

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

RAGS OVER THE ARKANSAS RIVER, INC.,

Plaintiff,

v.

THE BUREAU OF LAND MANAGEMENT, an agency of the United States; KEITH E. BERGER, in his official capacity as Field Manager for the Royal Gorge Field Office of the Bureau of Land Management; GREG SHOOP, in his official capacity as District Manager for the Front Range District of the Bureau of Land Management; HELEN HANKINS, in her official capacity as Colorado State Director of the Bureau of Land Management; and KENNETH SALAZAR, in his official capacity as Secretary of the Department of Interior;

Defendants.

**PETITION FOR REVIEW OF AGENCY ACTION
(D.C. COLO.LAPR 10.2(D))**

INTRODUCTION

1. Through this action Plaintiff Rags Over the Arkansas River, Inc. (“ROAR”), a non-profit citizen’s group whose members are dedicated to preserving and protecting the headwaters of the Arkansas River and Bighorn Sheep Canyon, challenges the federal government’s decision to issue a land use authorization (the “2920 Permit”) to the Over the River Corp. (“OTR Corp.”) to construct a massive commercial art project that would cover 5.9 miles of the Arkansas River (scattered over a 42-mile stretch of the river) with polypropylene fabric panels (the “Art Project”).

2. The Art Project will be constructed almost entirely within a critically sensitive area designated by the federal government as the Arkansas Canyonlands Area of Critical

Environmental Concern (“ACEC”). This designation was granted in acknowledgement of, and to protect and prevent irreparable damage to, the important historic, cultural, scenic, wildlife, and other natural values of this portion of the Arkansas River. In particular, this designation was made, in part, to protect key habitat for Bighorn sheep, the mammalian symbol of the Colorado Division of Parks and Wildlife (“CDPW”) and Colorado’s official animal.

3. The Arkansas Canyonlands ACEC is located within the larger Arkansas Headwaters Recreation Area (the “AHRA”). The AHRA is a scenic area considered to be one of Colorado’s most valuable natural resources. The portion of the Arkansas River flowing through, and which is the underlying reason for, the AHRA is one of the nation’s most popular white-water rafting destinations, and is designated by the state of Colorado as the most popular moving water fishery in Colorado. The AHRA is used extensively for fishing, rafting, hiking, and other outdoor recreational activities.

4. Management of the AHRA is of great importance to the people of Colorado generally, and to the people residing near the AHRA specifically.¹ For greater than two decades, the AHRA has been cooperatively managed by the federal Bureau of Land Management (“BLM”), the CDPW, and by local interests (including anglers, commercial rafters, private property owners, local governments, environmentalists, and water users). This management system has worked to balance the popularity of this portion of the Arkansas River (and its importance to the state and local economies) with protection of the wildlife and natural resources within the AHRA.

5. Defendants’ approval of the Art Project overthrew the established management scheme in the AHRA, along with the careful balance it had achieved to both utilize and protect this portion

¹ These include residents in the communities along U.S. Highway 50 from Salida to Royal Gorge, Colorado.

of the Arkansas River. The Defendants characterize the Art Project as “recreation,” and its impacts to the AHRA and its resources as “temporary.” In truth, the Art Project is akin to a massive resource extraction project, and under federal law should be treated as one to ensure protection of resources within the Arkansas Canyonlands ACEC.

6. The Art Project will require approximately 28 months and 3,000 crew work days to construct, along with an additional 3 to 12 months to dismantle. As with a mineral development project, the Art Project will require drilling over 9,000 bore holes to a depth of 20 to 35 feet into the bedrock and alluvium that form the Arkansas River’s banks, in order to install industrial rock bolts or anchors to hold the Art Project aloft. A majority of these bolts will be left permanently in place (being cut off just below the surface), but some will need to be completely removed in a manner that will further disturb the surface area. The Art Project construction and demolition requires the use of equipment commonly used in mining and road building, such as hydraulic drill masts mounted on Cat 320-330 long-reach excavators, Cat M313D—M322D wheeled excavators, boom truck cranes, grouters, air compressors, water tanks, grout mixers, support trailers, steel rock anchors, and anchor frames.

7. The Art Project will have significant short- and long-term impacts on wildlife within the Arkansas Canyonlands ACEC. The Art Project will increase the Bighorn Sheep’s susceptibility to disease, disperse sheep from the primary habitat along the Arkansas River, and likely increase the mortality rate in young lambs. The Art Project will also result in the displacement and potential death of other species, including bald eagles, golden eagles, and peregrine falcons. As one former Colorado Wildlife Commissioner explained, “there are no redeeming values of this project from a fish and wildlife perspective.”

8. The Art Project will also interfere with the usability of the AHRA for existing recreational purposes. Construction, exhibition, and dismantling of the Art Project will restrict

public use of AHRA facilities, prevent egress to the banks and surface of the Arkansas River, and limit access to restrooms, picnicking, camping and other recreational facilities. The displacement of anglers and others by the Art Project would have a severe effect on the reputation and appeal of the AHRA recreational experience both during the project and potentially for years thereafter.

9. The Art Project will also result in numerous lane closures during construction and dismantling of the project on U.S. Highway 50, a mostly 2-lane, bi-directional road. The highway is used by tourists and members of local communities within the AHRA for personal, recreational, and commercial purposes. These closures would significantly interfere with these uses and could impair the safety and welfare of people in the area.

10. In permitting the Art Project, the federal Defendants violated federal laws, including the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-1787, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4331-4370H. Among other things, the Defendants: (1) approved a project that is not authorized by the applicable federal land use plan for the area, known as the Royal Gorge Resource Management Plan (“Royal Gorge RMP”); (2) improperly identified the Art Project as a recreational activity where such recreational use is clearly inconsistent with the Royal Gorge RMP; (3) permitted unauthorized surface disturbances within the Arkansas Canyonlands ACEC inconsistent with directives in the Royal Gorge RMP intended to protect sensitive scenic, cultural, and natural resources from resource extraction projects; (4) permitted impairment of natural scenic values within the Arkansas Canyonlands ACEC inconsistent with the directives in the Royal Gorge RMP applicable to the area; (5) allowed for a project that will result in unnecessary and undue degradation of public lands; and (6) failed to adequately examine and/or mitigate impacts: (a) to bighorn sheep during construction of the Art Project; (b) on traffic flow on U.S. Highway 50 during construction and

demolition of the Art Project; and (c) to the Arkansas River from removal of anchors near Texas Creek.

11. Plaintiff seeks an order from the Court setting aside BLM's authorization of the Art Project until such time as the federal Defendants have fully complied with their obligations under federal law.

JURISDICTION AND VENUE

12. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because this action involves the federal government as a defendant, and it arises under the laws of the United States.

13. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) and 42 U.S.C. § 7604(c)(1). The events and omissions giving rise to Plaintiff's claims occurred in the District of Colorado. The Art Project is located in Colorado. The Colorado State BLM Director is located in Lakewood, and the Front Range District Manager, who approved the Project, is located in Cañon City, Colorado.

PARTIES

14. Plaintiff ROAR is a citizen's group organized as a Colorado not-for-profit corporation. Its mailing address is 662 Wapiti Trail, Cañon City, Colorado 81212. ROAR has 300 members, and over 5,000 supporters. ROAR is dedicated to preserving and protecting the headwaters of the Arkansas River and the Bighorn Sheep Canyon, where BLM has approved the Art Project to be constructed. ROAR is also dedicated to protecting the area's inhabitants and the communities that utilize and depend on the river and its canyon, and was formed to organize and communicate local concerns with early Project proposals. ROAR's members include residents of Bighorn Sheep Canyon, anglers, fishing guides, business owners, and others. ROAR's members regularly use and enjoy the facilities, access points, lands, and waters that would be affected by

the Art Project for fishing, boating, hunting, recreation, photography, hiking, nature and wildlife study, commercial guiding for anglers, and other commercial, recreational, and conservation purposes.

15. Defendant BUREAU OF LAND MANAGEMENT is an agency of the United States within the Department of the Interior. BLM is responsible for managing its lands, including the lands where the Art Project will be constructed, in accordance with federal law.

16. Defendant KEITH E. BERGER is sued in his official capacity as Field Manager for the Royal Gorge Field Office of the BLM. Mr. Berger is responsible for ensuring that the activities of BLM's Royal Gorge Field Office comply with all applicable laws and regulations. Mr. Berger signed and issued the land use authorization for the Art Project.

17. Defendant GREG SHOOP, is sued in his official capacity as District Manager for the Front Range District of the BLM. Mr. Shoop is responsible for ensuring that the activities of BLM's Front Range District office comply with all applicable laws and regulations. Mr. Shoop signed the Record of Decision ("ROD") authorizing the issuance of a land use authorization for the Art Project.

18. Defendant HELEN HANKINS is sued in her official capacity as the Colorado State Director of BLM. Ms. Hankins is responsible for ensuring that BLM lands in Colorado are managed in accordance with all applicable laws and regulations.

19. Defendant KENNETH SALAZAR is sued in his official capacity as Secretary of the Department of the Interior. Mr. Salazar is responsible for ensuring that lands administered by the Department of Interior, including BLM lands, are managed in accordance with all applicable laws and regulations.

LEGAL FRAMEWORK

The Federal Land Policy and Management Act ("FLPMA")

20. BLM must manage its lands in strict compliance with FLPMA.

21. In enacting FLPMA, Congress declared:

[I]t is the policy of the United States that . . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8).

22. Through FLPMA, Congress established a two-step process for managing projects on public lands administered by the BLM.

23. First, in carrying out FLPMA's management objectives, BLM is required to develop and maintain land use plans, known as Resource Management Plans ("RMPs"), to guide the management of specific public lands within the agency's designated planning areas. *See generally*, 43 U.S.C. § 1712. A land use plan generally describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps. When developing these land use plans, BLM shall, among other things, observe the principles of multiple use and sustained yield, "give priority to the designation and protection of areas of critical environmental concern (ACEC)," "consider present and potential uses of the public lands," and "weigh long-term benefits to the public against short-term benefits." 43 U.S.C. § 1712(c). Finally, when developing land use plans, BLM is required to coordinate land use planning and management activities with the state and local governments where the land is located. *Id.*

24. Second, BLM may not approve any project or use that is not in conformance with the existing land use plan. 43 C.F.R. § 1610.5-3(a). Conformity or conformance means that a

resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment. 43 C.F.R. § 1601.0-5. If a proposed action is not in conformance with the existing plan and warrants further consideration before a RMP revision is scheduled, then BLM shall amend the plan in accordance with 43 C.F.R. part 1600. 43 C.F.R. § 1610.5-3 (c).

25. Finally, FLPMA provides for an overarching obligation that in carrying out its public lands management duties, BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).

***The National Environmental Policy Act
 (“NEPA”)***

26. Congress enacted NEPA to, among other things, “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

27. To fulfill this goal, NEPA requires all federal agencies to analyze the environmental impact of particular federal activities. 42 U.S.C. § 4332(2)(C).

28. The heart of NEPA is the environmental impact statement, or EIS. A federal agency must prepare an EIS for all its major federal actions significantly affecting the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The EIS must explore all reasonable alternatives to an action (*see* 40 C.F.R. § 1502.14), must identify direct, indirect and cumulative impacts for each reasonable alternative (*see* 40 C.F.R. § 1502.15), and must consider possible mitigation measures to reduce such impacts to the environment (*see* 40 C.F.R. § 1502.14(f)).

29. The goals of an EIS are to “provide a full and fair discussion of significant impacts” associated with a federal decision and to “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality

of the human environment.” 40 C.F.R. § 1502.1.

30. A federal agency must prepare a draft EIS and must request comments on the draft EIS from relevant federal agencies, interested state, local, and tribal governments, the public, and other interested parties. 40 C.F.R. § 1503.1. The federal agency must assess and consider any comments in preparing the final EIS. *Id.* § 1503.4(a).

31. A federal agency has a continuing duty under NEPA to prepare and circulate a supplemental EIS (“SEIS”) when: (1) there is new information that has come to light that may result in significant impacts not previously disclosed, or (2) where the agency makes substantial changes in the proposed action that are relevant to the environmental concerns. 40 C.F.R. § 1502.9(c). A SEIS must meet all the requirements applicable to draft and final EISs under NEPA and its implementing regulations. *Id.* at 1502.9(c)(4).

FACTUAL BACKGROUND

The Over the River Project

32. The artists Christo and Jeanne-Claude and the OTR Corp. (collectively, “Christo”) propose to install a “temporary work of art” consisting of “[f]abric panels suspended horizontally clear of and high above the water level [that] will follow the configuration and width of the changing course of the river, during a period of two consecutive weeks to be selected between mid-July and mid-August of any given year . . .”

33. The Art Project would suspend a total of 5.9 miles of polypropylene fabric panels in scattered sections of a 42-mile stretch of the Arkansas River between Salida and Cañon City, Colorado.

34. The Arkansas River is situated in a canyon setting surrounded by hilly, steep terrain.

35. U.S. Highway 50 and the Union Pacific Railroad parallel the river through the entire Art Project area.

36. Access to and through the Art Project area is limited to U.S. Highway 50, which is the primary access road to all recreation sites and residential areas within the Arkansas River corridor.
37. Cañon City and Salida are the nearest incorporated population centers to the Art Project, with several other residential communities—Wellsville, Swissvale, Howard, Coaldale, Cotopaxi, Texas Creek, and Parkdale—also within the Art Project area.
38. To support the suspension of several tons of polypropylene fabric over the Arkansas River, the Art Project depends on a complex system of industrial anchors and cables.
39. The 5.9 miles of panels would require approximately 9,100 steel anchors, 2,275 anchor transition frames, 1,275 cables of varying lengths, and 925 fabric panel segments.
40. The drill holes for each anchor will be approximately 10 to 35 feet in depth. They will be drilled next to and/or beneath U.S. Highway 50 on the south side of the river, and next to and/or beneath the existing railroad tracks on the north side of the river.
41. Drilling activities will displace soil and mineral resources within the Art Project area.
42. The Art Project would only be on display for two weeks.
43. Construction of the Art Project will take approximately 28 months and 3,000 crew work days to complete.
44. Installing the anchor bolts and other hardware requires large drilling equipment normally used for mining and heavy construction activities. The Project equipment includes 4 hydraulic drill masts mounted on Cat 320-330 long-reach excavators, Cat M313D – M322D wheeled excavators, boom truck cranes, grouters, air compressors, water tanks, grout mixers, support trailers, steel rock anchors, anchor frames, and numerous personnel and contractors to perform the construction and dismantling work.
45. The Project also requires the use, transportation, and on-site storage of a variety

of hazardous materials.

46. Removal of the Art Project would span an additional 3 months to one year.

47. The demolition plan allows Christo to cut off anchor bolts (except those near Texas Creek) just below the surface, leaving in place a majority of the rock anchors permanently. However, anchors will be completely removed in the Texas Creek area. The final EIS does not disclose how many anchors would be removed in the Texas Creek area. A map of the project area shows the anchor points in the Texas Creek panel segment and depicts approximately 350 anchor points. Additional excavation and/or blasting will likely be required to remove these anchor bolts from the rock and alluvium.

The Arkansas Headwaters Recreation Area

48. The Arkansas Headwaters Recreation Area is located in Chaffee, Lake, Pueblo, and Fremont Counties, Colorado, and is comprised of the surface of the Arkansas River, lands owned by the State of Colorado, and lands owned by the United States and administered by the BLM.

49. The AHRA is a nationally significant multiple-use resource that provides a variety of recreational opportunities and serves as a regional hub for outdoor recreational pursuits.

50. The AHRA has retained its natural characteristics even through it has been modified by a railroad, U.S. Highway 50, and agricultural, residential, and commercial development along much of its length.

51. The AHRA is known for its natural beauty, biological productivity, and diverse river environments.

52. The AHRA has a significant and vital impact on the valley's economy.

53. The AHRA is subject to a Cooperative Management Agreement between the U.S. Department of Interior, the U.S. Department of Agriculture, and various agencies of the State of Colorado.

54. Under the Cooperative Agreement, the AHRA is managed jointly by the BLM and the Colorado State Parks Division (now the Colorado Division of Parks and Wildlife).

55. Under the Cooperative Agreement, the AHRA is managed in conformance with the Arkansas River Recreation Management Plan (the “AHRA Plan”), which was developed by the BLM and Colorado State Parks after a comprehensive public involvement process.

56. BLM and the State manage the AHRA with the advice of a 14-member Citizen Task Force comprised of a diverse array of stakeholders representing anglers, commercial agreement holders, private boaters, riverfront property owners, local government, environmental interests, and water users.

57. The AHRA Plan requires that the Citizen Task Force members will be polled as to their opinions, and their reasons for those opinions, regarding all decisions of substance relating to the AHRA, with the outcome of this to become a part of the public record.

The Royal Gorge Resource Management Plan

58. The Art Project would be located in the area of the AHRA covered by the Royal Gorge Resource Management Plan adopted by BLM in 1996.

59. The Royal Gorge RMP sub-divided the Royal Gorge Field Office area into 10 Eco-Subregions (“ESRs”) to enable site- and/or issue-specific management and planning decisions.

60. The Art Project falls entirely within the Arkansas River Subregion ESR #1.

61. The Royal Gorge RMP designates the 23,291 acres of the Arkansas River Canyonlands as an ACEC.

62. An ACEC is a federal designation under FLPMA that recognizes areas where special management attention is needed to protect, and prevent irreparable damage to, important historic, cultural or scenic values, fish and wildlife resources, or other natural systems or processes.

63. The Arkansas Canyonlands ACEC contains scenic values; peregrine falcons; and key habitat for raptors, bighorn sheep, and fisheries.

64. Under the Royal Gorge RMP, the Arkansas Canyonlands ACEC is subject to special management, including, but not limited to: (1) no surface occupancy for fluid minerals leasing; (2) prohibition on locatable mineral entry; (3) prohibition on mineral materials development; (3) treatment as a Visual Resources Management (“VRM”) Class II area; and (4) retention in public ownership.

65. The Royal Gorge RMP does not explicitly allow the Art Project or similar type of proposal within any ESR covered by the plan.

66. In June 2009, BLM told the Front Range Resource Advisory Council that the Royal Gorge RMP is “notably silent on land use proposals like OTR.”

67. The final EIS for the Art Project found that the project was in potential conflict with five (5) specific management decisions of the Royal Gorge RMP: Wildlife Habitat 1-16; Fishery Habitat 1-24; Special Status Plants/Plant Communities Habitat 1-27; Special Status Animal Species Habitat 1-30; and Areas of Critical Environmental Concern (ACEC) 1-66.

BLM Approval of the Art Project

68. Christo verbally proposed the Art Project to BLM in 1996. Before submitting a written application, Christo retained a contractor to initiate preparation of an Environmental Assessment (EA).

69. After several years of inattention to the application, Christo re-approached the BLM about the proposed project in August 2005.

70. Before BLM had even received a written application, and without written public disclosure of relevant details of the proposal, BLM conducted several “scoping” meetings for the Art Project in January and February 2006.

71. Christo submitted a written application for the Art Project to BLM on April 10, 2006.
72. In April 2006, BLM advised Christo that an EIS would be required for the Art Project due to the complexity, controversial nature of the proposal, concerns regarding public safety, and the potential for significant impacts.
73. On June 19, 2006, BLM published a Notice of Intent to prepare an EIS in the Federal Register (“Notice of Intent”).
74. Contemporaneously with publishing the Notice of Intent, BLM in June 2006 requested from Christo a detailed design proposal, including additional details on project design, scheduling, and event management.
75. In April 2007, Christo provided BLM with the 2,000 page “Christo and Jeanne-Claude Over the River Design and Planning Report” (“OTR Plan”) in response to BLM’s request.
76. BLM subsequently concluded that the OTR Plan was inadequate for BLM to properly analyze the impacts of the Art Project proposal. BLM requested additional information from Christo.
77. In April 2008, Christo submitted an addendum to the OTR Plan, at which time BLM concluded that it had sufficient information to “move forward with the EIS.”
78. A Notice of Realty Action for the Art Project was published in the Federal Register on October 31, 2008 (the “NORA”).
79. A draft EIS was issued in July 2010, with a notice of availability published in the Federal Register on July 16, 2010.
80. BLM provided a total of 60 days for public comment on the draft EIS.
81. BLM held a total of 2 public comment meetings regarding the draft EIS.
82. BLM received over 3,500 submissions during the comment period and recorded 4,558 comments.

83. BLM issued the final EIS in July 2011.
84. Of the several changes to the project made in the final EIS, BLM had removed the Art Project viewing center at Parkdale, Colorado, including the parking area, temporary bridge, and related facilities.
85. The ROD for the Project was signed by Mr. Shoop on November 4, 2011, and Ms. Hankins made the ROD immediately effective in the Notice of Availability published in the Federal Register on November 8, 2011.
86. At no time did BLM poll the AHRA Citizen Task Force before issuing the ROD.
87. The Art Project was discussed at numerous Citizens Task Force meetings throughout the NEPA process.
88. Some members of the Citizens Task Force proposed on several occasions that a vote be taken on the project. Each time a vote was proposed, Defendants' representatives failed to allow a vote.
89. After the final EIS was issued, the Citizens Task Force insisted on a vote. A vote was taken and the Art Project was disapproved by a 7 to 1 vote.
90. BLM does not mention the Citizen Task Force or the vote in any public document related to approval of the Art Project.

The Art Project as "Recreation"

91. BLM concluded that the Art Project is consistent with certain ESR-specific recreational management decisions in the Royal Gorge RMP.
92. BLM concluded that the Art Project is consistent with Recreation Management 1-82, which provides that "Recreation will be managed to provide for a variety of recreational opportunities and settings; additional opportunities for mountain biking, hiking, off-highway

vehicle use, interpretation, and horseback riding; facility development will be accomplished to reduce user conflicts and to improve visitor health and safety.”

93. In adopting Recreation Management 1-82, BLM sought to authorize common recreational uses of public land within the Arkansas River Subregion ESR #1.

94. The Art Project is not a common recreational use of public land.

95. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project are different than the impacts associated with common recreational uses such as those identified in Recreation Management 1-82.

96. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project would be more significant than the impacts associated with common recreational uses such as those identified in Recreation Management 1-82.

97. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project will be greater than that associated with mountain biking in the Subregion.

98. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project will be greater than that associated with hiking in the Subregion.

99. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project will be greater than that associated with off-highway vehicle (“OHV”) use in the Subregion.

100. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project will be greater than that associated with interpretation in the Subregion.

101. The impacts to natural resources within the Arkansas River Subregion ESR #1 from the Art Project will be greater than that associated with horseback riding in the Subregion.

102. In approving Recreation Management 1-82, BLM did not contemplate a recreational use within the Arkansas River Subregion ESR #1 with the impacts associated with the Art Project.

103. In approving Recreation Management 1-82, BLM did not weigh the long-term benefits to the public against the short-term benefits associated with a recreational activity with the impacts of the Art Project.

104. In approving Recreation Management 1-82, BLM did not coordinate with state and local governments where the land is located about the possibility of a recreational activity with the impacts of the Art Project.

105. BLM concluded that the Art Project is consistent with Recreation Management 1-86, which provides that “Various actions will occur to enhance recreation: river corridor and upland recreational opportunities emphasizing a balance between resource protection and tourism.”

106. In adopting Recreation Management 1-86, BLM sought to authorize common recreational uses of public land within the Arkansas River Subregion ESR #1.

107. In approving Recreation Management 1-86, BLM did not contemplate a recreational use within the Arkansas River Subregion ESR #1 with the impacts associated with the Art Project.

108. In approving Recreation Management 1-86, BLM did not weigh the long-term benefits to the public against the short-term benefits associated with a recreational activity with the impacts of the Art Project.

109. In approving Recreation Management 1-86, BLM did not coordinate with state and local governments where the land is located about the possibility of a recreational activity with the impacts of the Art Project.

110. The Art Project is, in fact, more similar to mineral resource extraction and development than it is to recreation.

111. The Art Project utilizes similar techniques as mineral resource extraction and development.

112. The Art Project utilizes similar equipment as mineral resource extraction and development.

113. The Art Project, which requires boring more than 9,000 holes to place the anchors, will displace from within the project area a substantial amount of soil and/or mineral resources.

114. The impacts associated with the Art Project on the environment are nearly identical to those impacts normally associated with mineral resource extraction and development.

The Art Project's Impacts to Protected ACEC Resources

115. Approximately eighty (80) percent of the Art Project would be located within the Arkansas Canyonlands ACEC.

116. The Arkansas Canyonlands ACEC is closed to both locatable mineral entry and mineral material development.

117. Limited fluid mineral development is allowed within the Arkansas Canyonlands ACEC with a "no surface occupancy" stipulation.

118. The purpose of the restrictions on mineral development in the Arkansas Canyonlands ACEC is to prevent disturbances to the surface associated with these activities that would impact protected and sensitive scenic, natural, and cultural resources within the ACEC.

119. BLM did not impose similar surface disturbance prohibitions within the Arkansas Canyonlands ACEC for the Art Project as those required for other resource extraction projects.

Bighorn Sheep

120. The proposed Art Project will occur along a narrow 42-mile stretch of the Arkansas River known as "Bighorn Sheep Canyon."

121. The Bighorn sheep is the Colorado state mammal, an economically important game species, and an important attraction for wildlife viewers visiting the area.

122. Bighorn sheep are present year-round in the project area.

123. Colorado wildlife officials estimate that there are a total of 410 Bighorn sheep in the project area.

124. The project area is considered critical habitat for the Bighorn sheep due to its habitat characteristics and because Bighorn sheep have a high fidelity to their home range, making it less likely that they will leave the area in response to increased stress or other threats.

125. Bighorn sheep are highly dependent on reliable water. Sheep typically stay within 2 miles of a water source. Ewes and lambs tend to stay much closer to dependable water sources.

126. Bighorn sheep herds are found on both the north and south side of the Arkansas River in the project area.

127. Federal and state officials have found that the Bighorn Sheep on the north side in the project area are of “paramount management concern.”

128. The north side of the project area lacks natural springs and perennial side creeks. Sheep on the north side must use the Arkansas River as their primary water source. Access to this source is of paramount importance to their survival.

129. The proposed Art Project is expected to result in significant short-term and long-term effects on the sensitive Bighorn sheep populations in the area.

130. The Art Project, through increased human presence, construction, and drilling activities, would increase stress levels in the Bighorn sheep, making them more susceptible to disease, decreased reproduction, and stochastic threats, which would result in a decline in herd health and long-term prosperity.

131. In the EIS for the Art Project, BLM discusses intentional displacement of the sheep into habitat currently unavailable to sheep as a primary means to mitigate impacts from the Art Project. The habitat would be made available by installing artificial water sources known as

guzzlers. In addition, forested lands would be “treated”—logged, hand-thinned, or burned—to open up new habitat.

132. BLM did not condition the Art Project on mitigation. The final EIS assumed mitigation would be required by the State of Colorado.

133. The Art Project is expected to cause sheep mortality in the area. Even with mitigation, BLM project plans allow for sheep mortality of up to 50 percent.

Fisheries

134. A high quality fishery exists in the proposed project area, which supports brown and rainbow trout, as well as sucker and minnow species. This fishery is an important component of both the local economy and local recreation.

135. While the brown trout population is healthy and is self-maintaining through natural reproduction, the rainbow trout population has depended on stocking. Recent efforts have attempted to establish a naturally producing population, and spawning of these rainbow trout was to occur in the Spring 2011.

136. The proposed project will impact the fisheries through increased erosion of the soil adjacent to the river, increased sedimentation in the river, and increased disruption of the riparian vegetation. The increased human presence and associated noise of construction will further impact the fisheries. Finally, accidents such as fuel spills or a dislodged panel could detrimentally impact the fisheries.

Avian Species

137. Avian wildlife species are abundant along the Arkansas River in the Art Project area. Song birds, raptors, and waterfowl are present. Some of these species habituate to human activities while others are very sensitive to or deterred by human activity.

138. Raptor species are generally sensitive to or deterred by human activity. It is documented that significant surface disturbances associated with mineral resource extraction activities can disrupt raptor breeding and feeding. Raptors are often deterred from such project activities.

139. Bald eagles, golden eagles, ospreys, and peregrine falcons are known to occupy habitat within the project area. Four golden eagle nests have been identified in the area. A peregrine falcon site was recorded in the area. Bald eagles and ospreys have been observed in the area perching and feeding along the Arkansas River.

140. The final EIS acknowledges that these species will be displaced as a result of the Art Project. The final EIS also acknowledges the potential for increased mortality from strikes with cables or other project elements.

141. BLM relies primarily on using “buffer zones” and monitoring to mitigate project impacts on avian species.

Impact to Scenic Resources

142. The Royal Gorge RMP designates the Arkansas Canyonlands ACEC as a Visibility Resource Management (“VRM”) Class II area.

143. The objective of classifying an area as VRM Class II is to:

Retain the existing character of the landscape. The level of change to the characteristic landscape should be low. Management activities may be seen, but should not attract the attention of the casual observer. Any changes must repeat the basic elements of form, line, color, and texture found in the predominant natural features of the characteristic landscape.

144. To meet this objective, VRM Class II areas are given the following protections: (1) Closed to mineral entry; (2) Closed to mineral materials development; (3) Avoided by major Right-of-Ways; (4) OHV use limited to designated roads and trails, and; (5) Retained in public ownership.

145. The VRM Class II guidance states that the level of change to the characteristics of the landscape from any activity within a Class II area should be low, and it should not attract the attention of a casual observer.

146. In the final EIS, BLM indicated a potential conflict between the Art Project and protection of the VRM Class II area within the Arkansas Canyonlands ACEC.

147. BLM acknowledges that the Art Project will not meet the VRM Class II objectives in the “short-term.”

148. BLM concludes that the objectives would be met in the “long-term” in that most visual effects would vanish after removal of the facilities and restoration of the disturbed sites.

149. BLM does not explain how 3 years of construction, exhibition, and demolition is only a short-term impact on visibility.

150. BLM also states that the VRM Class II objectives are “primarily designed to evaluate and minimize the impacts of resource extraction” and other traditional land uses, not art projects.

151. BLM does not explain why the impacts from the Art Project’s construction in the Arkansas Canyonlands ACEC should not be evaluated and mitigated in the same manner as mineral extraction due to the similarity of impacts.

152. BLM has often concluded that mineral exploration has temporary visual impacts.

153. Mineral extraction is prohibited within a VRM Class II area.

Impact to Cultural Resources (Traditional Recreation)

154. Recreational opportunities on Colorado’s BLM-managed land include camping, hiking, mountain biking, birding, wildlife viewing, horseback riding, photography, heritage site visits, hunting, fishing, boating, white-water rafting, hang gliding, OHV trail use, climbing, shooting, winter sports, and scenic driving.

155. Some areas adjacent to the Arkansas River are special recreational management areas (“SRMA”s), while others are extensive recreational management areas (“ERMA”s). Recreation in SRMAs is limited to low-impact activities such as bird watching, hiking, and biking, while ERMAs allow higher-impact activities such as camping, hunting, horseback riding, and OHV-use.

156. The Art Project would severely impact recreation in the Arkansas Canyonlands, including most notably the area’s main recreational activity, angling. Installation, exhibition, and removal would adversely affect anglers because access to the riverbank would be restricted, panels would interfere with fishing activities, and the crowds would destroy both the fishing experience as well as scare away any fish. The local angling industry would lose revenue, particularly from the thousands of anglers the Art Project will displace. The installation phase would displace approximately 2,150 anglers, and the actual exhibition could displace up to 3,600 anglers, as well as 700 commercial anglers.

157. In addition to the negative impacts the project would have on angling, the project impacts include: negative economic impacts on local recreational industries, negative impacts on the opportunity to enjoy the natural and scenic beauty of the canyon and river, negative impacts on nearby biking and hiking trails, restricted access to the river for other water sports, and the negative impacts associated with exceeding visitor capacity during the busy summer seasons.

The Art Project’s Impact to Life Along U.S. Highway 50

158. The Art Project will primarily occur along U.S. Highway 50 as it winds through Bighorn Sheep Canyon. U.S. Highway 50 is a two-lane federal highway and a primary east-west corridor through the middle of the State. Many of ROAR’s members, ranchers, tourists, and thousands of other members of the local community use these highways for personal, recreational, and commercial purposes.

159. The Art Project will affect travel on U.S. Highway 50 during the entire project, increasing travel times through the project area.

160. Three types of traffic interruptions are expected to occur during the project: lane closures, lane shifts, and lane delays. Lane closures are expected to occur on 218 days, 23 percent of the total project lifespan.

161. During the exhibition phase of the project, traffic congestion in the canyon is expected to delay travel through the canyon by 17 minutes, a 32 percent increase in travel time.

162. Travel delay during the exhibition is expected due to lower speeds through the corridor, caused by many visitors being unfamiliar with U.S. Highway 50, occasional stops for through traffic, and slower speeds in panel viewing areas and areas with traffic management facilities.

163. Additionally, vehicle crashes and other incidents would further delay travel through the project corridor. Modeling scenarios were completed to determine the effect of such incidents on traffic in the canyon. Modeling showed that a 5-minute incident would result in a vehicle queue of 1.2 miles and travel delay of 43 minutes, a 20-minute delay would result in a vehicle queue of 2.9 miles and a travel delay of 138 minutes, and a 1-hour delay would result in a vehicle queue of 3 miles and a travel delay of 1.8 hours.

164. The proposed project will affect emergency response in and through the project corridor due to traffic congestion.

165. The FEIS relied on the Transportation Research Board's Highway Capacity Manual ("HCM 2000") for the standards to measure and analyze the project's impacts on U.S. Highway 50. The FEIS, however, ignores the methodology of the HCM 2000 as it applies to two-lane highways, applying the capacity factor for a two-lane highway that contains only passenger vehicles. U.S. Highway 50, however, is also used for heavy vehicles and commercial traffic, which is subject to a different capacity standard under the HCM 2000. The FEIS thus

underestimates the traffic impacts and the mitigation measures necessary to alleviate those impacts.

166. Elimination of the Parkdale viewing area in the final EIS will further increase impacts to traffic along U.S. Highway 50 during the 2 week Art Project viewing period. Removing this viewing area eliminates the only pedestrian access to view the Art Project, thereby increasing the temptation for motorists to stop at other, more sensitive or dangerous locations to see the Art Project on foot, thereby increasing traffic, safety concerns, and environmental impacts at these locations.

167. During the draft EIS comment period, Plaintiff demonstrated that the proposed drilling and excavation equipment proposed in Christo's construction plan would not work without closing all of U.S. Highway 50 for extended periods of time. In the final EIS, Christo and BLM changed the work plan to replace almost every single piece of equipment it proposes to use to drill the 9,100 anchor holes. The new equipment suffers from the same incompatibility with site-specific project terrain as the first. Both sets of equipment fail to account for the dimensions of the Canyon, the fact that the panel sections are along some of the most-curved portions of the Canyon, and fail to account for the dimensions of vehicles regularly used in the canyon.

168. In the draft EIS, mitigation measure WATER-3 provided that mobile fueling of vehicles would be minimized to protect against spills. In the final EIS, BLM acceded to Christo's demands to allowing equipment refueling entirely via mobile fuel trucks.

169. BLM did not condition the Art Project on mitigation of traffic impacts on U.S. Highway 50. The final EIS assumed mitigation would be required in various permits and plans yet to be issued by the Colorado Department of Transportation.

FIRST CAUSE OF ACTION
(FLPMA: Failure to Amend the Royal Gorge RMP)

170. The allegations in paragraphs 1-169 are incorporated herein by reference.

171. FLPMA requires the BLM to develop and maintain land use plans to guide the management of specific public lands within a designated planning area. *See generally* 43 U.S.C. § 1712. It is through the land use planning process that BLM carries out its obligation to ensure that decisions about the use of public lands entrusted to it are made based upon several objectives, including, among other things: (1) application of the principles of multiple use and sustained yield set forth in this and other applicable law; (2) use of a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences; (3) the prioritization to protect areas of critical environmental concern; (4) consideration of present and potential uses of the public lands; (5) consideration of the relative scarcity of the values involved and the availability of alternative means and sites for realization of those values; (6) appropriately weighing long-term benefits to the public against short-term benefits; and (7) meaningful public involvement and coordination of State and local governments. *See id.*

172. BLM regulations implementing FLPMA expressly require that all resource management actions be specifically provided for in the RMP, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved RMP or RMP amendment. 43 C.F.R. § 1601.0-5.

173. Where a proposed use is not provided for in the RMP, and is otherwise not clearly consistent with the RMP, BLM is required to amend the RMP to ensure that the objectives of FLPMA's land use planning processes are met. 43 C.F.R. § 1610.5-3(c).

174. The Royal Gorge RMP does not explicitly allow for the use of lands within the Royal Gorge Field Office's area by a private party in the manner proposed by the Art Project.

175. The final EIS for the Art Project found that the project was in potential conflict with five (5) management directives in the Royal Gorge RMP, and thus not consistent with the plan. BLM did not amend the Royal Gorge RMP to address these deficiencies and ensure that the Art Project was authorized after meeting the objectives of FLPMA's land use planning process.

176. The failure of BLM to amend the Royal Gorge RMP violated FLPMA and its implementing regulations. Accordingly, Defendants acted arbitrarily, capriciously and otherwise not in accordance with the law in permitting the Art Project. *See* 5 U.S.C. § 706(2)(a).

**SECOND CAUSE OF ACTION
(FLPMA: Inconsistency with the Royal Gorge RMP)**

177. The allegations in paragraphs 1-176 are incorporated herein by reference.

178. FLPMA requires that BLM manage public lands in its trust "in accordance with the land use plans developed [by the agency] when they are available . . ." 43 U.S.C. § 1732(a).

179. BLM may not approve a project or use that is not in conformance with the existing land use plan. 43 C.F.R. § 1610.5-3(a).

180. BLM asserts that the Art Project is consistent with certain "recreational" management decisions in the Royal Gorge RMP.

181. In adopting the recreation management directives in the Royal Gorge RMP, BLM considered the objectives of FLPMA's land use planning provisions to evaluate the appropriateness of, and impacts from, common recreational uses on public lands along the Arkansas River. Such recreation included mountain biking, hiking, off-road vehicle use, rafting and boating, nature interpretation, and horseback riding.

182. The Royal Gorge RMP did not evaluate the appropriateness of, or impacts from, “recreation” that involves the construction of a massive industrial art project along 42 miles of the Arkansas River and substantially in the Arkansas Canyonlands ACEC.

183. BLM has never considered whether a use as proposed by the Art Project meets the planning objectives in the Royal Gorge RMP.

184. BLM’s permitting of the Art Project was not in accordance with the Royal Gorge RMP, and thus violated FLPMA. Accordingly, Defendants acted arbitrarily, capriciously and otherwise not in accordance with the law in permitting the Art Project. *See* 5 U.S.C. § 706(2)(a).

**THIRD CAUSE OF ACTION
(FLPMA: Violation of the Royal Gorge RMP’s ACEC Designation)**

185. The allegations in paragraphs 1-184 are incorporated herein by reference.

186. FLPMA requires that BLM manage public lands in its trust “in accordance with the land use plans developed [by the agency] when they are available . . .” 43 U.S.C. § 1732(a).

187. Under the Royal Gorge RMP, BLM must subject projects and uses located within an area designated as an ACEC to special management stipulations.

188. In the Arkansas Canyonlands ACEC, these special management conditions prohibit mineral materials development and locatable mineral entry.

189. The Art Project construction phase involves the use of techniques and equipment commonly used in mineral materials development and locatable mineral entry. The project will utilize drilling and other construction equipment to bore upwards of 9,100 anchor holes along the project route, most of which will be located in the Arkansas Canyonlands ACEC. This work will displace a substantial amount of soil and minerals, and impact sensitive and protected resources within the ACEC.

190. BLM's permitting of the Art Project was not in accordance with the Arkansas Canyonlands' ACEC designation in the Royal Gorge RMP, and thus violated FLPMA. Accordingly, Defendants acted arbitrarily, capriciously and otherwise not in accordance with the law in permitting the Art Project. *See* 5 U.S.C. § 706(2)(a).

**FOURTH CAUSE OF ACTION
(FLPMA: Violation of the Royal Gorge RMP's VRM Class II Designation)**

191. The allegations in paragraphs 1-190 are incorporated herein by reference.

192. FLPMA requires that BLM manage public lands in its trust "in accordance with the land use plans developed [by the agency] when they are available . . ." 43 U.S.C. § 1732(a).

193. The Royal Gorge RMP designates the Arkansas Canyonlands ACEC as a Visibility Resource Management Class II area.

194. BLM VRM Class II guidance requires that the level of change to the characteristic of the landscape be low, and should not attract the attention of the casual observer.

195. The Art Project intentionally emphasized "contrast [as] a positive aesthetic attribute" and creates an impermissible change to the characteristic of the landscape.

196. BLM recognizes that an impact associated with the drilling phase of a mineral resource extraction project also creates an impermissible change to the characteristic of the landscape.

197. BLM's permitting of the Art Project was not in accordance with Arkansas Canyonlands VRM Class II designation in the Royal Gorge RMP, and thus violated FLPMA. Accordingly, Defendants acted arbitrarily, capriciously and otherwise not in accordance with the law in permitting the Art Project. *See* 5 U.S.C. § 706(2)(a).

**FIFTH CAUSE OF ACTION
(FLPMA: Unnecessary and Undue Degradation of Resources)**

198. The allegations in paragraphs 1-197 are incorporated herein by reference.

199. FLPMA prohibits BLM from authorizing any use of public land in its trust that would cause “unnecessary or undue degradation of the lands.” *See* 43 U.S.C. § 1732(b).

200. In enacting this requirement, Congress’s intent was to prevent not only unnecessary degradation of the land and its resources, but also degradation that, while necessary, is undue or excessive.

201. Even if the Art Project was consistent with the general “recreation” directives of the Royal Gorge RMP, its benefit to the public is outweighed by the significant impacts it will create on the land.

202. The project’s public benefit involves a two (2) week viewing period.

203. The project’s impacts will occur, at minimum, for over two years. The project’s impacts were found by BLM to potentially conflict with five (5) specific management objectives intended to protect sensitive resources in the project area. The project undermines both the designation of the Arkansas Canyonlands as an ACEC, and its designation as a VRM Class II area.

204. The Art Project’s excessive impacts to the land are undue given its short-term benefit to the public.

205. BLM’s permitting of the Art Project violates Congress’s directive to prevent unnecessary and undue degradation to the land, and thus violated FLPMA. Accordingly, Defendants acted arbitrarily, capriciously and otherwise not in accordance with the law in permitting the Art Project. *See* 5 U.S.C. § 706(2)(a).

SIXTH CAUSE OF ACTION
(NEPA: Failure to Analyze Environmental Impacts and Mitigation Measures)

206. The allegations in paragraphs 1-205 are incorporated herein by reference.

207. NEPA requires federal agencies, including BLM, to take a “hard look” in an EIS at the consequences of a proposed major federal action. 42 U.S.C. § 4332(C)(i). The Act’s implementing regulations require that the EIS discuss, analyze, and evaluate the direct and indirect environmental effects of the alternatives, including the proposed action, as well as means to mitigate adverse environmental consequences (if not included in the alternatives). 40 C.F.R. §§ 1506.16(a), (b) and (h). Moreover, where an agency proposes substantial changes to a project after circulating the draft EIS and the close of public comment, the agency is required to prepare and circulate for comment a supplement to the EIS. 40 C.F.R. § 1502.9(c)(1)(ii).

208. In addressing mitigation measures to reduce significant impacts, BLM is obligated to provide both a reasonably thorough discussion of specific measures and cannot speculate on measures that might be used by Christo. *See generally*, 40 C.F.R. § 1502.16. Further, while BLM must analyze mitigation measures outside of its jurisdiction to implement, it may not rely on such a measure if BLM does not otherwise require it to be implemented in its EIS and decision documents. *Id.*

209. Here, BLM repeatedly speculated about future measures that could be implemented, many of them which would require action by other federal and state agencies, without requiring that Christo ensure implementation of those measures before obtaining permit from BLM for the Art project. This includes the measures to address impacts to Bighorn sheep to traffic along U.S. Highway 50. BLM also inappropriately relied on Christo’s agreement to monitor impacts.

210. The EIS does not adequately discuss, analyze, or evaluate the serious environmental consequences of the proposed Art Project in the AHRA. Among other things, the EIS: (1) relied upon use of the wrong standards to measure and analyze the project’s impact on traffic along U.S. Highway 50; and (2) is silent on the impacts of the removal of up to 300 anchors in the Texas Creek area will have on the Arkansas River and its banks.

211. BLM further failed to prepare a supplemental EIS when it made substantial changes to the draft EIA after the close of the public comment period that would further bear on its analysis of impacts to traffic along U.S. Highway 50. These changes include: (1) removing the Parkdale parking area; and (2) allowing increased use of mobile fueling vehicles to refuel construction equipment.

212. Defendants have violated NEPA and its implementing regulations, and therefore, have acted arbitrarily, capriciously and otherwise not in accordance with the law in permitting the Art Project. *See* 5 U.S.C. § 706(2)(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that BLM's actions are in violation of the Federal Land Policy and Management Act and its implementing regulations, as set forth above;
2. Declare unlawful and set aside BLM's decision approving a land use authorization for the Art Project until such time as the Defendants have complied with the Federal Land Policy and Management Act;
3. Declare that BLM's actions are in violation of the National Environmental Policy Act and its implementing regulations, as set forth above;
4. Declare unlawful and set aside BLM's decision approving a land use authorization for the Art Project until such time as the Defendants have complied with the National Environmental Policy Act;
5. Declare that BLM's decision to issue a land use authorization for the Art Project to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law under the Administrative Procedure Act ("APA");
6. Set aside the land use authorization and ROD for the Art Project under the APA;

7. Award preliminary and/or permanent injunctive relief preventing implementation of the land use authorization for the Art Project, until such time as BLM has complied with the Federal Land Policy and Management Act and the National Environmental Policy Act;
8. Award Plaintiffs costs and reasonable attorneys' fees as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and any other statute;
9. Retain jurisdiction of this action to ensure compliance with its decree; and
10. Grant such other and further relief as is proper.

Respectfully submitted,



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