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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

THE NEW MEXICO OFF-HIGHWAY VEHICLE ALLIANCE, a New Mexico nonprofit corporation,

Petitioner,

16-cv-01073-JAP-KBM

v.

UNITED STATES FOREST SERVICE, An agency of the United States Department of Agriculture, **THOMAS TIDWELL,** in his official capacity as Chief of the United States Forest Service, **MARIA T. GARCIA**, in her official Capacity as Santa Fe National Forest Supervisor, **CAL JOYNER**, in his official capacity as Regional Forester, Southwestern Region, United States Department of Agriculture and **TOM VILSACK,** in his official capacity as Secretary of the United States Department of Agriculture,

Respondents,

PETITIONER NEW MEXICO OFF-HIGHWAY VEHICLE ALLIANCE'S RESPONSE TO MOTION TO DISMISS

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Introduction

Petitioner New Mexico Off-Highway Alliance ("NMOHVA") seeks judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, of the United States Forest Service's ("FS'") action implementing the June 12, 2012 Record of Decision ("ROD") for Travel Management on the Santa Fe National Forest. The instant action is NMOHVA's second action seeking judicial review of the FS' travel management action.

NMOHVA's first action seeking judicial review was dismissed by the Tenth Circuit Court of Appeals, the appellate court concluding that NMOHVA had failed to establish standing. *See New Mexico Off-Highway Vehicle Alliance v. United States Forest Service*, 645 Fed. Appx. 795 (10th Cir. 2016). The lower court had concluded that NMOHVA had demonstrated standing, but ruled against NMOHVA upon the merits of the issues that it had raised in its petition for judicial review in that case. *See New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, 2014 WL 6663755 (D. New Mexico 2014). Federal Respondents did not challenge NMOHVA's standing in either the lower or appellate court.

NMOHVA appealed the lower court's decision and submitted with its appeal a Supplemental Declaration of NMOHVA to support its standing, but the appellate court expressly declined to consider the contents of its Supplemental Declaration. *See* 645 Fed. Appx. at *802. The appellate court considered the

contents of NMOHVA's initial Declaration to establish standing and concluded that the contents of that Declaration were deficient in establishing standing in two respects: (1) by failing to state the "particular routes" that affiant Werkmeister had used or intended to use that were affected by the travel designation process; and (2) by stating a "vague plan" to visit the forest "in the future," thus not supporting an "actual or imminent" injury. *Id.* The appellate court did not address the merits of the issues that NMOHVA had raised on appeal.

Based on its conclusion that NMOHVA had failed in that action to establish standing, the appellate court concluded that the lower court did not have subject matter jurisdiction to rule on the merits of NMOHVA's case. The appellate court, therefore, dismissed NMOHVA's appeal, and remanded the case to the district court with instructions to vacate its judgment and dismiss NMOHVA's action "without prejudice" for lack of subject-matter jurisdiction. *Id.* at **806-7. As instructed by the appellate court, the lower court vacated its earlier rulings in its Memorandum Opinion and Order and Final Judgment and dismissed NMOHVA's first action "without prejudice." *See New Mexico Off-Highway Vehicle Alliance v. United States Forest Service*, 2016 WL 5110259 (D. New Mexico 2016).

NMOHVA then filed the instant action, cause no. 1:16-cv-01073, its second petition for judicial review of the FS' ROD for Travel Management on the Santa Fe National Forest. In its instant action, NMOHVA has attached to its petition for

judicial review as exhibits A [doc. 1-1] and B [doc. 1-2] two Declarations to support NMOHVA's standing: One is submitted on behalf of NMOHVA by Mr. Werkmeister and another is submitted on behalf of NMOHVA by Mr. Tyldesley. Both Declarations remedy the "standing" deficiencies identified by the appellate court in its opinion. *See* 645 Fed. Appx. at *802. Mr. Werkmeister's Declaration, exhibit A, at ¶¶ 12, 13, 14, 15, 16, 17, 20, 21 and 22, states, with the particularity and concreteness required by the appellate court, those specific trails, roads and routes that affiant has used and would continue to use now, in 2017 and into the immediate future but for issuance of the Record of Decision, which has withdrawn the ability to use those identified trails, roads and routes. Mr. Tyldesley's Declaration, exhibit B, at ¶¶ 12, 13, 14, 15, 16, 17, 19, 20 and 21, states, with the particularity and concreteness required by the appellate court, those specific trails and roads that affiant has used and would continue to use now, in 2017 and into the immediate future but for issuance of the Record of Decision, which has withdrawn the ability to use those identified trails and roads. Injury, causation and redressability, necessary to support standing, have been shown by these Declarations. NMOHVA's standing has been established as present "at the outset," *see* 645 Fed. Appx. at *802, of the instant petition for judicial review filed in the district court.

Argument

I. NMOHVA IS NOT BARRED BY "ISSUE PRECLUSION" FROM ESTABLISHING STANDING IN THIS ACTION AND THUS IS NOT BARRED FROM PROCEEDING WITH ITS PETITION FOR JUDICIAL REVIEW IN THIS ACTION

Federal Respondents do not dispute NMOHVA's unquestioned standing in this petition for judicial review action. Instead, Federal Respondents contend in their motion to dismiss that NMOHVA is barred by "issue preclusion" from establishing standing in this action and thus is barred from proceeding with its action in this case. Federal Respondents are in error because the prior action was dismissed "without prejudice," the previous rulings made by the lower court upon the merits of NMOHVA's prior case were vacated and NMOHVA has "cured" the deficiencies with respect to standing that the appellate court had identified in its earlier appellate decision in the prior case. Federal Respondents erroneously ask this court to attach "with prejudice" consequences to its "without prejudice" dismissal of NMOHVA's prior suit, such that NMOHVA would be barred from obtaining a judicial ruling on the "merits" of its dispute with the FS respecting the FS' Travel Management Record of Decision ("ROD").

In this circuit, only where a plaintiff cannot cure jurisdictional defects in his complaint is it proper for a district court to dismiss with prejudice. *See Raiser v. Daschle*, 54 Fed. Appx. 305, 307 (10th Cir.), *cert. denied*, 539 U.S. 903 (2003); *Curley v. Perry*, 246 F.3d 1278, 1282 (10th Cir.), *cert. denied*, 534 U.S. 922 (2001).

The appellate court's identified defects with respect to NMOHVA's earlier Declaration, quite clearly, have been cured by the two Declarations that have been filed here with the instant petition for judicial review, which unquestionably satisfy standing requirements pursuant to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-1 (1992) (standing requires that a plaintiff have suffered an "injury in fact" that is "actual or imminent," and that the injury is capable of being redressed by a favorable decision of the court).

In *Stewart Securities Corp. v. Guaranty Trust Co.*, 597 F.2d 240, 243 (10th Cir. 1979), the court stated, in discussing situations where dismissal for want of jurisdiction is no bar to another suit, in quoting *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250, 1256 (10th Cir. 1978): "[S]uit may be brought again where a jurisdictional defect has been cured or loses its controlling force," citing *Lukor v. Nelson*, 341 F. Supp. 111, 115 (N.D. Ill. 1972). In *Lukor*, the court concluded that the previous dismissal for lack of jurisdiction, which was based on the plaintiff's failure to comply with the jurisdictional prerequisite of providing a statutory notice, was no bar to plaintiff's second suit between the same parties and to the court reaching the merits of his claims so long as the plaintiff satisfied the federal prerequisites for jurisdiction. The *Lukor* court stated, at 114-5:

> [A] determination of lack of jurisdiction will be deemed judicially conclusive in a subsequent suit on the same cause of action as to the precise issue of jurisdiction previously ruled upon, [citing *American Surety Company v. Baldwin,* 287 U.S. 156, 166 (1932)].…

> A dismissal for lack of jurisdiction, however, will not preclude a second suit between the same parties unless the same jurisdictional issue is again decisive. Thus, if the jurisdictional defects that lead to the first dismissal either are cured or otherwise lose their controlling force, a second suit is no longer barred and the merits of the suit may be reached.

In the case at bar, the "precise" issue respecting standing upon which the appellate court previously ruled is not "again decisive," because the two Declarations that accompany the instant petition for review are markedly different from the initial Declaration and both are sufficient to demonstrate standing, unlike the Declaration that was filed with the initial suit that the appellate court reviewed and found deficient. The jurisdictional defects that the appellate court previously found have been "cured" and the reasoning behind the appellate court's conclusion respecting lack of standing has lost its "controlling force."[1] NMOHVA has complied with the requisite condition, namely, supporting its petition for judicial review with adequate Declarations that establish its standing, and hence the earlier dismissal is no bar to proceeding to adjudication of the merits here.

The United States Supreme Court recognizes that pleading defects that can be cured are remediable in a second suit. *See Costello v. United States,* 365 U.S.

[1] The Tenth Circuit has recognized that standing deficiencies are "curable." *See Reynoldson v. Shillinger,* 907 F.2d 124, 126 (10th Cir. 1990) (*pro se* prisoner's complaint should not be dismissed without leave to amend a potentially curable defect in standing), cited in *Suarez. v.Utah Bd. of Pardons Parole,* 76 Fed. Appx. 230, 234 (10th Cir. 2003).

265 (1961) (plaintiff's failure to comply with a "precondition requisite," namely, supporting the complaint with an affidavit of good cause, was held not to be an adjudication on the merits and hence not a bar to the subsequent proceeding); *Smith v. McNeal,* 109 U.S. 426, 431 (1883) (first action was dismissed for failure to allege that title was disputed and that defendants resided in Tennessee; this failure to "state the jurisdictional facts" was not a bar to a second action). *See also Johnson v. Boyd-Richardson Co.,* 650 F.2d 147, 148 (8th Cir. 1981) (plaintiff misnamed the defendant corporation and failed to amend when given 15 days to do so; a second action correctly naming the defendant was not barred); *Lemmon v. Cedar Point, Inc.,* 406 F.2d 94, 95 n. 2 (6th Cir. 1969) (dictum) (affirming dismissal for failure to properly allege $10,000 in controversy, but noting that "this deficiency can be cured by amendment … since it is apparent that jurisdiction does in fact exist'). In *Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75, 76 (5th Cir. 1973), a complaint was dismissed "for want of establishing diversity jurisdiction, with leave to amend within 10 days." Plaintiff failed to amend, and the case was dismissed. Eighteen months later, plaintiff refiled a proper diversity complaint. The Fifth Circuit held that the earlier dismissal was not res judicata on the issue of diversity jurisdiction.

In the case at bar, it is apparent that jurisdiction does, in fact, exist. NMOHVA's standing in this case is not questioned or challenged, nor can it be.

The earlier defects with respect to the previous Declaration have been cured and the standing issue remedied.

Unlike the plaintiff in *Matosantos Commercial Corporation v. Applebee's International, Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001), whose second suit was held to be barred by collateral estoppel, NMOHVA does not "attempt to relitigate the very issue decided" by another court and does not "rel[y] on the same evidence and factual allegations considered" by the other court to do so. The contents of its two Declarations submitted with the instant petition for judicial review are substantively different from the initial Declaration and they suffice, legally and factually, to establish NMOHVA's standing, as distinct from the initial one presented in the first case.

Federal Respondents cite *Park Lake Resources Limited Liability Co. v. U. S. Dept. of Agriculture*, 378 F.3d 1132 (10th Cir. 2004) to argue that "issue preclusion" bars a party from re-litigating a dismissal for lack of jurisdiction and that a plaintiff cannot relitigate a prior failure to establish jurisdiction based on facts available to the plaintiff in the prior case. *See* Federal Respondents' motion [doc. 12] at 2 and 10. *Park Lake* is distinguishable from the case at bar. There, the plaintiff's first appellate case, *Park Lake Resources Limited Liability Co. v. U.S. Dept. of Agriculture*, 197 F.3d 448 (10th Cir. 1999) (referred to in the later opinion as *Park Lake II)*, was dismissed for lack of ripeness. The plaintiff's case there was

not ripe because the mere Research Natural Area ("RNA") designation did not injure plaintiff in its ability to mine. Plaintiff could still engage in mining if it submitted a proposed plan of operations ("PPO") for mining, which the government could approve. Plaintiff had not yet submitted such plan. When plaintiff re-filed its second case, it still had not yet submitted such plan.

The *Park Lake* court held: "[O]ur dismissal of the earlier action for lack of ripeness requires dismissal of this action as well. Plaintiffs can overcome the previous dismissal only by showing satisfaction of the conditions for ripeness set forth in *Park Lake II*. Having failed to do so, Plaintiffs cannot proceed with their claim." 378 F.3d at 1134. In discussing "issue preclusion," the court stated, at 1136-7:

> We held in that case [*Park Lake II*] that Plaintiffs' APA challenge to the Hoosier Ridge RNA designation was not ripe because Park Lake had not yet submitted to the Forest Service for approval a PPO for exploiting its existing claims. *See Park Lake II*, 197 F.3d at 450-54. Plaintiffs cannot now present an argument that conflicts with our decision on that issue.

The court disregarded Plaintiff's additional new claim that the Department of Interior had withdrawn the RNA from mineral entry and location, because that claim was tied to its challenge to the RNA designation. The court stated: "In our view the ripeness issue before us is therefore 'in substance the same' as that raised in *Park* II, and cannot be relitigated." 378 F.3d at 1137-8. Quoting *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1411-12 (8th Cir. 1883), the court

stated: "None of the new theories [of relief] presented correct the jurisdictional problem… [because they] are simply additional arguments why this court should have reached a different result [in its jurisdictional ruling]." 378 F.3d at 1138.

The *Park Lake* court, 378 F.3d at 1137, quoted *Eaton v. Weaver Mfg. Co.*, *supra*, in stating that under the curable-defect doctrine "suit may be brought again where a jurisdictional defect has been cured or loses its controlling force." The court further stated: "Here, nothing has ripened since *Park Lake I* [the first district court case]." Essentially, then, *Park Lake* is a case that was not ripe the first time it was filed and remained unripe the second time it was filed.

As distinguished from *Park Lake*, NMOHVA in its present suit has satisfied the appellate court's rulings respecting the insufficiencies of its initial declaration. The court dismissed its case without prejudice. It has now refiled its case, together with two new Declarations that are sufficient to establish its standing under the appellate court's ruling. NMOHVA does not argue that the appellate court should have reached a different result. It strives only to comply with and has complied with the appellate court's ruling. Contrary to Federal Respondents' assertion in their motion at 10, NMOHVA is "not relitigating" its prior failure to establish standing. It is "curing" that failure consistently with the appellate court's opinion. The issues relating to "standing" are markedly different from then and now, as evidenced by the Declarations. In fact, "standing" is not and cannot be questioned

here under *Lujan v. Defenders of Wildlife, supra*. The new circumstance attendant NMOHVA's filing of its action here are the two new, sworn Declarations, akin to the new affidavit that the United States Supreme Court permitted to be filed and adjudicated together with the new complaint in *Costello v. United States, supra.*

Federal Respondents rely on *Nat'l Assn of Home Builders v. EPA,* 786 F.3d 34 (D.C. Cir. 2015) and the earlier case, *Nat'l Assn of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011), to argue in their motion [doc. 12] at 10-13 that NMOHVA cannot remedy the errors identified by the Tenth Circuit Court of Appeals in its prior opinion by submitting new declarations with facts that were available in the prior suit. The *Home Builders* cases are actions for declaratory and injunctive relief. Those actions challenged the EPA's issuance of a "traditional navigable water" ("TNW") determination under the Clean Water Act respecting two reaches of the Santa Cruz River. The TNW determination itself had no enforcement effect. Only a "jurisdictional determination" would affect, in a regulatory manner, a property owner. "Unless and until such a jurisdictional determination applies the TNW to particular property (and its watercourses) and finds a sufficient nexus—or the Agencies use the TNW Determination in an enforcement action … the owner or developer of the property suffers no incremental injury in fact from the TNW Determination and any challenge to it is premature." 667 F.3d at 13. The court discussed the inadequacies of the declarations submitted to establish standing,

concluding that they fell short of establishing "certainly impending dangers" for any particular member of the association and noting that past injuries would not establish the "immediate threat" necessary for injunctive relief. *Id.* at 15. The court dismissed for lack of standing.

In Home Builders' second case, the appellate court affirmed the lower court's dismissal for lack of standing "under the criteria identified by *Home Builders I*." 786 F.3d at 40, 43. The appellate court stated: "We hold that Home Builders' case for standing, although since supplemented with new declarations by adding factual detail to their assertions of injury, is materially unchanged and thus precluded by *Home Builders I*." 786 F.3d at 36. Discussing the new declarations, the appellate court stated: "None of Home Builders' new declarations makes up for any of the prior shortfalls or adds any new evidence of standing." 786 F.3d at 42.

In contrast to *Home Builders*, NMOHVA's two new Declarations do make up for the prior shortfalls identified by the Tenth Circuit Court of Appeals in its prior opinion and do add new evidence of standing. Moreover, those two new Declarations are entirely consistent with the "criteria" articulated by the Tenth Circuit in its prior opinion. Although not important to its decision, the appellate court in *Home Builders II* stated that its prior opinion in *Home Builders I* "cannot be used as a mere instruction manual on how Home Builders might correct defects

in its claim of standing." *See* 786 F.3d at 43. However, in *Home Builders II* both the lower court and the appellate court, in affirming, did, in fact, apply the "criteria" established in *Home Builders I.* In short, the plaintiff in *Home Builders I* and *II* failed to establish standing in both cases.

NMOHVA has established standing in the case at bar and has done so according to the "criteria" articulated by the Tenth Circuit in the prior appeal. In contrast to *Home Builders II,* issue preclusion is no bar to NMOHVA's instant action.[2]

Federal Respondents in their motion [doc. 12] at 10 cite *Brereton v. Bountiful City Corp.*, 434 F.3d 1213 (10th Cir. 2006). In *Brereton*, the appellate court ruled that the lower court erred in dismissing the plaintiff's complaint "with prejudice" based on lack of standing. In discussing "issue preclusion" in the context of Mr. Brereton's claim, the court stated: "[T]he district court's standing ruling precludes Mr. Brereton from relitigating the standing *issue* on the facts presented, but does not preclude his *claim* about the validity of the ordinance." *Id.*

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[2] *Home Builders II* cites *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983) for the proposition that the "curable defect" exception is limited by the requirement that new allegations of a sufficient "precondition requisite" identify "*occurrences subsequent to the original dismissal"* that "remed[y]" "the jurisdictional deficiency." 786 F.3d at 41. (Emphasis in original). *Dozier* recognized that the filing of an affidavit could suffice as "an occurrence subsequent." In addition, the dissenting judge in that case stated that he would prefer adoption of the Tenth Circuit's approach to "curable defect." 702 F.2d at 1197-8.

at 1219. (Emphasis in original). In the case at bar, the standing issue in NMOHVA's earlier appellate case was decided based "on the facts presented," i.e., the earlier declaration that the court found deficient. It was not based on the two new Declarations that accompany the instant action, which are sufficient to establish standing.

Federal Respondents in their motion [doc. 12] at 3 cite *GAF Corportion v. U.S.*, 818 F.2d 901 (D.C. Cir. 1987), which considered the standard for presentments of tort claims under the Federal Tort Claims Act, a proper "presentment" being a jurisdictional prerequisite to suits under the Federal Tort Claims Act. As it concerns Mr. Keene's lawsuit, his case was dismissed by the district court and affirmed on appeal in *Keene I*, because his presentment was deficient in failing to specify a specific dollar amount for each claim and in failing to provide sufficient information for the government to evaluate his claim. Mr. Keene filed a second presentment and second lawsuit. In that second lawsuit, the district court held that "principles of collateral estoppel bound it to apply the presentment standard set forth by the Second Circuit in *Keene I*." *Id.* at 911. The court concluded that Mr. Keene's second presentment was deficient under that standard and dismissed his suit for that reason. The court's dismissal was upheld.

The appellate court upheld the district court's ruling that "Keene is precluded from relitigating the standards of proper presentment set forth by the

Second Circuit in *Keene I*." *Id.* at 912. Thus, the "decision in *Keene I* does not preclude Keene's effort to establish federal jurisdiction in this circuit for its tort claim against the United States. The judgment in *Keene I* does, however, prevent it from relitigating the standards for proper presentment under Section 2675(a)." *Id.* at 913.

In discussing curable defects and noting that Mr. Keene was entitled to establish jurisdiction by filing a new presentment "curing" the deficiencies the Second Circuit had identified, the court in *GAF Corp.* stated: "While the curable-defect exception allows relitigation of a claim of jurisdiction, it does not allow relitigation of the standards by which jurisdiction is ascertained." *Id.* at 913.

In the case at bar, NMOHVA has properly cured its earlier deficiencies with respect to standing as identified by the Tenth Circuit Court of Appeals. It is entitled to do so. It is adhering to the "standards" articulated by the Tenth Circuit Court of Appeals. It is not seeking to relitigate those standards.

Federal Respondents cite, in their motion [doc. 12] at 2 and 11, *Perry v. Sheahan*, 222 F.3d 309 (7th Cir. 2000), *Hollander v. Members of Bd. of Regents of Univ. of New York*, 524 Fed. Appx. 727 (2nd Cir. 2013) and *Hooker v. Fed. Elec. Comm'n*, 21 Fed. Appx. 402 (6th Cir. 2001) to support their argument that issue preclusion bars NMOHVA from relitigating standing based on the same or similar

facts available in the prior proceeding. Those cases are distinguishable and do not support Federal Respondents' contention.

Perry was an action seeking declaratory and injunctive relief under 42 U.S.C. § 1983, complaining about a seizure of property by police during the course of an eviction that the court had stayed. The court entered an order that the property be returned and thereafter dismissed the plaintiff's remaining claims for lack of standing. Mr. Perry lacked standing because he could not satisfy the "redressability" component of standing in his suit for declaratory and injunctive relief, the court having given him relief for the injury caused by the continued retention of his property in the form of an order requiring its return. Mr. Perry appealed the decision in the first action and also filed a second action, which was identical to the first except for an additional damage claim against the sheriff, which the plaintiff later withdrew. The court stated: "Therefore, we are left with a case that is identical to *Perry I*, except for the inclusion of some facts that Perry (mistakenly) believes would establish his standing to seek injunctive and declaratory relief." *Id.* at 317. The court concluded: "The determination that Perry lacked standing in *Perry I* precludes relitigation of the same standing argument in *Perry II*." *Id.* at 318. (Emphasis added). While the court stated that "[o]nly facts arising after the complaint was dismissed—or at least after the final opportunity to present the facts to the court—can operate to defeat the bar of issue

preclusion," it reiterated that "*Perry II* was nothing more than a reargument of the same contentions rejected in *Perry I,* that were barred by issue preclusion, and that duplicated the arguments simultaneously being made in this court on appeal from *Perry I.*" *Id.* at 318.[3]

In the case at bar, NMOHVA does not present the "same" case with respect to standing and is not rearguing the "same contentions" with respect to standing as earlier presented to the appellate court.

Hollander was a taxpayer suit, brought under the Establishment Clause, challenging New York's funding of a particular university, claiming that because that university offered programs pertaining to "Women's Studies," the university was promoting "feminism religion." Mr. Hollander had brought the same case before. Mr. Hollander's asserted "taxpayer status" to support standing was rejected in the first case and likewise in the second on the basis of collateral estoppel. Similarly, in *Hooker*, a former senatorial candidate's constitutional challenge to the campaign finance statutes administered by the Federal Election Commission, brought in a third lawsuit, was dismissed with prejudice based on issue preclusion and lack of standing. Mr. Hooker's standing claims were based on

[3] Federal Respondents also cite in their motion [doc.12] at 2 *College Sports Council v. Department of Educ.*, 465 F.3d 20 (D.C. Cir. 2006), which is distinguishable from the case at bar. There, the plaintiffs could not satisfy the redressability prong of standing. Their claims in the second case "mirror[ed]" the claims raised in their first case. There were "no material differences" between their first and second cases. *Id.* at 22.

his status as a voter and a potential candidate for federal office. Nothing had changed in that regard in his suits. Addressing the first factor of "issue preclusion," namely, that the "precise issue" raised in the present case must have been raised and litigated in the prior case, the court concluded:

> In sum, issue preclusion applies in the present case, because the plaintiff is attempting to reassert the same claim with unchanged facts supporting his standing. Federal courts have used issue preclusion to bar litigants who have 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 have not changed.

Id. at 405.

In the case at bar, NMOHVA does not raise the "precise issue" respecting standing as it did earlier. The facts NMOHVA presents to this court through its two new Declarations are materially different. The earlier identified standing deficiencies have been cured in accordance with the appellate court's ruling.

In *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000), cited by Federal Respondents in their motion [doc.12] at 2, the appellate court concluded that the lower court had incorrectly applied the doctrine of collateral estoppel, precluding the plaintiff from litigating the issue of negligence. There, the court stated that application of collateral estoppel requires, among other elements, that the issue previously decided is identical with the one presented in the action in question. *Id.* at 1198. There, the general finding of negligence failed to identify what the jury found was sustained by the evidence. "Thus, we cannot say as a matter of law the

issue decided by the first jury is identical to the issue in controversy in this case." *Id.* at 1198-9. Similarly, in the case at bar, there is no "identity" of issue as it pertains to standing, because the demonstration of standing in the current action is markedly different from that in the previous action.

Taylor v. Sturgell, 553 U.S. 880 (2008), cited by Federal Respondents in their motion at 14, involved the question whether one FOIA plaintiff could be bound by the result reached in a different FOIA plaintiff's case under the theory of "virtual representation." The court answered that he could not, also observing that "a party asserting preclusion must carry the burden of establishing all necessary elements." *Id.* at 906.[4]

II. NMOHVA'S PETITION FOR JUDICIAL REVIEW FILED IN THIS ACTION IS NOT CONTRARY TO JUDICIAL RULES AND AUTHORITY IN THE TENTH CIRCUIT, OTHER CIRCUITS AND THE UNITED STATES SUPREME COURT AS WELL

Federal Respondents conclude their argument by asserting that: "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." *See* Federal Respondents' motion [doc. 12] at 20. That is not the case.

[4] Federal Respondents cite *Magnus Electronics, Inc. v. La Republica Argentina*, 830 F.2d 1396 (7th Cir. 1987) in their motion [doc. 12] at 15. That case involved a plaintiff whose repeated complaints were substantively deficient, and, in light of that track record, the court believed that the bare bones allegations of agency, alter ego and conspiracy made in the latest complaint appeared to be "mere verbiage" made solely for the purpose of obtaining jurisdiction. *Id.* at 1401.

Federal Respondents do not suggest how their theory that only facts that "postdate the prior litigation," *see* motion at 19, would suffice to permit a new lawsuit, is relevant in the context here, where when the ROD issued it caused the injury of which NMOHVA complains and that injury continues into the future. While that theory might have relevance in the context of ripeness, as in *Park Lake*, where an unripe case can later ripen (although it remained unripe in *Park Lake*), it would not under the facts here. Essentially, then, Federal Respondents improperly seek to revise the appellate court's order dismissing "without prejudice" to make it an order dismissing "with prejudice," which the appellate court did not do.

NMOHVA is not, as Federal Respondents argue in their motion [doc. 12] at 13, "seeking reconsideration of the standing issue decided against it in *NMOHVA I*." NMOHVA seeks merely to comply with that order and opinion of the appellate court by curing the deficiencies with respect to its earlier filed Declaration by filing the two new Declarations and thus to establish standing in the instant case. Those Declarations clearly show standing in accordance with the appellate court's opinion in the prior case and its standards and criteria for establishing standing specified therein. No argument to the contrary is made by Federal Respondents.

The Tenth Circuit and other circuits, as well as the United States Supreme Court, permit a "cure" of jurisdictional deficiencies, including standing. The authority cited and discussed at Point I so demonstrates. And if the filing of an

affidavit, as in the United States Supreme Court case of *Costello v. United States*, *supra*, suffices to "cure" so, too, should the filing here of two new sworn Declarations as here.

Federal Respondents cannot carry their burden to show that the "identical" standing issue is present, a required first factor for issue preclusion. *See Park Lake* at 1136. The initial declaration and the two new Declarations that have been filed in support of standing for the instant case are markedly different. The two new Declarations contain facts that the appellate court found lacking in the initial declaration and which serve to prove injury, causation and redressability. Additionally, Mr. Werkmeister's new Declaration, exhibit A to this action, at ¶ 12, describes the "Citizen's Proposal," which he submitted and which detailed many of the important and historic 4 WD routes in frequent and continuous use (AR002800-AR002863). Mr. Werkmeister then details the specific roads and routes that he and other members of NMOHVA have used and would continue to use but for the ROD, which has denied their use. Those two new Declarations submitted in this action "cure" the earlier standing deficiencies in accordance with Tenth Circuit and other authority.

This is not a case, as Federal Respondents suggest in their motion [doc. 12] at 15 of multiple, vexatious lawsuits. Federal Respondents did not quarrel with NMOHVA's standing in the first case. Federal Respondents do not, in their

motion to dismiss, quarrel with NMOHVA's standing in this case, which is supported by the two new Declarations, exhibits A and B, that have been filed in this case. The Administrative Record has already been filed in the first case. The issues on the merits were earlier briefed by the parties, except for a few new issues in the instant case. There would be additional argument and authorities cited with respect to the issues raised in the earlier case.

Contrary to Federal Respondents' argument in their motion at 15-16, it would be exceedingly unfair to NMOHVA were the court to grant Federal Respondents' motion to dismiss and lock the courthouse door on NMOHVA, where it has remedied and cured the standing deficiencies identified by the appellate court and in accordance with that court's standards and criteria for doing so. The appellate court dismissed the prior case "without prejudice" and vacated the lower court's rulings on the merits. NMOHVA "can" cure standing and should be permitted to do so, as it has done, in accordance with Tenth Circuit authority.

Conclusion

NMOHVA respectfully requests that Federal Respondents' motion to dismiss [doc. 12] be denied and for such further relief as the court deems just and proper.

RESPECTFULLY SUBMITTED this 6th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 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/Karen Budd-Falen
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