UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHESAPEAKE & OHIO CANAL ASSOCIATION, and WASHINGTON CANOE CLUB Plaintiffs, v. GALE NORTON, in her official capacity, as Secretary of the U.S. DEPARTMENT OF THE INTERIOR and FRAN MAINELLA, in her official capacity as Director, National Park Service Defendants.	)	Case No. 1:04-cv-01714 Judge Ricardo M. Urbina

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants Gale Norton, the United States Department of the Interior, and Fran Mainella (collectively, the "Federal Defendants") hereby submit this reply brief in support of their motion to dismiss. Plaintiffs' complaint must be dismissed in its entirety because Plaintiffs have not challenged a final agency action as required by the Administrative Procedure Act ("APA"). Plaintiffs' opposition to our motion to dismiss clarifies that their complaint is based on Plaintiffs' erroneous premise that the Preliminary Agreement to Exchange Real Property ("Preliminary Agreement") qualifies as "final agency action" under the APA. As explained below, the Preliminary Agreement cannot constitute final agency action, as that term is defined by the APA, because several steps in the land exchange process still must occur before the exchange challenged here can go forward.

The lack of final agency action in this case is far from a theoretical problem. Until the Preliminary Agreement is finalized and further steps have been taken, the agency's action remains undefined and incomplete. Judicial review should be withheld until the agency's action is sufficiently final.

In addition, because the National Park Service ("NPS") has committed to doing further consultation and analysis under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"), Plaintiffs' claims based on these statutes are either moot or not ripe. Finally, Plaintiffs' claim under the Land, Water, and Conservation Fund Act, 16 U.S.C. § 460*l*-22(b) ("LWCFA"), is not ripe because no land has been exchanged in violation of the statute. In sum, because Plaintiffs' opposition does not overcome the finality, ripeness and mootness arguments in the Federal Defendants' Rule 12(b) motion, the complaint must be dismissed.

ARGUMENT

I. THE PRELIMINARY AGREEMENT IS NOT FINAL AGENCY ACTION

Plaintiffs' opposition to Defendants' motion to dismiss makes it clear that Plaintiffs' challenge is based solely on a "Preliminary Agreement" to exchange land. Pls.' Opp'n to Defs.' Mot. to Dismiss (hereinafter "Pls.' Opp'n") at 1, 8–15. The Preliminary Agreement is simply not a final agency action because it does not impose an obligation, deny a right, or fix a legal relationship, but, rather, provides a process through which the parties to the agreement can determine whether an exchange should take place. See Action on Smoking and Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994) ("Agency action is final when it 'imposes an

obligation, denies a right, or fixes some legal relationship.'") (quoting NRDC v. United Stated Nuclear Regulatory Comm'n, 680 F.2d 810, 815 (D.C. Cir. 1982)). The Preliminary Agreement cannot impose obligations, deny rights, or fix legal relationships because there are several conditions precedent that need to be meet before the land exchange can be consummated. Accordingly, the Preliminary Agreement does not represent the end of the agency's decisionmaking process and there is no final agency action for this Court to review under the APA. The Court, therefore, does not have jurisdiction to review this action, and plaintiffs have failed to state any claim for which relief can be granted under the APA.

One of the requirements that an agency action must meet before it can be deemed "final" is that the challenged action must "mark the 'consummation' of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature." Harris v. F.A.A., 353 F.3d 1006, 1010 (D.C. Cir. 2004) (citing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)). On its face, the Preliminary Agreement establishes that it is tentative and interlocutory. The Agreement states that "[t]he parties agree to follow the process set out in this Agreement to determine whether the exchange of Tracts 102-109 and 102-114, between the parties to establish a non-motorized recreational boathouse facility on Tract 102-114 can be accomplished." See Exh. 1 to Defendants' Motion to Dismiss [Preliminary Agreement at 2, ¶ 1][1/] (emphasis added.). The Preliminary Agreement is also indefinite about the property subject to the potential land exchange. It states that the description of Tract 102-114 may change subject to the design of the proposed boathouse. Id. [Preliminary Agreement at 2, ¶ 1]. As discussed more fully in the Federal Defendants' motion to dismiss, the Preliminary Agreement

[1/]The exhibits cited to in this brief are those attached to the Defendants' motion to dismiss.

does not bind the NPS to exchange any land because several conditions precedent exist that must be satisfied before there is final agency action under the APA. For one thing, NPS must complete the reopened NEPA and NHPA processes. See Lawler Decl. ¶¶ 6–8, 10. The NPS must also complete an appraisal in accordance with federal acquisition standards. Lawler Decl. ¶¶ 6–7, 10; Exh. 1 [Preliminary Agreement] at 4. And even after the foregoing prerequisites are fulfilled, the NPS must submit a comprehensive informational package, including a valid appraisal, to the Appropriations Committee of the U.S. Senate and House of Representatives, and receive written notification from the Appropriations Committees of both Houses of Congress approving the exchange. Lawler Decl. ¶¶ 6–7, 10; Exh. 1 [Preliminary Agreement] at 4. As a separate matter, even if a land exchange were to receive congressional approval, the exchange is subject to a condition that may never occur – a favorable zoning ruling from a local government. Land that is presently titled in the United States, which is currently unzoned, must receive unappealable zoning approval. Exh. 1 [Preliminary Agreement] at 7, ¶ 11(a). An appeal before the District of Columbia Court of Appeals is presently pending. If that appeal is decided favorably to the appellants, it is possible that the land exchange will not be consummated. Because many conditions still need to be fulfilled, and the project may change during the course of securing approvals, the Preliminary Agreement is simply not the end of the agency's decisionmaking process.

Plaintiffs nonetheless rely heavily on Daingerfield Island Protection Society v. Lujan, 797 F. Supp. 25 (D.D.C. 1992) for the asserted proposition that a federal land exchange becomes final agency action at the time of execution of the land exchange agreement, not the transfer of title. Pls.' Opp'n at 10–12. Plaintiffs' reliance is misplaced.

Daingerfield was a statute of limitations case. In Daingerfield, the United States executed a Land Exchange Agreement in 1970, which was signed and became effective on July 6, 1971. Daingerfield Island Protective Soc. v. Lujan, 920 F.2d 32, 34 (D.C. Cir. 1990). as the appellate court explained,

> The 1970 Exchange Agreement provided that Fairchild would be entitled to Parkway access as soon as he deeded his Dyke Marsh property to the government. After delaying for more than a year, Fairchild conveyed a deed to the property in June 1971 and signed the Exchange Agreement on July 6, 1971. By its terms, the Agreement became effective on that date.

Id. (internal citations to record omitted). [2/] Thus, the exchange agreement at issue in Daingerfield, unlike the Preliminary Agreement here, became binding on and enforceable against the United States as soon as it became effective. In contrast to the factual circumstances here, the execution of the Daingerfield Exchange Agreement represented the culmination of the agency's decisionmaking process. After the agency signed the Exchange Agreement in Daingerfield, the only action remaining before the agreement became final rested with the other party. Once the other party signed the agreement and conveyed the property, the land exchange

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[2/]In Daingerfield, therefore, the parties signed an Exchange Agreement that became effective upon signing and conveyance of property. Daingerfield, 710 F. Supp. at 370 n.3. The district court held that the United States was "at all times obligated since the execution of the Exchange Agreement in 1971." Id. at 371. Because under the arrangement, the United States was not called upon to execute a deed of easement conveying a right-of-way on the other parcel of land involving in the transfer in 1984, the plaintiffs argued in the statute of limitations context that their claim did not accrue until 1984, when the United States transferred the deed of easement. Daingerfield, 797 F. Supp. at 28 n.4. The court held, however, that the plaintiffs' complaint challenged the approval of the land exchange and their cause of action accrued at the latest, when the Exchange Agreement, by its terms, became effective, on July 6, 1971. Id.

became fully enforceable.[3/]

In the case at bar, as noted, the Preliminary Agreement in this case simply establishes a process by which the parties determine whether it is advisable to exchange land. The agency's signing of the agreement did not effectuate any land exchange.[4/] Instead, until the conditions precedent in the terms of the Preliminary Agreement are met, the details of the project can change and the agency's decisionmaking process cannot be deemed complete. Therefore, there is no final agency action flowing from the NPS's participation in the Preliminary Agreement.

Plaintiffs nonetheless seek to establish that the Preliminary Agreement constitutes final agency action by relying on two cases, National Steel Corp. v. Gorsuch, 700 F.2d 314, 325 n.16 (6th Cir. 1983), and First National Bank of Fayetteville v. Smith, 508 F.2d 1371, 1379 n.3 (9th Cir. 1974), for the proposition that agency action can be deemed final even when future conditions must be fulfilled before the agency action can take effect. Those cases are inapposite, however, because (like Daingerfield) they involved agency decisionmaking that was for all purposes complete, subject only to conditions that must be satisfied by other parties, not by the

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[3/]It is also notable that in Daingerfield, the district court determined that the action had not accrued when the United States made its final decision and signed the Exchange Agreement, but rather concluded that the action accrued when the Exchange Agreement became effective. Daingerfield Island, 797 F. Supp. at 28 n.4. This further establishes that there can be no rights or obligations fixed, and thus no final agency action, by a federal land exchange agreement until the agreement becomes fully enforceable.

[4/]Plaintiffs argue that it is "hornbook law" that a contract for conveyance of real property conveys equitable title and is enforceable by specific performance prior to closing. See Pls.' Opp'n at 10. Even if the Preliminary Agreement were a contract for conveyance of real property, courts have found that there is no waiver of sovereign immunity for specific performance of a breach of contract. See, e.g., Coggeshall Development Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989); see also Price v. U.S. Gen. Servs. Admin., 894 F.2d 323, 324 (9th Cir. 1990). Therefore, federal courts do not have power to order the specific performance of the United States of alleged contractual obligations. Coggeshall, 884 F.2d at 3.

federal decisionmaker. For example, in National Steel, the court held that despite the fact that "further action by the state" was required in order for the Environmental Protection Agency's approval to be final, the agency's conditional approval represented its final action. National Steel, 700 F.2d at 325 n.16. The court noted that the "conditional approval" was a decision by the Administrator of the EPA that if the state met certain specific conditions, the approval would be granted. The conditional approval, therefore, was the agency's final decision on the matter.

Likewise, in First National Bank, the court found that the Comptroller of the Currency of the United States' "grant of preliminary approval contained numerous conditions for the organizers of the proposed bank to fulfill." First National Bank, 508 F.2d at 1379 n.3. The court held that the action was final, despite it being "preliminary approval," because the Comptroller's decisionmaking process was complete. Id. Both National Steel and First National Bank stand for the proposition that if the agency's decisionmaking is complete, the agency's action is sufficiently final for judicial review even though its effectiveness may be is contingent on other parties meeting certain requirements.

The case at bar, however, is not such a case. Before the NPS can approve, and be bound to any commitment to participate in, a land exchange, the future conditions that must be fulfilled must be performed by the agency itself. In particular, before it can be deemed committed to enter upon a land exchange, the NPS (as explained above) must complete the NEPA and NHPA processes, obtain an appraisal, and submit a comprehensive informational package to the Appropriations Committees of the U.S. Senate and the House of Representatives, and receive written notification from the Appropriations Committees of both Houses approving the exchange. Because it is subject to all of those future contingencies, the Preliminary Agreement

is distinguishable from the regulatory actions deemed final in National Steel and First National Bank and does not represent the agency's final decision on the matter.[5/]

The other cases Plaintiff cites are likewise distinguishable. See Pls.' Opp'n at 11–12. For example, in Center for Biological Diversity v. United States Department of the Interior, 255 F. Supp. 2d 1030 (D. Ariz. 2003), the BLM issued a Record of Decision approving a land exchange. Id. at 1032. The plaintiffs in that lawsuit filed an administrative appeal and a request for a stay of the land exchange decision to the Interior Board of Land Appeals ("IBLA"). When the IBLA did not rule on the stay request within a 45-day period prescribed by Interior's regulations, the land exchange became "final" under express provisions of those regulations, and the plaintiffs filed their lawsuit in district court. Thus, in contrast to the circumstances here, the land exchange in Center for Biological Diversity had already become "final" and "effective" by regulation by the time the plaintiff filed suit in federal court. Unlike the circumstances in Center for Biological Diversity, there is no land exchange agreement that has become final or effective in this case, and thus the fact situation in Center for Biological Diversity is wholly distinguishable.

[5/]Defendants also argued in their motion to dismiss that if Plaintiffs contend the final agency action was the 1995 EA and FONSI, that challenge is barred by the statute of limitations. Plaintiffs opposition brief indicates that Plaintiffs contend the final agency action at issue is the Preliminary Agreement. In any event, however, as explained more thoroughly in Defendants' motion to dismiss, the statute of limitations certainly applies to NEPA cases and would bar Plaintiffs' challenge here. See, e.g., Western Land Exchange Project v. United States Bureau of Land Management, 315 F. Supp. 2d 1068, 1083 (D. Nev. 2004) ("[I]t bears mention that NEPA provides a procedural remedy for a procedural injury, and that plaintiffs' alleged injury occurred when the EA was published and the DR/FONSI was adopted.")

II. EVEN IF THE PRELIMINARY AGREEMENT COULD BE DEEMED FINAL AGENCY ACTION, PLAINTIFFS' NEPA, NHPA, AND LWCFA CLAIMS ARE MOOT AND/OR UNRIPE FOR JUDICIAL REVIEW

Even assuming that the Preliminary Agreement could reasonably be considered final agency action under the APA, this Court still lacks jurisdiction over Plaintiffs' NEPA, NHPA, and LWCFA claims because they are moot and/or not ripe for judicial review.

A. Plaintiffs NEPA and NHPA Claims Are Moot Or Unripe

The Federal Defendants have committed themselves to do additional NEPA analysis and to reopen the NHPA consultation process. Further work must be done with respect to appraisal of the land subject to a future land exchange decision. These future, uncompleted administrative processes highlight the central problem with this case: there is no live case or controversy because the agency's decisionmaking is ongoing. To the extent that Plaintiffs challenge the agency's prior NEPA and NHPA documents, those challenges are moot because the agency is committed to reconsider the project. The previous EA and FONSI, therefore, will be superceded by new NEPA documentation. To the extent that Plaintiffs challenge the NEPA and NHPA work that has not yet been completed, that challenge is not yet ripe.

Plaintiffs nonetheless argue that their NEPA and NHPA claims cannot be barred by the ripeness doctrine because they were ripe at the time they filed their complaint. Pls.' Opp'n at 22–24. On the contrary, to the extent that Plaintiffs challenge the existing EA, FONSI, and MOA, those claims are moot because the Federal Defendants are in the process of conducting a new EA and additional Section 106 consultation. To the extent that Plaintiffs seek to challenge the future EA and Section 106 consultation, that challenge is not ripe because the agency has not yet made its final determinations on those matters.

Plaintiffs argue that their case is not moot because "NPS has failed to demonstrate that it has fully eradicated the effects of each of the violations of NEPA alleged in the complaint," and because, Plaintiffs assert, preparation of a new EA will not remedy NPS's violation of the MOA.[6] Pls.' Opp'n at 24–27. Plaintiffs' arguments are without merit. Plaintiffs' NEPA and NHPA claims are moot because the documents underlying Plaintiffs' NEPA and NHPA claims are obsolete, and will be supplanted by new NEPA and NHPA documents, meaning that this Court is unable to grant Plaintiffs any meaningful relief.

Under D.C. Circuit caselaw, a claim is moot when intervening events prevent the court from granting any effective relief, even if the plaintiff were to prevail on its underlying claim. Burlington Northern R. Co. v. Surface Transp. Bd., 75 F.3d 685, 688 (D.C. Cir. 1996); Gaines v. Continental Mortgage and Inv. Corp., 865 F.2d 375, 378 (D.C. Cir. 1989). "Article III confines federal courts to the resolution of actual cases or controversies, and thus prevents their passing on moot questions — ones where intervening events make it impossible to grant the prevailing party effective relief." Burlington Northern R., 75 F.3d at 688 (citing Church of Scientology v. United States, 506 U.S. 9, 11 (1992)). When no relief for the alleged violation can be given, the case is moot. Because NEPA is a procedural statute, the proper remedy for a violation of NEPA is a remand to the agency for further reconsideration. See, e.g., Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency

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[6]Plaintiffs also argue that Defendants' ripeness argument is at odds with its statute of limitations argument because the case cannot be brought both too early and too late at the same time. On the contrary, Defendants made these arguments in the alternative. If Plaintiffs' challenge is to the 1995 EA and FONSI, the challenge, brought more than six years after the challenged NEPA documents were issued, is too late. See Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999); Sierra Club v. Slater, 120 F.3d 623, 630 (6th Cir. 1997). If Plaintiffs' challenge is to the not-yet-completed NEPA documents, it is too early.

action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). In the case at bar, no relief can be given for Plaintiffs' NEPA and NHPA claims because Defendants are currently involved in ongoing administrative processes, and have already committed to do additional work.

Plaintiffs nevertheless make three arguments in an attempt to overcome mootness. First, Plaintiffs argue that Defendants have not met the high bar for the "voluntary compliance" exception to the mootness doctrine. Pls.' Opp'n at 24–27. Second, according to Plaintiffs, the Federal Defendants' completion of a new EA will not remedy their NEPA claim. Finally, Plaintiffs argue that an new EA will not remedy the Federal Defendants' violation of the MOA. Id. at 24–28. As we now explain, these arguments are without merit.

Plaintiffs' attempt to rely on the "voluntary compliance" exception to the mootness doctrine to avoid dismissal, see id. at 24–27, must fail because that doctrine is inapplicable to the case at bar. In a voluntary cessation case, ~~the~~ a defendant seeks to establish mootness concerning a claim for declaratory or injunctive relief by voluntarily stopping allegedly unlawful activity. See, e.g., United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). As the Ninth Circuit explained, "[v]oluntary cessation saves an issue from becoming moot if the defendant voluntarily stops the allegedly illegal conduct to avoid a judgment against him, unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Forest Guardians v. U.S. Forest Service, 329 F.3d 1089, 1095 (9th Cir. 2003) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

Plaintiffs'opposition to dismissal is not well-served by the "voluntary cessation" line of cases. Simply stated, the instant case does not involve voluntary cessation of allegedly illegal activity. The Federal Defendants have committed to doing additional NEPA and NHPA work, not because the Federal Defendants' prior NEPA and NHPA work was not fully compliant with those statutes, but because the land exchange proposal is still undergoing change, and thus warrants updated NEPA and NHPA review. This case is moot not because of "cessation of illegal conduct to avoid a judgment," but because the documents underlying Plaintiffs' claims — the EA, FONSI, and MOA — may be superseded during the on-going NEPA and NHPA processes. The "voluntary cessation" doctrine exists to prevent a defendant from creating articial mootness by voluntarily ceasing illegal action long enough to obtain a dismissal, and then resuming the illegal conduct. There is no such risk in the case at bar because Federal Defendants have no plans to proceed with a future land exchange without complying with NEPA and NHPA, and Plaintiffs will have a full opportunity to challenge the new NEPA and NHPA documents when there has been final agency action and the case is ripe. Accordingly, the "voluntary cessation" doctrine does not apply to the case at bar. [7/]

Next, Plaintiffs argue in their opposition that, in order for the case to be moot, the Federal

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[7/]The theory underlying Plaintiffs' "voluntary cessation" claim has been discredited by Oregon Natural Resources Council, Inc. v. Grossarth, 979 F.2d 1377 (9th Cir. 1992) ("ONRC"), a case involving similar facts. In ONRC, the Forest Service agreed to cancel the timber sale that was the subject of the plaintiffs' lawsuit and prepare an environment impact statement ("EIS"). The Forest Service noted that after it completed the EIS, it would offer another timber sale. The plaintiffs argued that the case was not moot because of the "voluntary cessation" doctrine. The court held, however, that the voluntary cessation doctrine did not apply. 979 F.2d at 1979. The court further held that the plaintiffs' case was not ripe because the nature and effect of the second sale was unknown at the time of suit. Id. Likewise, in the case at bar, Plaintiffs' argument that another EA will be issued does not save the case from being moot. Any challenge Plaintiffs may wish to mount to the as-yet-incomplete EA is not yet ripe.

Defendants must remedy every violation of which Plaintiffs complain. Pls.' Opp'n at 25–27. Specifically, Plaintiffs argue that because the Federal Defendants have indicated that they initally will perform a new EA, it does not address Plaintiffs' request that an EIS be prepared. Id. at 25–26. In addition, according to Plaintiffs, a new EA, once completed, will not address alternatives to the proposed boathouse. Id. at 26. Both arguments are unavailing. The Federal Defendants have already committed to issuing a new EA. The purpose of an EA is to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a). While at this point, it appears that an EA may be legally sufficient, the agency has committed to do whatever NEPA work is necessary and will conduct an EIS if it is required by law. In any event, when the project, including the new EA, becomes ripe for review, Plaintiffs will have an opportunity to challenge it on NEPA grounds.

Plaintiffs also argue that the Federal Defendants' preparation of a new EA would not remedy its NHPA challenge based on the MOA. Pls.' Opp'n at 27–28. Plaintiffs argument must fail, however, because the agency is also reopening the Section 106 consultation process. Lawler Decl. ¶ 9. The Advisory Council regulations on Section 106 make it clear that an MOA may be amended if circumstances require. See 36 C.F.R. § 800.6(c)(7). Plaintiffs' NHPA claim is based solely on the Federal Defendants' alleged violation of the MOA. Accordingly, because the MOA could be amended during the reopened Section 106 process, Plaintiffs' NHPA claim to the existing MOA is moot. To the extent that Plaintiffs challenge future NHPA consultation, that claim is not yet ripe for review because the process is not complete and there is no concrete action for the Court to review. See Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977).

B. Plaintiffs' LWCFA Claim is Not Ripe for Review.

Finally, Plaintiffs' LWCFA claim that the NPS violated Section 22(b) is similarly unripe. While Plaintiffs are correct that the Federal Defendants have not attempted to equalize the value of the two properties, this only highlights the fact that this claim is premature. Indeed, this claim cannot be ripe because the NPS has not yet obtained an appraisal that has been approved by the Department of the Interior's Office of Appraisal Services, meaning that no values can be assessed for the tracts. The NPS will not conduct and certify an appraisal until the factors surrounding the exchange of land are better defined and a realistic value can be given to the parcel. See Lawler Decl. ¶ 10. Further, any disparity in the value of the tracts can be equalized with compensation upon closing.

In these circumstances, Plaintiffs cannot meet the three factors established in Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–33 (1998), to demonstrate ripeness of their LWCFA claim. There would be no harm to Plaintiffs from deferring judicial review of the LWCFA claim because they will have every opportunity to challenge the land exchange (including their allegations of unequal value) once it is finalized. There is no imminent injury to Plaintiffs from postponing judicial review of their LWCFA contentions because several conditions must be met before any land exchange can take place. Notably, Plaintiffs do not allege that there is a danger of injury before a transfer of deeds can occur. Finally, because the NPS has not yet obtained an appraisal that has been approved by the Department of the Interior's Office of Appraisal Services, judicial intervention at this time would potentially interfere with ongoing administrative processes under the LWCFA. Once the NPS obtains an appraisal that has been approved by the Department of the Interior's Office of Appraisal Services, the NPS can

use that appraisal to ensure that the value of the lands to be exchanged is approximately equal or that the values are equalized. At this point in time, neither the Court nor the parties have a basis by which to judge the value of the two tracts of land, and it is unknown whether a cash payment will be necessary to equalize the value of the properties. Therefore, Plaintiffs' claim that no adequate compensation has been made to equalize the values under the LWCFA is not ripe, and should be dismissed.

CONCLUSION

Plaintiffs' challenge to the Preliminary Agreement must fail because it is not a final agency action. In any event, the NPS has committed to doing additional NEPA analysis and NHPA consultation, which render Plaintiffs' NEPA and NHPA claims both not ripe and moot. For the foregoing reasons, Defendants request that this Court dismiss Plaintiffs' complaint.

Respectfully submitted this 5th day of March, 2005.

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