UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO OFF-HIGHWAY VEHICLE ALLIANCE, Petitioner, v. UNITED STATES FOREST SERVICE, et al., Federal Respondents.	)	Civil Action No. 1:16-cv-01073-JAP-KBM

FEDERAL RESPONDENTS' MOTION TO DISMISS

Federal Respondents, by and through their undersigned counsel of record, hereby move to dismiss the Petition for Review of Agency Action ("Petition"), ECF No. 1, filed on September 29, 2016, by Petitioner New Mexico Off-Highway Vehicle Alliance ("NMOHVA"). Below is Federal Respondents' Brief in Support of this Motion to Dismiss the Petition.

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INTRODUCTION

This is the second time NMOHVA has filed a lawsuit in this Court challenging the Travel Management Plan (the "Plan") for the Santa Fe National Forest. NMOHVA claims that the United States Forest Service ("Forest Service") violated the National Environmental Policy Act ("NEPA") in approving the Plan. The prior lawsuit, however, was dismissed for lack of standing. After carefully reviewing NMOHVA's standing declaration and conducting a "laborious search" of the Administrative Record, the Tenth Circuit concluded that NMOHVA had failed to establish standing. *N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.* ("*NMOHVA I*"), 645 F. App'x 795, 804 (10th Cir. 2016). The Tenth Circuit remanded the case to this Court to be dismissed for lack for subject-matter jurisdiction. *Id.* at 797. The Court dismissed the case on September 15, 2016.

NMOHVA promptly filed this lawsuit, claiming to have "remedied the standing issue" identified by the Tenth Circuit. *NMOHVA I* Pet. ¶ 12. NMOHVA's attempt to seek a second consideration of their case is barred by issue preclusion. As the Tenth Circuit has clearly stated, "dismissals for lack of jurisdiction 'preclude relitigation of the issues determined in ruling on the jurisdiction question.'" *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004). A plaintiff who fails to establish standing in a prior lawsuit cannot use the court's prior decision as "a mere instruction manual on how [a plaintiff] might correct defects in its claim of standing by doing a better job of pleading preexisting facts and arguing the law more forcefully in a new case." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 43 (D.C. Cir. 2015). Yet, that is precisely what NMOHVA has attempted here by submitting two standing declarations alleging facts that were available to NMOHVA in the prior litigation. Issue preclusion forecloses exactly such a tactic, and the case should be dismissed.

BACKGROUND

I. Legal Background

A. Issue Preclusion

The doctrine of issue preclusion, or collateral estoppel, bars "successive litigation of an issue of fact or law actually litigated and resolved" that was "essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 & n.5 (2008) (internal quotation marks omitted). The doctrine serves to "protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* (alterations in original (quoting *Montana v. United States*, 440 U.S. 147, 153–54 (1979))).

The Tenth Circuit has held that issue preclusion bars a party from re-litigating a dismissal for lack of jurisdiction. *Park Lake*, 378 F.3d at 1136 (precluding a party from re-litigating a prior dismissal as unripe). The Courts of Appeals have repeatedly applied issue preclusion in the context of Article III standing. *See Home Builders*, 786 F.3d at 42; *Coll. Sports Council v. U.S. Dep't of Educ.*, 465 F.3d 20, 22 (D.C. Cir. 2006); *Perry v. Sheahan*, 222 F.3d 309, 317-18 (7th Cir. 2000); *Hollander v. Members of Bd. of Regents of Univ. of New York*, 524 F. App'x 727, 729 (2d Cir. 2013); *Hooker v. Fed. Elec. Comm'n*, 21 F. App'x 402, 405 (6th Cir. 2001).

Issue preclusion will apply in a case if: "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Park Lake*, 378 F.3d at 1136 (quoting *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000)). Issue preclusion operates slightly differently from claim preclusion with respect to jurisdiction-based prior decisions. Even though

a jurisdictional dismissal does "not result in an adjudication on the merits, it has issue-preclusive consequences with respect to the issue decided." *Park Lake*, 378 F.3d at 1136; *see also GAF Corp. v. United States*, 818 F.2d 901, 912 & n.72 (D.C. Cir. 1987).

B. Standards for Motion to Dismiss

Rule 12(b) of the Federal Rules of Civil Procedure allows courts to dismiss a complaint for "lack of subject-matter jurisdiction." *See* Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b) is appropriate in cases, such as this, that seek judicial review of agency action or inaction pursuant to *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), but fail to establish the Court's jurisdiction. *See Kane Cty. v. Salazar*, 562 F.3d 1077, 1086 (10th Cir. 2009) ("[N]othing in *Olenhouse* . . . precludes an APA-based complaint from being summarily dismissed pursuant to Federal Rule of Civil Procedure 12(b).").

Pursuant to Rule 12(b)(1), a complaint must be dismissed for lack of subject matter jurisdiction if the action:

> does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, S[ection] 2, [of the Constitution], or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Baker v. Carr, 369 U.S. 186, 198 (1962). Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." *Celli v. Shoell*, 40 F.3d 324, 327 (9th Cir. 1994) (citations omitted). "Mere conclusory allegations of jurisdiction are not enough; the party pleading jurisdiction 'must allege in his pleading the facts essential to show jurisdiction.'" *Id*. (quoting *Penteco Corp. Ltd. P'ship-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)). Under the doctrine of standing, the court "may only hear a case where a party can demonstrate that 'it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable

to the defendant, and that it is likely that a favorable decision will redress that injury.'" *NMOHVA I*, 645 F. App'x at 801 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. In the first form, the movant asserts that the allegations in the complaint on their face fail to establish the court's subject matter jurisdiction. "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted). In the second form, the movant may present evidence challenging the factual allegations in the complaint "upon which subject matter jurisdiction depends." *Id*. at 1003 (citation omitted). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations . . . [but] reference to evidence outside the pleading does not convert the motion to a Rule 56 motion." *Id*. (citations omitted).

II. Procedural History

As NMOHVA admits in its Petition, this case seeks judicial review of the same Record of Decision and Final Environmental Impact Statement challenged in the prior lawsuit, *NMOHVA I* Pet. ¶ 11. Below is a history of that case ("*NMOHVA I*"), followed by a summary of this case ("*NMOHVA II*").

A. *NMOHVA I*: Dismissal For Failure to Establish Standing.

The Forest Service began the process of preparing a Plan for the Santa Fe National Forest ("the Forest"), consistent with its regulations. *See* Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. §§ 212.50–212.57). To comply with NEPA, the Forest Service prepared an Environmental Impact Statement analyzing the effects of the Plan on resources across the Santa Fe National Forest. In constructing the no-action alternative, the Forest Service used a reality-based estimate of where motor vehicle use was actually occurring under the status quo regime, "based on preexisting data,

field visits, sampling and statistical calculations, and input from motorized vehicle users." *NMOHVA I*, 645 F. App'x at 799. The Forest Service compared the effects of the no-action alternative to five other alternatives it developed in consultation with the public, including NMOHVA, and consistent with the purpose and need of the project.

The Forest Service circulated a draft Environmental Impact Statement for public review and, based on comments received, prepared a Final Environmental Impact Statement ("FEIS"). On June 12, 2012, the Forest Service issued a Record of Decision ("ROD") adopting an alternative which limited the use of motor vehicles to 2,255 miles of roads, 208 miles of trails, and forty-one acres for cross-country travel.

Six months later, NMOHVA filed a Petition for Review of Agency Action challenging the ROD and FEIS. *See NMOHVA v. U.S. Forest Serv.*, 12-cv-1272-WJ-GBW (D.N.M. filed Dec. 10, 2012), Pet. for Rev. of Agency Action, ECF No 1. NMOHVA alleged multiple violations of NEPA, *id.* ¶ 11 (a)-(f), which can be grouped into challenges to the no-action alternative, the range of alternatives, and the adequacy of the analysis in the FEIS. NMOHVA sought, among other things, an order setting aside the ROD and FEIS, "thereby reinstituting the previous travel management policy throughout the Santa Fe National Forest." *Id.* ¶ 12(b).

The parties agreed to brief the case pursuant to *Olenhouse* and the Federal Rules of Appellate Procedure. NMOHVA filed its opening brief but failed to provide any standing declarations to establish the Court's subject-matter jurisdiction. *NMOHVA I*, Opening Br., ECF No. 24. Federal Respondents informally challenged NMOHVA's standing and requested that the group provide declarations in support of standing. *NMOHVA I*, Pet. Notice of Standing Decl. at 2, ECF No. 48. NMOHVA responded by filing the Declaration of Mark Werkmeister, ECF No. 48-1 ("*NMOHVA I*, Werkmeister Decl."). Mr. Werkmeister alleged that he had "recreated on the

Santa Fe National Forest using my off-highway vehicle" and had a "plan to return to the National Forest to continue [his] use in the future." *Id.* ¶ 11.

Intervenor-Respondents challenged the sufficiency of the Werkmeister declaration, claiming that it was too vague and general to establish a "concrete and particularized injury in fact" that would establish NMOHVA's organizational standing. Resp.-Intervenors Br. at 15, ECF No. 50. They claimed the Werkmeister Declaration was "overly broad in terms of geographic specificity and too general in terms of alleging the time and place of past and anticipated future motorized use of the Forest to establish an injury sufficient for Article III standing. *Id.* at 16. NMOHVA responded to these arguments, claiming that Mr. Werkmeister's declaration was sufficient and that he was "not required to sort out which particular roads and trails that he has used of the several thousand existing roads and trails that are the subject of the challenged Record of Decision here." *NMOHVA I*, Reply Br. at 3, ECF No. 52.

The District Court held a hearing and demanded proof of NMOHVA's standing. NMOHVA relied on Mr. Werkmeister's declaration and also asserted that it had provided the Forest Service with specific examples of trails used by its members, as set forth in comments in the Administrative Record. The Court found the Werkmeister's declaration insufficient to establish standing. "Mr. Werkmeister's testimony is the very type of 'some day intention' that the Supreme Court has found conjectural or hypothetical, and thus insufficient for standing purposes. *NMOHVA v. U.S. Forest Serv.*, No. 12CV1272 WJ/GBW, 2014 WL 6663755, at *3 (D.N.M. July 25, 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). At the hearing, however, NMOHVA argued that "by providing the specific trails used in the [Santa Fe National Forest], Federal Defendants were put on notice as to the past, present and future pattern of use of

SFNF trails by NMOHVA's members." *Id.* Based on this testimony, the Court found that NMOHVA has established standing, "but only by the slimmest of margins." *Id.*[1]

The Court proceeded to the merits and found that the Forest Service did not act arbitrarily and capriciously in defining the no-action alternative. *Id.* at *4-8. The Court further held that the Forest Service analyzed a reasonably range of alternatives. *Id.* at *8-11. Finally, the Court held that the Forest Service had conducted a proper scientific analysis of the issues before reaching a decision. *Id.* at *11-14. The Court thus found that NMOHVA had failed to demonstrate a violation of NEPA, upheld the Forest Service's decision, and dismissed the Petition for Review of Agency Action. *Id.* at *15.

NMOHVA appealed to the Tenth Circuit. NMOHVA submitted its opening brief on appeal and attached a supplemental standing declaration of Mark Werkmeister. *NMOHVA I*, Opening Br. at 109-114 ("Supp. Werkmeister Decl."), attached as Ex. A. Mr. Werkmeister provided additional details regarding the roads and trails he and members of NMOHVA used on the Santa Fe National Forest. *Id.* ("For example, roads and trails that we have used and would continue to use, but for the ROD, are Forest Roads 652/655, 656, 607, and 530 and trails commonly known as Tank Trap, Motown, North Pass, and Airplane."). He also stated that he and other members of NMOHVA had plans to continue using those roads and trails. *Id.* ¶ 13. NMOHVA asserted that the supplemental declaration "provided additional support for its standing" as it identified specific

[1] The Court was disappointed that "Federal Defendants were not prepared and thus took no position on whether NMOHVA has standing lawsuit bring this suit." *NMOHVA I*, 2014 WL 6663755, at *4. The Court thus gave notice that in future lawsuits, it would "review the issue of standing near the inception of the case in an effort to avoid the situation where the litigants and the Court expend significant time and resources litigating factual and legal issues only to discover that all efforts were in vain because the Court lacked subject matter jurisdiction." *Id.* Consistent with this notice, Federal Respondents hereby file this motion to dismiss the case on the grounds of issue preclusion.

trails and roads Mr. Werkmeister and other members of NMOHVA "have used and would continue to use but for the ROD." *NMOHVA I*, Reply Br. at 6.

The Tenth Circuit held that NMOHVA had failed to establish standing as required by the Supreme Court's decision in *Lujan*. *NMOHVA I*, 645 F. App'x at 801. First, the Tenth Circuit held that Mr. Werkmiester had failed to state that "he has used, or intends to use, any particular route affected by the designation process." *Id.* at 802. Second, the Tenth Circuit found that Mr. Werkmeister's "vague plan to visit the forest 'in the future' . . . —without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of . . . 'actual or imminent' injury." *Id.* (quoting *Lujan*, 504 U.S. at 564). The Tenth Circuit thus found that the Werkmeister Declaration presented to the District Court was inadequate. The Tenth Circuit refused to consider the supplemental declaration of Mr. Werkmeister, because it had not been presented to the District Court. *Id.* at 802.

The Tenth Circuit also "scoured the extensive administrative record in this case, attempting to discern whether NMOHVA has suffered a sufficiently concrete and particularized injury to establish its standing." *Id.* at 804-06. Nevertheless, the Tenth Circuit was unable to find sufficient evidence to support NMOHVA's standing and thus concluded that it lacked subject matter jurisdiction. *Id.* at 806. The Tenth Circuit remanded the case to be dismissed without prejudice. *Id*. at 807. On September 15, 2016, this Court dismissed the case for lack of subject-matter jurisdiction. Order, ECF No. 65.

B. *NMOHVA II*: NMOHVA's Attempt to Remedy the "Standing Issue"

On September 29, 2016, NMOHVA filed this lawsuit challenging the same ROD and FEIS at issue in *NMOHVA I*. *See NMOHVA II*, Pet. ¶ 11. The petition summarizes the prior litigation, including the Tenth Circuit's holding that NMOHVA had failed to establish standing. *Id.* (citing *NMOHVA I*, 645 F. App'x 795). NMOHVA asserts that it "has remedied the standing issue," *id.*

¶ 12 (citing *Lujan*, 504 U.S. at 560-61), and provides two standing declarations from its members Mr. Werkmeister and James Tyldesley. *See* Declaration of Mark Werkmeister, ECF No. 1-1 ("*NMOHVA II*, Werkmeister Decl."); Declaration of James R. Tyldesley, ECF No. 1-2 ("Tyldesley Decl.").

Mr. Werkmeister's declaration includes all of the allegations he previously asserted in *NMOHVA I*. *Compare NMOHVA II*, Werkmeister Decl. ¶¶ 1-7, 19-22 *with NMOHVA I*, Werkmeister Decl. ¶¶ 1-11. Mr. Werkmeister also provides additional details about the trails and roads he and NMOHVA members used and would have continued to use, but for the ROD. For example, he identifies routes NMOHVA presented to the Forest Service during the travel management planning process. *See NMOHVA II*, Werkmeister Decl. ¶ 12. He further asserts that he and other members of NMOHVA used these routes "before the ROD for travel management was issued," and intended to continue using them "[b]ut for the issuance of the ROD." *Id.* ¶¶ 13-14.

Mr. Tyldesley provided a declaration almost identical to the one provided by Mr. Werkmeister. He asserts that he is president of NMOHVA and has held a position on the NMOHVA Board of Directors since 2010. Tyldesley Decl. ¶ 4. Mr. Tyldesley asserts that he and other members of NMOHVA "frequently recreated" on the Santa Fe National Forest "before the ROD for Travel Management was issued" and identifies trails that he "used and would continue to use, but for the ROD." *Id.* ¶ 12. He further asserts that he would continue to use those routes and trails "that the ROD closed, including those described in detail above." *Id.* ¶ 13.

NMOHVA's petition raises all of the NEPA claims that this Court rejected on the merits. NMOHVA again challenges the no-action alternative, the range of alternatives, and the Forest Service's scientific analysis. *NMOHVA II*, Pet. ¶ 17 (A-C), (E-H), (J-K). NMOHVA also raises

two new challenges that it did not bring on the prior lawsuit: a challenge to the "Purpose and Need" statement, *id.* ¶ 17(D), and a claim that the Forest Service failed to provide the public with the underlying environmental data. *Id.* ¶ 17(I). NMOHVA seeks the same relief it sought in the prior lawsuit, including an order vacating the ROD and FEIS and reinstating the "previous, 'open' travel management policies in effect" prior to the ROD. *Id.* ¶ 18.

ARGUMENT

NMOHVA is barred from relitigating the issue of standing based on facts and evidence that could have been submitted in *NMOHVA I*. There, the Tenth Circuit thoroughly adjudicated the issue of NMOHVA's standing and found fatal defects in NMOHVA's arguments and evidence. NMOHVA cannot attempt to remedy the errors identified by the Tenth Circuit by submitting new declarations with facts available in the prior suit. This approach is squarely barred by issue preclusion as made clear in *Home Builders*, 786 F.3d at 42-43. The case must therefore be dismissed.

I. The Case Must Be Dismissed for Lack of Jurisdiction Because Plaintiffs Are Barred by *NMOHVA I* from Relitigating Their Case for Standing.

It is well established in the Tenth Circuit that a plaintiff cannot relitigate a prior failure to establish jurisdiction based on facts available to the plaintiff in the prior case. *See Park Lake*, 378 F.3d at 1136. That rule has been applied by other courts to bar a plaintiff from relitigating standing. *See Home Builders*, 786 F.3d at 41; *Perry*, 222 F.3d at 317-18. Here, all of the elements of issue preclusion are met, and therefore NMOHVA is barred from relitigating standing based on the same or similar facts available to it in *NMOHVA I.*

A. The Doctrine of Issue Preclusion Bars a Plaintiff From Relitigating Standing Based on the Same or Similar Facts Available in the Prior Proceeding.

"It cannot be gainsaid that even a dismissal without prejudice will have a preclusive effect on the standing issue in a future action." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218–

19 (10th Cir. 2006). The Courts of Appeals have thus repeatedly applied issue preclusion to bar a plaintiff from relitigating a prior dismissal for lack of standing. *Home Builders*, 786 F.3d at 41 ("Issue preclusion applies to threshold jurisdictional issues like standing as well as issues going to a case's merits."); *Perry*, 222 F.3d at 318 ("The determination that Perry lacked standing in [the prior case] precludes relitigation of the same standing argument in [the subsequent case]."); *Hollander*, 524 F. App'x at 729 ('"collateral estoppel precludes this action because [Hollander] previously litigated the issue of his standing to bring such a claim.'"); *Hooker*, 21 F. App'x at 405-06 ("Federal courts have used preclusion to bar litigants who had been found to lack standing in a prior suit from reasserting the same claim in a subsequent suit if the facts presented by the litigants to support standing had not changed.").

All of these cases confirm that a plaintiff is barred from establishing standing in a subsequent lawsuit based on "preexisting" or "materially unchanged" facts that were alleged or available in the prior lawsuit. *Home Builders*, 786 F.3d at 35, 43; *Perry*, 222 F.3d at 318 (barring plaintiff from relying on "facts known" or "available" to plaintiff in the prior proceeding); *see also Park Lake*, 378 F.3d at 1138 (barring plaintiff from relying on facts "in substance the same" as those raised in prior decision dismissing case as unripe). The only exception to this rule is known as the "curable defect" exception, which allows a litigant "to establish jurisdiction in a subsequent case only if a material change *following dismissal* cured the original jurisdictional deficiency." *Home Builders*, 786 F.3d at 41 (emphasis added); *see also Park Lake*, 378 F.3d at 1137 ("the change in circumstances that cures the jurisdictional defect must occur *subsequent to the prior litigation*." (emphasis added)); *Home Builders*, 786 F.3d at 218 ("Only facts arising after the complaint was dismissed . . . can operate to defeat the bar of issue preclusion"). This strict limitation prevents the "curable defect" exception "from undermining the preclusive effect of issues already fairly and finally determined in prior litigation." *Home Builders*, 786 F.3d at 41-42 (citing *Dozier*, 702 F.2d at 1192).

The D.C. Circuit recently applied the doctrine of issue preclusion to bar an industry group's second attempt to establish standing in *Home Builders*, 786 F.3d at 42. There, trade groups filed

suit on behalf of their members challenging a federal determination that the Santa Cruz River in Arizona was a traditional navigable water ("TNW") subject to regulation under the Clean Water Act. *Id.* at 35 (discussing *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11-16 (D.C. Cir. 2011) ("*Home Builders I*")). The D.C. Circuit dismissed the original suit, identifying a number of fatal defects in plaintiffs' standing declarations, including the failure to identify (1) a site-specific application of the TNW, (2) imminent plans to discharge into a likely jurisdictional watercourse (and thus be subject to regulatory jurisdiction), or (3) a substantially increased risk of regulation or enforcement at a specific site. *Id.* at 42 (summarizing *Home Builders I*, 667 F.3d at 13-14).

In response to this dismissal, the plaintiffs refiled their lawsuit asserting the same claims, albeit with new standing declarations "expanding on those submitted in the earlier case." *Id.* at 40. Their new declarations were written in an attempt to fix the flaws identified in *Home Builders I*. *Id.* The D.C. Circuit rejected this effort to circumvent issue preclusion, holding that their "case for standing, although since supplemented with new declarations from members adding factual detail to their assertions of injury, is materially unchanged and thus precluded by *Home Builders I*." *Id.* at 36.

The court was precluded from reviewing the new declarations because they relied on "preexisting facts" available to plaintiffs when they filed *Home Builders I*. For one, the new declarations failed to identify an approved TNW determination, a missing factual predicate in *Home Builders I*. *Id.* at 42. Nor did the new declarations identify any plans to imminently discharge pollutants into jurisdictional waters, another factual predicate required by *Home Builders I*. *Id.* While the declarations claimed projects "will result in discharges" to navigable waters, the Court dismissed this allegation as "materially the same as those we previously held to be insufficiently concrete and imminent." *Id.* Finally, the Court rejected plaintiffs' allegations of an increased risk of regulation, finding that these assertions were available to plaintiffs in their original lawsuit, but were not brought forward, and thus could not be considered in a subsequent lawsuit. *Id.* at 43. For these reasons, the D.C. Circuit firmly rejected plaintiffs' attempt to use the court's prior decision as "a mere instruction manual on how [plaintiffs] might correct defects in

[their] claim of standing by doing a better job of pleading preexisting facts and arguing the law more forcefully in a new case." *Id.*

B. All of the Elements of Issue Preclusion Are Present Here.

This case involves the same party litigating the same standing issue that was fully, fairly, and finally decided in *NMOHVA I*. Issue preclusion applies.

1. *NMOHVA was a party in NMOHVA I.*

Issue preclusion requires that the parties against whom preclusion is asserted were parties or in privity with the parties to the prior case. *See Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 323–24 (1971). There is no question that NMOHVA was the party in the prior lawsuit.

2. *The Case Involves the Same Issues Litigated In NMOHVA I.*

NMOHVA's case for standing involves the same jurisdictional issue – whether NMOHVA has established standing – as the one decided by the Tenth Circuit in *NMOHVA I*. There, the Tenth Circuit examined NMOHVA's standing declaration and "scoured" the evidence in the Administrative Record. Nonetheless, it was unable to find evidence establishing NMOHVA's standing, as required by the Supreme Court's decision in *Lujan*. *NMOHVA I*, 645 F. App'x at 801-802. The Tenth Circuit thus dismissed the case for lack of jurisdiction. NMOHVA has filed this second lawsuit seeking reconsideration of the standing issue decided against it in *NMOHVA I*. This Case thus involves the "same issue" as was decided in *NMOHVA I*. *Park Lake*, 378 F.3d at 1138.

Indeed, NMOHVA agrees that the standing issues in this case are identical to those litigated in *NMOHVA I*. It filed this case ostensibly seeking to remedy the "standing issue" identified in *NMOHVA I*, and suggests that is has satisfied the requirements for standing set forth in *Lujan*. *NMOHVA II*, Pet. ¶ 12. That is precisely the issue on which NMOHVA lost in the prior litigation.

This Court found that "Mr. Werkmeister's testimony is the very type of 'some day intention' that the Supreme Court has found conjectural or hypothetical, and thus insufficient for standing purposes." *NMOHVA I*, 2014 WL 6663755, at *3 (quoting *Lujan*, 504 U.S. at 564). Likewise, the Tenth Circuit found that NMOHVA has failed to satisfy the requirements of *Lujan*, including the requirement to demonstrate a concrete plan to visit the affected area. *See NMOHVA I*, 645 F. App'x. at 801.

That NMOHVA has raised additional NEPA claims in this case does not alter the fact the standing issues are the same in both cases. NMOHVA challenges the same 2012 ROD and FEIS alleging, as it did in *NMOHVA I*, that these documents violate NEPA.[2] As the Supreme Court has held, issue preclusion applies to any "issue of fact or law actually litigated and resolved" that was "essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. NMOHVA's failure to establishing standing in the prior lawsuit led to dismissal of that lawsuit for lack of jurisdiction. NMOHVA cannot re-litigate that same issue in this case on the pretense that its declarations now satisfy *Lujan*. *NMOHVA II*, Pet. ¶ 12; *see Park Lake*, 378 F.3d at 1137 ("Plaintiffs cannot now present an argument that conflicts with our decision on that issue.").

As these examples confirm, NMOHVA's case for standing is simply a rehash of *NMOHVA I*, confirming that this case involves the same standing issues.

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[2] In the prior litigation, NMOHVA did not challenge the Purpose and Need of the Plan, and could not establish the range of alternatives was unreasonable in light of that purpose and need. *NMOHVA I* Reply Br. at 32. NMOHVA lost on this issue before the district court. *NMOHVA I*, 2014 WL 6663755, at *10 (finding range of alternatives reasonable in light of the purpose and need of the Plan). In an apparent attempt to use the prior briefing and the Court's decisions to re-argue not just standing but the merits of its case, NMOHVA has now challenged the Purpose and Need statement.

3. *NMOHVA I Was Fully and Finally Decided Against NMOHVA.*

The dismissal of a case for lack of standing fully and finally "adjudicate[s] the court's jurisdiction," and thus precludes "relitigation of the precise issues of jurisdiction adjudicated." *Home Builders*, 786 F.3d at 41 (citation omitted). Here, the Tenth Circuit fully and finally determined that NMOHVA have failed to establish standing to challenge the Santa Fe Travel Management Plan. See *NMOHVA I*, 645 F. App'x at 806. Contrary to NMOHVA's belief, they do not get another bite at the apple.

NMOHVA cannot escape the Tenth Circuit's decision by refiling its case with a new set of declarations in an attempt to address the deficiencies that the Tenth Circuit pointed out in NMOHVA's prior try. The prior lawsuit has been fully and finally decided against NMOHVA. Indeed, the Tenth Circuit "scoured the extensive administrative record in this case, attempting to discern whether NMOHVA has suffered a sufficiently concrete and particularized injury to establish its standing." *NMOHVA I*, 645 F. App'x at 804. Despite this "laborious search," the Court concluded that NMOHVA lacked standing. *Id.* That the Court dismissed the case without prejudice does not limit the decision's power to preclude NMOHVA from relying on the same facts and arguments to establish standing here. *See Park Lake*, 378 F.3d at 1136-37; *Dozier*, 702 F.2d at 1194; *Perry*, 222 F.3d at 317-18.

4. *Issue Preclusion Works No Unfairness on NMOHVA and Protects Against the Vexation and Expense Of Multiple Lawsuits.*

As the Tenth Circuit has stated, '"it does not make sense to allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements.'" *Park Lake*, 378 F.3d at 1138 (quoting *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401 (7th Cir. 1987)). There is thus no unfairness to precluding

NMOHVA from relitigating standing. By contrast, such repeat litigation wastes scarce judicial resources.

NMOHVA had the opportunity to establish standing in the prior litigation, both before this Court and the Tenth Circuit. At the outset, Federal Respondents informally challenged NMOHVA's standing and requested that it submit a declaration in support of its standing. NMOHVA argued that no such declaration was required, but nonetheless submitted the declaration of Mr. Werkmeister. *NMOHVA II*, Pet. Notice of Filing Standing Decl. at 2, ECF No. 48. Intervenors challenged the adequacy of that declaration, arguing that it lacked the requisite detail to establish the organization's standing. Resp.-Intervenors Br. at 15. NMOHVA replied, claiming that the declaration was adequate and refusing to provide any additional detail. *NMOHVA I*, Reply Br. at 3. NMOHVA also argued before the District Court that the Administrative Record established its standing. *NMOHVA I*, 645 F. App'x at 800. On appeal, NMOHVA reiterated its standing arguments in response to Intervenor-Respondents renewed challenge.

Both this Court and the Tenth Circuit thoroughly examined the evidence to determine whether NMOHVA had carried its burden to establish standing. The Tenth Circuit even undertook its own "laborious search" of the Administrative Record to determine whether NMOHVA had established standing, "devoting considerable time to this endeavor." *NMOHVA I*, 645 F. App'x at 804. Despite these efforts, the Tenth Circuit concluded NMOHVA lacked standing and chastised NMOHVA for the "dereliction" of its duty to establish standing. *Id.* NMOHVA had multiple opportunities to establish standing, and there is no unfairness in denying NMOHVA a second chance to argue standing on the same available facts. *See, e.g., Park Lake*, 378 F.3d at 1138 (holding that there was "no unfairness in denying Plaintiffs a second chance to argue ripeness on the same available facts.").

NMOHVA cannot use this lawsuit to take another bite at the apple and argue standing based on facts available to it in the prior litigation. This Court and the Tenth Circuit have already devoted precious time and effort to assessing NMOHVA's standing. Even though this Court "chastised the parties for their failure to adequately address standing," *NMOHVA I*, 645 F. App'x at 804 n.5, NMOHVA did not provide the Tenth Circuit with "any record citations to support its standing." *Id.* at 804. Rather, NMOHVA maintained – at least before this Court – that it was not required to sort out which trails or roads its members used. *NMOHVA I* Reply Br. at 3. It cannot now use the Tenth Circuit's decision requiring such specificity as a mere "instruction manual" on how to better plead standing based on pre-existing facts. *Home Builders*, 786 F.3d at 43. Dismissal is appropriate.

C. Issue Preclusion Bars NMOHVA from Relitigating Standing Based on the Same or Similar Facts Available to It in *NMOHVA I*.

The Tenth Circuit held that NMOHVA failed to establish an imminent injury sufficient to establish standing. *NMOHVA I*, 645 F. App'x at 801-02. NMOHVA did not show that its members used the area affected by the ROD. *Id.* Nor did it establish that its members had concrete plans to use those affected areas in the future. *Id.* at 802. The Tenth Circuit also found inadequate evidence to satisfy either of these deficiencies in the Administrative Record. *Id.* NMOHVA now attempts to file two standing declarations to expand on the same or similar facts available to them in the original lawsuit, and thereby address the defects found by the Tenth Circuit. Issue preclusion forecloses precisely this approach: NMOHVA cannot rely on "preexisting" facts to establish standing in this lawsuit. *Home Builders*, 786 F.3d at 35, 43.

The standing allegations in this case could have been asserted in the prior litigation. In *NMOHVA I*, Mr. Werkmeister alleged that he had "recreated on the Santa Fe National Forest using my off-highway vehicle" and had a "plan to return to the National Forest to continue [his] use in

the future" *NMOHVA I*, Werkmeister Decl. ¶ 11. NMOHVA, however, refused to expand on these allegations in *NMOHVA I* on the grounds that it was "not required to sort out which particular roads and trails that he has used of the several thousand existing roads and trails that are the subject of the challenged Record of Decision here." *NMOHVA I*, Reply Br. at 3. Due to the lack of specifics, both this Court and the Tenth Circuit found Mr. Werkmeister's declaration inadequate. *NMOHVA I*, 2014 WL 6663755, at *3; *NMOHVA I*, 645 F. App'x at 801-02.

NMOHVA now attempts to remedy its error and provide the requisite level of detail in this lawsuit. Mr. Werkmeister details certain routes he states he frequently used and provides citations to the Administrative Record purporting to show his use of these routes. *NMOHVA II*, Werkmeister Decl. ¶ 12. He further claims a continuing intention to use these routes. *Id.* ¶ 21 ("I plan to return to the Santa Fe National Forest roads and trails, including the routes described in detail above, to continue my use, now and in the immediate future."). But the additional facts – the routes Mr. Werkmeister used and plans to continue to use – were available to NMOHVA in the prior litigation. Mr. Werkmeister provides citations to the Administrative Record lodged in the prior case identifying the routes he and other members of NMOHVA frequently used "before the ROD for Travel Management was issued" on June 12, 2012. *Id.* ¶ 12.[3] He further asserts that "[b]ut for the issuance of the ROD," he and other members of NMOHVA would "continue to enjoy using or having the ability to use, now and into the immediate future, those trails and roads that have been withdrawn from us." *Id.* ¶ 14. These facts did not "occur subsequent to the prior litigation." *Park Lake*, 378 F.3d at 1137. Rather, they occurred in 2012 when the ROD was issued.

[3] Mr. Werkmeister discusses routes that NMOHVA's members used and would continue to use, as identified in the "Citizen's Proposal." *NMOHVA II*, Werkmeister Decl. ¶ 12. NMOHVA provided that proposal to the Forest Service in May of 2007, and it was contained in the Administrative Record in the prior case at AR002800-63.

These historic assertions were available to NMOHVA in the original lawsuit, but were not brought forward, and thus cannot be considered in this lawsuit. *Home Builders*, 786 F.3d at 43 (rejecting plaintiff's attempt to "correct defects in its claim of standing by doing a better job of pleading preexisting facts and arguing the law more forcefully in a new case.").

Nor can NMOHVA rely on the allegations of Mr. Tyldesley to establish standing as these allegations could have been raised in *NMOHVA I*. Just like Mr. Werkmeister, Mr. Tyldesley asserts that he "and other members of NMOHVA have frequently recreated in the Santa Fe National Forest by using our off-highway vehicles on the numerous trails that have always been open to the public for off-highway motorized use before the ROD for Travel Management was issued." Tyldesley Decl. ¶ 12. He too provides examples of those historic routes and asserts that he and other members of NMOHVA (including Mr. Werkmeister) would have continued to use these routes, "but for the ROD," which issued in 2012. *Id.* These are not "facts postdating the prior litigation." *Park Lake*, 378 F.3d at 1137. These facts were readily available to NMOHVA in the prior litigation, could have been raised in support of the associations standing in that case, but were not. They cannot be asserted now to establish jurisdiction in this lawsuit. *See Perry*, 222 F.3d at 218 (rejecting a plaintiffs' "attempt to circumvent issue preclusion" by alleging "additional facts" "available" in the prior lawsuit).

As should be clear, neither the Wekrmeister nor the Tyldesley declaration presents any materially new facts that were unavailable to NMOHVA in the prior lawsuit. In fact, NMOHVA already attempted to file essentially the same allegations in the prior lawsuit when it submitted the supplemental declaration of Mr. Werkmesiter to the Tenth Circuit. That declaration is almost identical to the one submitted in this case. *Compare NMOHVA II*, Werkmeister Decl. *with* Ex. A (*NMOHVA I*, Werkmeister 10th Cir. Decl.). In fact, both declarations discuss Mr. Werkmeister's

and other NMOHVA member's intent to use the same trails, which were closed by the ROD in 2012. *Compare NMOHVA II*, Werkmeister Decl. ¶ 13 (discussing trails closed by the ROD, including "trails commonly known as Motown, North Pass, and Airplane") *with* Ex. A ¶ 12 (discussing trails closed by the ROD, including "trails commonly known as Tank Trap, Motown, North Pass, and Airplane"). While the Tenth Circuit refused to consider this late-filed declaration in *NMOHVA I*, 645 F. App'x at 802, all of the material in the declaration was available to NMOHVA at the time of that lawsuit and could have been presented in a timely manner to this Court. NMOHVA cannot now rely on essentially the same declaration in this case as it does not reflect new information "following dismissal" in *NMOHVA I*. *See Home Builders*, 786 F.3d at 41.

CONCLUSION

Permitting NMOHVA to use the same facts and allegations available in the prior lawsuit to reargue standing in this lawsuit would run roughshod over the judicial process. This Court and the Tenth Circuit expended substantial resources addressing NMOHVA's original lawsuit. NMOHVA should not be permitted to use facts available to it in the prior litigation in an attempt to establish standing again. Federal Respondents thus respectfully request that the Court dismiss the case for lack of jurisdiction.

Respectfully submitted this 22nd day of November, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2016, a copy of this foregoing document was filed electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

/s/ Stuart Gillespie
Stuart C. Gillespie