environmental impacts of the Holcomb Expansion Project, and did not provide financial assistance to the Holcomb Expansion Project through any individual action.

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[14] See also Dist. ct. Dkt. No. 112 at 28, PJA _ ("[T]he Court concludes plaintiff has demonstrated that RUS 's involvement in the Holcomb Expansion Project amounted to major federal action."); id. at 33-34, PJA _ (viewed collectively, RUS 's approvals in 2002 and 2007 "became major federal actions"); id. at 42-43, PJA __ ("RUS's involvement amounted to a major federal action.").

1. RUS lacked control and responsibility over the Holcomb Expansion Project.

A federal approval is a "major federal action" only if the environmental effects of the approved project are "subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Stated differently, NEPA requires an EIS only when the information provided by the analysis "may cause the agency to modify its proposed action." Citizens Against Rails-to-Trails, 267 F.3d at 1151.

The District Court, disregarding RUS 's contrary position,[15] held that the agency had the authority under the 2003 RUS Loan Contract and NEPA to control the environmental impacts of the Holcomb Expansion Project through the contested approvals. See Dist. Ct. Dkt. No. 112 at 43-49, PJA __. Neither of these identified bases for RUS 's authority, however, actually gave RUS such power.

a. The 2003 RUS Loan Contract did not provide RUS with control over the environmental impacts of the Holcomb Expansion Project.

The District Court first pointed to sections 5.14 and 5.15 of the 2003 RUS Loan Contract, which require Sunflower to seek prior RUS approval before entering into agreements for development of new generating units at the Holcomb site. See Dist. Ct. Dkt. No. 112 at 31, 44, 48, PJA __ (citing AR 4391, JA). According to the District Court, these provisions gave RUS virtually unlimited authority "to place conditions on any approvals it granted in connection with the

[15] See Dist. Ct. Dkt. No. 91 at 23-32, 38-41, JA_.

Holcomb Expansion Project." Id. at 44. This conclusion is clearly wrong. Morphing a lender's approvals into federal authority to require environmental mitigation violates federal common law and the loan contracts themselves.

Federal common law governs the interpretation of contracts to which the United States is a party.[16] See, e.g., Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988); United States v. Allegheny Cnty., Pa., 322 U.S. 174, 183 (1944), abrogated on other grounds by United States v. City of Detroit, 355 U.S. 466 (1958). Under the federal common law of contracts, the covenant of good faith and fair dealing is implied in every contract and imposes the duty on both parties, including the government, to avoid acting "to destroy the reasonable expectations of the other party regarding the fruits of the contract." Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005). Moreover, "[a] party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously." Pac. Far E. Line, Inc. v. United States, 394 F.2d 990, 998 (Ct. Cl. 1968) (per curiam). See also Contra Costa Cnty. Flood Control & Water Conservation Dist. v. United States, 512 F.2d 1094, 1097-98 (Ct. Cl. 1975)

[16] The 2003 RUS Loan Contract's choice of law clause provides that the agreement is "governed by and construed in accordance with applicable federal law to the extent applicable and, otherwise by the laws of the State of Kansas, except those that would render such choice of law ineffective." AR 4395, JA __.

("[C]oncurrence or approval is not left to unbridled discretion but can be withheld only if objectively reasonable in the particular circumstances.").

These implied covenants and principles limit the scope of RUS's discretion to only what could have been reasonably contemplated by the parties. Critically, RUS's statutory role as "a lending agency rather than a classic public utility regulatory body," defined the contracting parties' expectations. Ark. Elec. Coop. Corp. v. Ark. Pub. Servo Comm'n, 461 U.S. 375, 386 (1983). See also Westlands Water Dist. v. United States, 337 F.3d 1092, 1100 (9th Cir. 2003) (federal contracts "should be interpreted against the backdrop of the legislative scheme that authorized them" (internal quotation and citation omitted)). RUS, and more importantly, Sunflower, would have reasonably expected that the consent provisions of the 2003 RUS Loan Contract were intended only to protect RUS's security interest and right to receive payment from Sunflower. See Morgan City v. S. La. Elec. Coop. Ass'n, 49 F.3d 1074, 1075 (5th Cir. 1995) (per curiam) (7 U.S.C. § 907 "reflects a general federal policy of protecting the integrity of the REA's security interests").

Other clauses of the contract are also necessary to the proper interpretation of the consent clauses cited by Sierra Club. Section 4.15 of the 2003 RUS Loan Contract required Sunflower to "submit plans and specifications for construction to RUS for review and approval, in conformance with RUS Regulations, if the

construction will be financed in whole or in part by a loan made or guaranteed by RUS." AR 4384, JA __ (emphasis added).

In these circumstances, RUS would have been acting in bad faith and in an objectively unreasonable manner had it attempted to meddle in the details of the new generating units' design or impose environmental standards as a condition of its consents. See Contra Costa Cnty., 512 F.2d at 1097-98 ("[C]oncurrence or approval is not left to unbridled discretion but can be withheld only if objectively reasonable in the particular circumstances . . . ."). Any attempt by RUS to use these contractual clauses to transform itself into an environmental regulatory agency would "destroy the reasonable expectations of the other party . . . ." Centex Corp., 395 F.3d at 1304.

The District Court relied heavily on language in the 2003 RUS Loan Contract giving RUS "sole discretion." Dist. Ct. Dkt. No. 112 at 31, PJA __. This language only gave RUS unfettered discretion to determine the effect of any requested approvals on its security. Plainly, it did not allow RUS to mandate, for example, emission standards for a future generating plant. Thus, when providing consents and approvals pursuant to the 2003 RUS Loan Contract, RUS's discretion and authority were limited such that "the information that NEPA provides c[ould] have no [e]ffect on the agency's actions . . . ." Citizens Against Rails-to-Trails, 267 F.3d at 1151.

b. NEPA does not provide RUS with substantive environmental regulatory authority or expand the scope of the agency's discretion.

The District Court next erroneously concluded that "NEPA and the accompanying regulations explicitly grant RUS the requisite discretion" to condition its approval based on environmental impacts. Dist. Ct. Dkt. No. 112 at 47, PJA ___. NEPA, does not, however, provide an independent source of regulatory authority or "expand the range of final decisions an agency is authorized to make." Natural Res. Def. Council, Inc. v. EPA, 859 F.2d 156, 169 (D.C. Cir. 1988) (per curiam) [hereinafter NRDC]. Rather, "[a]ny action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)." Id.

In NRDC the Environmental Protection Agency ("EPA") was empowered by the Clean Water Act ("CWA") to issue permits regulating industrial facilities' discharges to surface water. Relying on NEPA, the EPA attempted to impose permit conditions unrelated to the facilities' discharges to mitigate other environmental effects. Id. In doing so, the agency exceeded its authority. Id. at 168-70. NEPA obligated EPA to consider all environmental impacts of its permitting actions, but did not "expand [the] agency's substantive powers" beyond those expressly set forth in the CWA. Id. at 169.

RUS 's "appropriate province" under its organic statute-the Rural Electrification Act-is purely that of a lender, granting approvals and imposing conditions on its borrowers based only on economic considerations. See 7 U.S.C. § 904(d) (RUS may make loans if it "finds and certifies that ... the security therefor is reasonably adequate and such loan will be repaid within the time agreed"); City of Stillwell, Okla. v. Ozarks Rural Elec. Coop., 79 F.3d 1038, 1044 (10th Cir. 1996) ("The [Rural Electrification] Act did not ... confer regulatory powers upon the REA.") Thus, the Rural Electrification Act does not enable RUS to serve as an environmental regulator of its borrowers.

Moreover, after RUS makes an initial loan, its future authority over the borrower is entirely contractual. See 7 C.F.R. § 1717.600(a) ("The loan contract and mortgage ... gives RUS ... the right to approve or disapprove certain actions contemplated by the borrowers."). Thus, in the interactions between RUS and Sunflower at issue here, RUS 's only source of authority over Sunflower is the contracts in place between the parties. As discussed above, the 2003 RUS Loan Contract did not provide RUS with the authority to impose environmental conditions. Because RUS did not have the power to impose environmental

conditions on a future coal plant, none of the RUS approvals required an EIS. [17] See Citizens Against Rails-to-Trails, 267 F.3d at 1151.

2. RUS did not provide significant financial assistance to Sunflower for the Holcomb Expansion Project.

Although financial assistance can trigger NEPA, see 40 C.F.R. § 1508.18(a), the amount of federal funding to a non-federal project must be "significant." Gov't of Province of Manitoba v. Norton, 398 F. Supp. 2d 41, 54 (D.D.C. 2005); Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 54-55 (D.D.C. 2003). See also NAACP v. Med. Ctr., Inc., 584 F.2d 619, 631 (3rd Cir. 1978) (EIS required "when massive federal financial assistance has been given to a project"). Contrary to the District Court's conclusion, see Dist. Ct. Dkt. No. 112 at 42, PJA ___, the administrative record shows that RUS provided no financial assistance to Sunflower through the 2002 Restructuring. Alternatively, to the extent RUS did provide assistance to Sunflower, it was not for the Holcomb Expansion Project, and was not "significant."

[17] As the Federal Defendants adeptly explained below, RUS also had no authority under the Consolidated Farm and Rural Development Act to impose environmental conditions related to the Holcomb Expansion Project in connection with the 2002 Restructuring or the agency's other consents and approvals. See Dist. ct. Dkt. No. 91 at 27-28, JA ___.

a. No RUS debt was forgiven or reduced, and no new financing was provided as part of the 2002 Restructuring.

The District Court primarily based its conclusion that the 2002 Restructuring provided financial assistance on the fact that the total value of the promissory notes issued by New Sunflower to RUS were less than the sum of the amount then owed by Old Sunflower under its existing DRA notes. Dist. Ct. Dkt. No. 112 at 39-40, PJA ___. This fact is completely irrelevant. Even if New Sunflower makes all of its payments on the notes it issued in 2002, any outstanding, unpaid debt owed by Old Sunflower on its DRA notes will remain. Absolutely none of Old Sunflower's existing debt to RUS was discharged or forgiven in 2002, nor has it subsequently been discharged or forgiven; Old Sunflower's existing notes to RUS "remain an obligation of [Old] Sunflower." AR 182, JA ___. As the administrative record unambiguously states, the 2002 Restructuring did not "reamortize debt, extend the maturity of debt, reduce the interest rate on debt, forgive interest accrued, penalties, or costs or forgive loan principal." AR 2955A.2, JA ___.

Nor does the fact that some amount of Old Sunflower's debt may be written off in the distant future justify the District Court's conclusion. See Dist. Ct. Dkt. No. 112 at 39, PJA ___. Until there is a "firm commitment" for federal funding, there is no major federal action. Macht, 916 F.2d at 17. Here, RUS has committed to nothing with respect to writing off Old Sunflower debt. The speculative future

write-off of Old Sunflower debt cannot be viewed as the provision of substantial financial assistance in 2002.

Moreover, no new loans were made by RUS as part of the 2002 Restructuring. In fact, not a single penny flowed from RUS to Old Sunflower or New Sunflower as part of the 2002 Restructuring. Quite the opposite; new promissory notes were issued by New Sunflower to RUS "for the purchase of [Old] Sunflower assets" at fair market value.[18] AR 178, JA __. It is difficult to conceive how a transaction where no debt was forgiven and no new loans were made could amount to financial assistance.

b. Sunflower did not realize a tax benefit as a result of the 2002 Restructuring.

The District Court also asserted that "Sunflower realized a tax benefit as a result of the 2002 Debt Restructuring in the amount of [redacted]." [19] Dist. Ct. Dkt. No. 112 at 40, PJA __ (citing AR P00002A, PJA [redacted]. This is simply not correct.

[18] See 7 C.F.R. § 1717.1204(f)(1) (prohibiting RUS from settling a debt "for less than the value . . . of the borrower's system and other collateral").

[19] The District Court stated that "the parties agree[d]" to this fact, Dist. Ct. Dkt. No. 112 at 40, PJA __, but Sunflower never agreed to it. Moreover, neither Sierra Club nor the Federal Defendants clearly asserted that Sunflower realized a [redacted] tax benefit. See Dist. ct. Dkt. No. 88 (Unredacted) at 21, PJA __; Dist. Ct. Dkt. No. 91 at 33, JA __.

First, the District Court cited a document discussing tax implications of the 2002 Restructuring for Old Sunflower, a separate and distinct corporate entity from Sunflower.[20] Second, the document cited states that Old Sunflower would "[redacted]" from the sale of its assets to New Sunflower that would potentially be subject to taxation. AR P00002A_DOC4.5, PJA __. The document explained that Old Sunflower was going to have a substantial tax liability as a result of the sale, not a tax benefit. AR P00002A_DOC4.6, PJA __.

c. Any financial assistance the 2002 Restructuring provided to Sunflower cannot be accounted to the Holcomb Expansion Project and was not significant.

Even if the Court concludes that RUS provided financial assistance through the 2002 Restructuring, such assistance was not for the Holcomb Expansion Project. Importantly, RUS did not view its action at the time as providing financial assistance for the Holcomb Expansion Project. To the contrary, RUS stated in 2002 that it "will not provide financial assistance for the development or construction of the potential new generation facility," Dist. Ct. Dkt. No. 88-1 at 5,

[20] "A corporation and its stockholders are generally to be treated as separate entities. Only under exceptional circumstances . . . can the difference be disregarded." Burnet v. Clark, 287 U.S. 410, 415 (1932). Sierra Club has not alleged such exceptional circumstances exist here. See United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc., 322 F.3d 738, 740-41 (D.C. Cir. 2003) (corporate form cannot be set aside absent pleading and proof by the plaintiff that it is a sham).

JA __. and likewise argued to the District Court in 2009 that it "has not provided any federal funding for the Holcomb Expansion Project." Dist. ct. Dkt. No. 91 at 33, JA . The term "financial assistance" is a term of art employed in RUS's NEPA regulations. See, e.g., 7 C.F.R. § 1794.3 ("The provisions of this part apply to actions by RUS including the approval of financial assistance ...." (emphasis added)). Thus, the District Court should have deferred to RUS 's interpretation of its own regulations, see Auer, 519 U.S. at 461, but it did not.

Furthermore, financial assistance to Sunflower in 2002 cannot be equated with financial assistance to the Holcomb Expansion Project. The record before RUS in 2002 showed that Sunflower would not own any share whatsoever in the project. To the contrary, Sunflower planned to sell all of its rights in the contemplated new unit to another party. See AR P00001A.1, PJA __. Even now, the PODA provides that Tri-State, not Sunflower, will construct and own any new generating unit. See AR 5636, JA .

The District Court reasoned that the alleged financial benefits from the 2002 Restructuring were connected to the Holcomb Expansion Project because of the way Old Sunflower's assets were divided and because RUS agreed to release its lien on the Holcomb 2 site in the future. Dist. ct. Dkt. No. 112 at 40-42, PJA __. The manner in which Old Sunflower assets were divided was a feature of the 2002 Restructuring designed to "accommodate []" the Holcomb Expansion Project. Dist.

Ct. Dkt. No. 88-1 at 5, JA __. This feature of the transaction, however, in no way involved government funds flowing to the Holcomb Expansion Project, much less "significant federal funding." Mineral Policy Ctr., 292 F. Supp. 2d at 54-55.

That leaves only RUS's conditional agreement to release its lien on the Holcomb 2 site at some point in the future. Initially, this is not "financial assistance" because RUS agreed it would release its lien only when it receives equivalent value in return, i.e., a security interest in rent paid by the developer of Holcomb 2. See AR 231-32, JA __. Moreover, neither the District Court nor Sierra Club has pointed to any precedent that would suggest that a mere promise to release a lien in the future rises to the level of significant federal financial assistance. When viewed in perspective, RUS's agreement to release its lien on the Holcomb 2 site is but one very small piece of a much larger project. Such "incidental federal involvement" is not major federal action. Save the Bay, Inc. v. U.S. Corps of Eng'rs, 610 F.2d 322, 327 (5th Cir. 1980).

Finally, Sunflower estimates that the total cost of a single new coal-fired generating unit at Holcomb will be approximately $1.5 billion. Dist. Ct. Dkt. No. 116-2 at 5, JA __. Nothing in the administrative record indicates that RUS, through the 2002 Restructuring, provided enough financial assistance to make the

2002 Restructuring a major federal action?[21] See, e.g., Rattlesnake Coal. v. EPA, 509 F.3d 1095, 1101 (9th Cir. 2007) (federal funding comprising "just under 6%" of total project budget was not major federal action); Citizens Alert Regarding the Env't v. EPA, 259 F. Supp. 2d 9, 21-22 (D.D.C. 2003) (no major federal action when federal funding would cover only 9% of the total project cost).[22]

IV. The District Court erred when it issued an injunction in this case.

Although the District Court declined to invalidate or vacate any of the 2002 or 2007 RUS approvals, the Court nevertheless issued an injunction against RUS, a serious remedy. See Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). The District Court's remedial order was flawed and should be reversed.

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[21] Indeed, under unchallenged RUS NEPA regulations, financial assistance to a borrower owning five percent or less of a project is not a federal action under NEPA. 7 C.F.R. § 1794.20(a).

[22] In a footnote, the District Court also suggested that RUS provided assistance by providing a lien subordination. See Dist. ct. Dkt. No. 112 at 34 n.13, PJA __. Sierra Club asserted that Subordination Non-Disturbance and Attornment Agreements ("SNDAs") executed by RUS in 2007 were lien subordinations and amounted to financial assistance, see Dist. ct. Dkt. No. 88 at 35-36, PJA __, so presumably this is what the District Court was referring to. The SNDAs were actually not lien subordinations, but instead subordinate Tri-State's lease to RUS's lien. AR 8050, JA __; AR 8059, JA __. Moreover, the cases cited describe extensive federal involvement in the planning and execution of non-federal projects and are not comparable to RUS's simple execution of the SNDAs.

A. The District Court remanded the case to RUS; therefore, no injunction was required.

Under this Court's precedent, a remand is the usual remedy in a case like this. "When a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal." N Air Cargo v. U.S. Postal Serv., 674 F.3d 852, 861 (D.C. Cir. 2012). The District Court remanded the case to RUS; more was not required.

B. The District Court's injunction is impermissible.

1. The injunction fails to remedy the particular alleged NEPA violations.

An injunction in a NEPA case is only appropriate if it "remed[ies] the particular violations that have taken place." Andrus, 580 F.2d at 485. As discussed above in Part II.C, the District Court's injunction does not even attempt to address the past NEPA violations.

2. The injunction improperly enjoins future RUS action.

The injunction prohibits RUS from "issu[ing] any approvals or consents for agreements or arrangements directly related to the Holcomb Expansion Project, or tak[ing] any other major federal actions in connection with the Holcomb Expansion Project, until an EIS is complete." Dist. Ct. Dkt. No. 121, JA __. This

injunction impermissibly restricts agency actions that have not yet even been proposed.

The APA limits judicial review to "final agency action[s]." 5 U.S.C. § 704. Here, however, the Court's injunction preemptively adjudicates agency actions that have not yet occurred. This is impermissible under the APA. See also Dist. Ct. Dkt. No. 68 at 11-13, JA __.

Additionally, under the ripeness doctrine, a court may not review an agency action until the court can evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Util. Air Regulatory Grp. v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003) (internal quotation and citation omitted). When an agency has not yet made a final decision on an action, any NEPA challenge to that action is not yet ripe for review. See, e.g., Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006) (interim plan to transport nuclear waste to disposal site not ripe).

Here, it is not yet possible to determine whether any future RUS approvals, consents, or other actions will---or will not-qualify as maj or federal actions under

NEPA. Moreover, the future RUS approvals could fall within the ambit of 7 C.F.R. § 1794.3 or some other applicable NEPA exemption or categorical

exclusion.[23] Without knowing the specifics of the particular future approvals, it is impossible to evaluate now whether such hypothetical approvals would require an EIS. See also Dist. ct. Dkt. No. 68 at 13-14, JA __.

The Supreme Court recently concluded in Geertson Seed Farms that a District Court had prematurely enjoined future agency action. 130 S. Ct. at 2758-60. In that case, the plaintiffs challenged a decision of the Animal and Plant Health Inspection Service ("APHIS") to "completely deregulate [Roundup Ready Alfalfa ("RRA")]" without complying with NEPA. Id. at 2758. After finding that APHIS violated NEPA when it implemented the complete deregulation of RRA, the District Court enjoined any future "partial deregulation" of RRA. Id. The Supreme Court held that this injunction was inappropriate, explaining that "[u]ntil APHIS actually seeks to effect a partial deregulation, any judicial review of such a decision is premature." Id. Until the agency actually considered a plan for partial deregulation of RRA, the plaintiffs could not "show that they will suffer irreparable injury" resulting from a potential future partial deregulation. Id. at 2759-60.

As in Geertson Seed Farms, the District Court has enjoined future agency action that has not yet even been proposed, and which could be very different in

[23] Sierra Club did not facially challenge 7 C.F.R. § 1794.3, and the District Court found only that § 1794.3 either did not apply to or was invalid as applied to certain of RUS's past actions. See Dist. Ct. Dkt. No. 112 at 49-54, PJA __.

many ways from the past actions that the District Court found violated NEPA. Accordingly, "[u]ntil such time as the agency decides whether and how to exercise its regulatory authority . . . the court[] ha[s] no cause to intervene." Id. at 2760.

3. The injunction is vague and overly broad.

An injunction must not be vague. See Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (a court may not "sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt"). Nor should it "include, as a necessary descriptor of the forbidden conduct, an undefined term that the circumstances of the case do not clarify." United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1137 (D.C. Cir. 2009) (per curiam).

The injunction is impermissibly vague because it uses the undefined terms "directly related to" and "in connection with." See id. RUS is unable to determine whether the actions for which Sunflower has sought approval are "directly related to" or "in connection with" the Holcomb Expansion Project. As Sunflower predicted, RUS has interpreted the injunction broadly, reading it to prohibit RUS from issuing almost any approvals to Sunflower, even though none of Sunflower's requests have been legitimately related to the Holcomb Expansion Project. See Dist. Ct. Dkt. No. 116-2 at ♦ 45, JA __. As a result, Sunflower has been unable to timely make necessary capital improvements, meet its obligations to maintain and operate its system of transmission lines, or maintain adequate cash flow. See id. ♦♦

45-48, JA ___. In light of the District Court's sweeping interpretation of the types of RUS actions that are linked with the Holcomb Expansion Project and vague language of the injunction, the agency remains paralyzed and nonresponsive. Further, by ordering RUS not to "take any other major federal actions in connection with the Holcomb Expansion Project, until an EIS is complete," Dist. Ct. Dkt. No. 121, JA ___, the District Court improperly entered a "sweeping injunction to obey the law . . . ." Swift & Co., 196 U.S. at 401. If the Holcomb Expansion Project were a "connected action" to an RUS major federal action, it would already have to be assessed in the same EIS. See 40 C.F.R. § 1508.25(a)(1).

An injunction must also be "narrowly tailored to remedy the harm shown." Gulf Oil Corp. v. Brock, 778 F.2d 834, 842 (D.C. Cir. 1985). In other words, the injunction should not prohibit any more activity than is necessary to ensure that the particular identified harm is abated. See id.

The District Court's injunction goes far beyond remedying "the harm shown" because it prohibits actions that NEPA allows prior to the preparation of an EIS. Id. CEQ regulations explicitly recognize that many preliminary activities can rightfully occur prior to the completion of a legally necessary EIS. 40 C.F.R. § 1506.1(d) ("Nothing in this section shall preclude [RUS] approval of minimal expenditures not affecting the environment (e.g. long lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees

from the Administration."). See also 7 C.F.R. § 1794.15 (allowing any activities so long as they would not have an adverse environmental impact, preclude alternatives, or impair RUS 's security interest if approval were ultimately denied). In contrast, this injunction prohibits anything deemed "directly related to" the Holcomb Expansion Project, including any action or arrangements for the planning or development of any additional generating units. The District Court's injunction should therefore be vacated.

CONCLUSION

For the foregoing reasons, Sunflower respectfully requests that this Court reverse the District Court's ruling on summary judgment and the associated remedial order and remand with instructions to (1) dismiss the case as moot, or (2) enter summary judgment in favor of Sunflower and the Federal Defendants and dismiss the action. Additionally, Sunflower respectfully requests that this Court vacate the District Court's injunction.

Respectfully submitted,

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By: /s/ Sharon M. Mattox

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 13,900 words exclusive of the certificate required by Circuit Rule 28(a)(1), table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word 2010 to compute the word count.

/s/ Sharon M. Mattox
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CERTIFICATE OF SERVICE

I certify that on October 29, 2012, a true and correct copy of the foregoing was served upon all counsel of record via the Court's case management electronic case filing system. According to the system, all counsel of record are registered users.

/s/ Sharon M. Mattox
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