

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Civil Action No. 18-CV-1017-PAB

4 ROCKY MOUNTAIN PEACE & JUSTICE CENTER,
5 CANDELAS GLOWS/ROCKY FLATS GLOWS,
6 ROCKY FLATS RIGHT TO KNOW,
7 ROCKY FLATS NEIGHBORHOOD ASSOCIATION, and
8 ENVIRONMENTAL INFORMATION NETWORK (EIN) INC.,

9 Plaintiffs,

10 vs.

11 UNITED STATES FISH AND WILDLIFE SERVICE,
12 GREG SHEEHAN, in his official capacity as Acting Director of
13 the United States Fish and Wildlife Service,
14 RYAN ZINKE, in his official capacity as Secretary of the
15 Interior,
16 DAVID LUCAS, in his official capacity as Project Leader,
17 Region 6 of the United States Fish and Wildlife Service,
18 UNITED STATES FEDERAL HIGHWAY ADMINISTRATION,
19 BRANDYE HENDRICKSON, in her official capacity as Acting
20 Administrator of the United States Federal Highway
21 Administration, and
22 ELAINE L. CHAO, in her official capacity as Secretary of
23 Transportation,

24 Defendants.

25 REPORTER'S TRANSCRIPT
26 Hearing on Motion for Preliminary Injunction

27 Proceedings before the HONORABLE PHILIP A. BRIMMER,
28 Judge, United States District Court for the District of
29 Colorado, commencing at 9:05 a.m., on the 17th day of July,
30 2018, in Courtroom A-701, United States Courthouse, Denver,
31 Colorado.

32 Proceeding Recorded by Mechanical Stenography, Transcription
33 Produced via Computer by Janet M. Coppock, 901 19th Street,
34 Room A-257, Denver, Colorado, 80294, (303) 893-2835

1 APPEARANCES

2 Randall M. Weiner, Annmarie Cording and Andrew Gibson
3 Ogden of Randall M. Weiner, P.C., 3100 Arapahoe Avenue, Suite
4 202, Boulder, CO 80303, appearing for the Plaintiffs

5 Lesley Lawrence-Hammer, U.S. Department of Justice,
6 Environment & Natural Resources Section, 999 18th Street, South
7 Terrace, Suite 370, Denver, CO 80212;

8 Jessica Michelle Held, U.S. Department of Justice,
9 601 D Street, N.W., Washington, DC 20004 , appearing for the
10 Defendants.

11 * * * * *

12 PROCEEDINGS

13 *THE COURT:* The matter before the Court is Rocky
14 Mountain Peace & Justice Center and others versus the United
15 States Fish & Wildlife Service and others. This is Civil Case
16 18-CV-1017.

17 I will take entries of appearance, first of all, on
18 behalf of plaintiffs.

19 *MR. WEINER:* Randall Weiner on behalf of plaintiffs.
20 With me at counsel table is Annmarie Cording, my associate, and
21 Jon Lipsky. Jon Lipsky is representing the plaintiff, Rocky
22 Mountain Peace & Justice Center.

23 *THE COURT:* Good morning to you.

24 *MR. WEINER:* At second counsel table we have Andrew
25 Ogden also representing the plaintiffs. He is an environmental

1 attorney specializing in the Endangered Species Act. Finally,
2 we have David Stotsky, who was a senior enforcement attorney
3 with the EPA.

4 *THE COURT:* Just names. We will do the resumes later.
5 Great.

6 *MR. WEINER:* Okay.

7 *THE COURT:* Thank you. And entries of appearance on
8 behalf of the defendants?

9 *MS. HELD:* Your Honor, my name is Jessica Held, and I
10 am one of the Department of Justice attorneys representing
11 federal defendants. And with me at counsel table is Ms. Leslie
12 Lawrence-Hammer, and she will be handling the ESA portions of
13 our defense against plaintiffs' claims. And I also have
14 Mr. David Lucas, who is the project manager for the Rocky Flats
15 National Wildlife Refuge. And we also have Ms. Williams-Shuck
16 who is one of our Solicitor's Office attorneys who is assisting
17 us on this case.

18 *THE COURT:* Good morning to each of you.

19 We are here today for a preliminary injunction hearing
20 in this case. Nice to see so many people here today. Usually
21 when I have hearings no one is here, but I would want to point
22 out to the audience that pursuant to a local rule that we have,
23 namely local Rule 83.1, you can't use a camera or a recording
24 device, nothing -- no telephones to record or photograph any of
25 the proceedings. You can't do any of those things anywhere

1 within the courthouse.

2 And if you were to do that -- some people in other
3 types of hearings have done that -- your phone is subject to
4 confiscation, search. You could be subject to sanctions, too.
5 So I just wanted to bring that to your attention, if you could
6 make sure to avoid that.

7 All right. And have we had any refinement in terms of
8 how long we think the evidence will last, Mr. Weiner? What do
9 you think?

10 *MR. WEINER:* We gave you an order of proof that shows
11 we've -- there is one less witness than anticipated before.
12 Otherwise, the timing is probably the same.

13 *THE COURT:* Okay. How about on behalf of the
14 defendants?

15 *MS. HELD:* Your Honor, we anticipate about the same
16 timing as we filed on our witness list.

17 *THE COURT:* Okay. What we are going to do is we are
18 going to cut off the evidence at 3:00, so I am going to be kind
19 of keeping track informally of the time estimates to make sure
20 that both sides are able to get their evidence in. But if it
21 looks like we are way off schedule or something, I will start
22 shortening the time period. So it might be best to lead with
23 the person that you want to testify most just in case we get in
24 a time jam at the end.

25 We've had a lot of briefing in the case, but

1 nonetheless, anything as a preliminary matter before we start
2 the evidence?

3 *MR. WEINER:* I think so. We filed our trial brief on
4 Sunday, I believe.

5 *THE COURT:* Even though we don't have a trial.

6 *MR. WEINER:* Right. We could have called it a hearing
7 brief, but we figured having the law in front of you would not
8 be a disservice. And then finally, in -- I've taken your
9 instructions to mean that our witnesses are really addressing
10 the equitable portions of relief, particularly irreparable
11 harm. However, in my opening remarks and probably my closing,
12 I will be addressing the merits because that's one of the four
13 prongs I need to prove to you. And I just wanted to make sure
14 that that was okay.

15 *THE COURT:* Yeah, that's fine. I mean, I think that I
16 wouldn't spend a lot of time on any openings because I will
17 give you time -- that's why we are going to end at 3:00. The
18 closing is a lot more important to see what evidence was shown,
19 and there has been a lot of briefing. So I will let you make
20 an opening, but as I say, the length of it will cut into
21 whatever time you want to do for presentation of evidence.

22 *MR. WEINER:* So warned, thank you.

23 *THE COURT:* Thank you. Go ahead.

24 *MR. WEINER:* May I begin?

25 *THE COURT:* Go ahead.

1 MR. WEINER: Your Honor is no stranger to Rocky Flats.
2 As you pointed out in a recent decision, many of the facts have
3 been addressed in previous decisions involving Rocky Flats,
4 including your decision in 2012. And as you just pointed out,
5 there was an extensive briefing, so I am not going to delve
6 into the general facts.

7 What I will delve into are the facts relevant to this
8 hearing, the most important of which -- let's go to
9 Exhibit 1 -- the most important of which is that in 2004 the
10 Fish & Wildlife Service issued their -- what we are calling the
11 2004 CCP/EIS or I will just say 2004 EIS when the Service
12 listed or configured trails for Rocky Flats Refuge. This is
13 the map of that 2004 trail system.

14 Two major changes occurred when the Fish & Wildlife
15 Service issued their March 23rd Environmental Action Statement.

16 And let's go to Exhibit 2.

17 The trails were configured around the Section 16
18 parcel.

19 Can we do that comparison? Thank you.

20 So for the first time we see, and I can circle, for
21 the first time we see a portion of the trail, the Greenway
22 trail, which is the major trail going through this Section 16
23 parcel. And secondly, the trail was routed through this area
24 to the east of the central core known as the wind-blown area.
25 That's significant because the wind-blown area has been

1 referred to by the Fish & Wildlife Service as the plutonium
2 plume.

3 And the Service promised in 2011 that they would keep
4 trails off of the plutonium plume because of the concern, the
5 public concern about -- or the public, yeah, concerns about
6 plutonium.

7 Now, let's go to Exhibit 3.

8 The plutonium plume is named because the Department of
9 Energy issued what we refer to extensively in our briefing as
10 Fig. 10. And this is a Department of Energy map which shows
11 current plutonium activity on Rocky Flats. And you can see by
12 looking at the map that to the east portion there are a number
13 of dots that are both yellow and green. Yellow is I believe
14 the lower portion, but it's above background, and green is even
15 worse. And that's the reason that that area to the east was
16 considered the plutonium plume and was in the direction of the
17 wind.

18 It's important to state at this point that no
19 remediation of plutonium has ever occurred on the refuge
20 portion of Rocky Flats. When the Service talks about an
21 \$8 million remediation, that did not remediate any plutonium on
22 the refuge itself. In other words, it's still there.

23 Your Honor, this lawsuit does not challenge EPA's
24 determination that the refuge is safe. By the same token, the
25 Department of Energy has acknowledged that plutonium, even in

1 tiny particles, is extremely dangerous to human health. This
2 is not pristine soil. And where to locate public trails on
3 ground that contains even tiny amounts of plutonium is a
4 significant issue worthy of review in, at a minimum, an
5 environmental assessment, perhaps more.

6 It is arbitrary and capricious of the agency to
7 utterly disregard any analysis of plutonium on any of the
8 decisions that it makes regarding Rocky Flats, especially
9 because that's what it did in 2004. The Fish & Wildlife
10 Service at a minimum should look at where to locate the trails
11 in light of this Department of Energy map which shows where the
12 more significant deposition of plutonium is.

13 We believe the 2004 CCP/EIS is also stale. They
14 usually are stale after five years. It's been 14 years. And
15 in that intervening 14 years, there have been significant
16 events that have occurred and significant information that has
17 developed.

18 For instance, there have been a number of decisions
19 that have been released since 2004, court decisions. There
20 have been reports suggesting the migration of plutonium off
21 site, perhaps an increase in cancer in some of the
22 neighborhoods nearby, and erosion events which the
23 department -- the Fish & Wildlife Service has said is the one
24 way that plutonium can get from underneath to the surface.
25 This is a picture of an erosion event that occurred in 2013.

1 Your Honor approved an approach in your 2012
2 decision -- we will call it the *Superior* decision -- Your Honor
3 approved an approach whereby the Service relied on the 2004 EIS
4 as a programmatic type of document. But then in 2011 when it
5 was developing or doing a land swap of the Section 16 parcel
6 for that transportation corridor, they did a subsequent
7 environmental assessment. In other words, they did a more site
8 specific analysis once the final decisions were made in an
9 environmental assessment. That hasn't been done here.

10 Also in -- you may recall from your analysis of what
11 happened in 2011 in the 2012 decision, the Service actively
12 reached out to the Environmental Protection Agency to ask them
13 site specific questions regarding some of the issues in that
14 transportation corridor. That hasn't been done here. The EPA
15 has never been asked, hey, in light of the new configurations
16 of the trails, especially through this plume area, has the
17 location been chosen that reduces the risk the most to public
18 health? The Service has not consulted the EPA whatsoever as it
19 did in your *Superior* decision.

20 The Service's contention that only minor changes have
21 occurred since 2004 flies in the face of these very facts that
22 now the trail goes through the Section 16 parcel and through
23 the wind-blown area. But even if they were minor changes, a
24 categorical exclusion, which is what the Service relies on, is
25 inappropriate where there are extraordinary circumstances.

1 And we list on the screen before you seven of the
2 extraordinary circumstances, not the least of which is that an
3 extraordinary circumstance that involves a controversial
4 decision is not one worthy of a categorical exclusion.

5 And the decision to locate the trail suddenly through
6 this wind-blown area, through this plume, is a new decision.
7 It's not one that was considered in 2004.

8 We have two -- I take it to heart what you said, Your
9 Honor. We have two brief claim -- I will talk briefly about
10 our two other claims. One is under the National Wildlife
11 Refuge System Administration Act, the Refuge Act. The Service
12 is relying on an expired trails consistency determination. It
13 expired in September of 2014.

14 The Service says it can rely upon tangentially related
15 consistency determinations, but they can't do so if the
16 language of the trail CD, which is spot on, conflicts with the
17 language in these tangentially related CDs. And they do. The
18 Service is relying on an expired CD.

19 And, finally, we have our claims under the Endangered
20 Species Act regarding the Preble's Meadow Jumping Mouse. The
21 critical point there is that critical habitat was designated in
22 2010 for the jumping mouse. That certainly wasn't analyzed in
23 2004. It should be analyzed in at least an environmental
24 assessment now.

25 And finally, under the Endangered Species Act itself,

1 the Service is required to look at all of the activities that
2 occur to see what the impact might be on the mouse in its
3 critical habitat, all of the activities, and that includes that
4 land transfer that you looked at in 2012. It involves the
5 Greenway trail. It involves the other trails. It involves the
6 visitor center. The piecemeal approach undertaken by the Fish
7 & Wildlife Service now is a direct violation of the Endangered
8 Species Act.

9 So I thank Your Honor for indulging me in talking
10 about the merits. This proceeding is mostly about the
11 equitable portions or specifically irreparable harm. And we
12 will be putting on eight witnesses, four of whom are fact
13 witnesses. Three of those fact witnesses are members of the
14 plaintiffs' groups. And then we will be putting on four
15 experts to address the plutonium that's present in the refuge
16 from an individual who actually tested it and knows that it's
17 there.

18 We are putting on a micrometeorologist. We will talk
19 about how when the trails were used for hiking, biking and
20 horseback riding, they can endure the suspended plutonium. It
21 can migrate off site in the windy area. We will have an expert
22 talk about what that really means when people ingest it, when
23 people inhale it off site. And finally, we have the
24 toxicologist. He has generously allowed us to have him by
25 telephone and he will be talking about the impacts to health

1 from those occurrences.

2 *THE COURT:* Is the witness who is going to testify by
3 telephone, is he anticipating the call at any particular time?
4 Because we can -- we should probably take him whenever it's
5 most convenient.

6 *MR. WEINER:* I told him to expect a call between
7 11:00 and 12:00 and between 1:15 and 2:30, and he is fine with
8 that.

9 *THE COURT:* Okay. Good.

10 *MR. WEINER:* Now, with respect to balancing of
11 equities, Your Honor has expedited briefing on the merits of
12 the case so much so that by the time my reply brief is in, we
13 will be right around the point when the Service says they plan
14 on building the refuge, September 15. So at most the harm to
15 the Service is a couple of weeks, maybe a couple of months of
16 delay in their plans to open the refuge to unlimited public
17 access.

18 Balanced against the exposure to contaminants that my
19 clients and the public will suffer if the refuge is open, as
20 well as the bureaucratic final act that will be done by the
21 agency, opening a refuge, which will make it virtually
22 impossible for them to reanalyze the decision, honestly
23 reanalyze the decision, if Your Honor rules in our favor on our
24 claims. And then finally, the public interest certainly favors
25 the government complying with its own laws.

1 With that we are ready to call our own witness or
2 proceed any way --

3 *THE COURT:* Well, we better give the defendants a
4 chance to do an opening if they choose.

5 Thank you.

6 *MR. WEINER:* Thank you.

7 *THE COURT:* Opening on behalf of defendants?

8 *MS. HELD:* Good morning, Your Honor.

9 As you are aware, the Rocky Flats National Wildlife
10 Refuge was established as a refuge through the Rocky Flats Act
11 of 2001. In this law, Congress recognized the Denver
12 metropolitan area was growing rapidly and that establishment of
13 the refuge would preserve valuable open space and wildlife
14 habitat.

15 Congress specified that one of the purposes of the
16 refuge was to provide the public with opportunities for
17 compatible wildlife-dependent outdoor recreation and
18 educational activities. And after a lengthy environmental
19 review, that included extensive public involvement in
20 compliance with NEPA. Over a four-year period the Service
21 approved the opening of trails to the public use of Rocky Flats
22 in the 2005 record of decision for the final comprehensive
23 conservation plan for the refuge. That was based on the
24 detailed Environmental Impact Statement completed in 2004.

25 The decision to allow trail use by the public was in

1 furtherance of fulfilling the purpose of the refuge, to provide
2 opportunities for wildlife-dependent outdoor recreation. Since
3 2015, the public has been allowed to hike on trails mapped out
4 in the CCP in tours led by refuge staff. And in continuing
5 their implementation of the CCP, the Service has been planning
6 the opening of trails on the refuge to unguided use.

7 The Service has conducted a number of public meetings
8 to keep the community informed of its plans. And during those
9 meetings, the Service received feedback from some members of
10 the community as to how the routes of the trails in the CCP
11 could be improved. The Service determined that it would make
12 some minor adjustments to the routes of the trails set forth in
13 the CCP in order to improve the visitor experience and further
14 benefit wildlife.

15 In March 23rd, 2018, the Service issued the
16 Environmental Action Statement that's at issue here today and
17 determined that the NEPA analysis that was conducted under the
18 CCP was adequate for these minor adjustments to the trail
19 routes and that no additional NEPA analysis was required to
20 open the trails to the public as was envisioned under the CCP.
21 Now, despite these efforts plaintiffs are now seeking a
22 preliminary injunction to keep unguided public use off the
23 trails.

24 Now, plaintiffs must meet all four requirements of the
25 preliminary injunction in order to prevail; first, the

1 likelihood of success on the merits, irreparable injury,
2 balance of harms, and public interest. Now, if the plaintiff
3 fails to meet any of those four requirements, its request must
4 be denied.

5 Your Honor, as I mentioned briefly earlier, I will be
6 addressing plaintiffs' arguments regarding their NEPA and
7 National Wildlife Refuge System Administration Act claims. And
8 my co-counsel, Ms. Lawrence-Hammer, will be addressing
9 plaintiffs' ESA claims. I will briefly go through our
10 arguments with regard to plaintiffs' NEPA and Refuge Act
11 claims, and then Ms. Lawrence-Hammer will take over with the
12 ESA.

13 Now, with regard to plaintiffs' merits arguments on
14 the NEPA claim, as this Court knows, NEPA ensures that federal
15 agencies consider the environmental impacts to propose major
16 federal actions. And this goal is realized through the
17 agency's requirement to take a hard look at environmental
18 consequences of agency actions. And that's just what the Fish
19 & Wildlife Service did back in 2005 when it issued a CCP.

20 So to the extent that plaintiffs are challenging the
21 opening of the refuge to unguided public trail use, the request
22 must fail because that was already considered under the CCP.
23 And even if the plaintiffs could challenge the CCP, their
24 arguments would fail because the CCP fully considered the issue
25 of potential plutonium contamination when deciding to allow

1 trail use on the refuge.

2 The CCP looked at soil contamination on the area to be
3 retained by DOE and on the lands that were transferred to the
4 refuge and stated that they would only obtain lands for the
5 refuge if there were no use restrictions on them. And that's
6 just what they did. When the EPA published its notice in the
7 Federal Register in 2007 that the cleanup had been completed,
8 it certified that the land that would be transferred to the
9 Fish & Wildlife Service for use -- for the refuge was clean.
10 It had no use restrictions on it at all. So uses, such as
11 trail use, that's all included.

12 And secondly, to the extent that plaintiffs are
13 seeking a supplemental EIS, which they have in their briefing,
14 the Service has already issued the CCP and the record of its
15 decision. And under the Supreme Court's decision in *Norton v.*
16 *Southern Utah Wilderness Alliance*, a supplementation of the EIS
17 "is necessary only if there remains a major federal action to
18 occur." And here, once the CCP was approved, there was no
19 ongoing major federal action that required supplementation.

20 And plaintiffs also argue that the CCP is stale
21 because it is over five years old. However, the Refuge Act
22 anticipated the CCP which are -- just a little background. So
23 these Comprehensive Conservation Plans are issued for all
24 national wildlife refuges, not just Rocky Flats, and their
25 purpose is to provide a long-term guidance and management plan

1 for these refuges.

2 And they take a long time for the Service to complete.
3 For example, the one at issue here took over four years. And
4 they are supposed to be a plan that's valid for a number of
5 years. In fact, they only need to be reviewed every 15 years
6 or as may be necessary under the statute. So to arbitrarily
7 consider the CCP as stale because it was over five years old is
8 contrary to the language of the Refuge Act and the
9 practicalities creating Comprehensive Conservation Plans.

10 Plaintiffs also talk about extraordinary circumstances
11 and how issuing what effectively is a categorical exclusion
12 here in the form of an Environmental Action Statement was not
13 allowed because of supposed controversy of this action.
14 However, plaintiffs are referring to the opening of the refuge
15 trail use, which has already been decided in the CCP. They
16 have not shown that the minor readjustments of the trails are
17 controversial.

18 Now, with regard to the National Wildlife Refuge
19 System Improvement Act, plaintiffs complain that the trail use
20 compatibility determination that was issued as part of the CCP
21 is expired, but that was just one of the compatibility
22 determinations that was issued. In reality, the Service did
23 not rely on that compatibility determination when it issued its
24 Environmental Action Statement; instead relied upon the
25 compatibility determination for wildlife observation,

1 photography, including public uses and development in support
2 of these uses, which includes trail use, as well as the
3 compatibility determination for interpretation of environmental
4 education, which also includes trail use. And these are not
5 due for reevaluation until 2019.

6 With regard to plaintiffs' irreparable injury claims,
7 first of all, the injury is not imminent. As we have explained
8 in our briefing, the trails will not be open to unguided public
9 use until September 2018. And as Mr. Lucas will explain later,
10 the construction of new trails on the Section 16 portion will
11 not occur this year.

12 And moreover, with regard to evidence that plaintiffs
13 intend to put on regarding concerns about plutonium
14 contamination and the dangers of plutonium, with respect to
15 plutonium being released through the use of these trails in the
16 revised locations, those beliefs are purely speculative.

17 The Service received a clean site, according to the
18 EPA, to create the refuge. When the EPA provided the site was
19 clean, it said there were no use restrictions on the site at
20 all. There were no groundwater restrictions, no restrictions
21 for excavation, nothing. So the Service is completely correct
22 in relying on that determination and relocating trails where it
23 sees fit.

24 With regard to the balance of harms of public
25 interest, as we discussed, as I discussed earlier, the

1 potential for irreparable injury is purely speculative. Ever
2 since 2005 the decision was made that the refuge should be open
3 for public use on trails. And the public has been waiting a
4 long time to be able to use the trails on the refuge. The
5 public tours that are currently occurring are typically full
6 every month and there is normally a waiting list.

7 And additionally, with regard to the public interest,
8 a preliminary injunction would not be in the public interest
9 because -- I want to point the Court to in the plaintiffs'
10 briefing the plaintiffs seek not only to enjoin the opening of
11 the trails to the public for unguided use, but also any
12 additional work by defendants and/or their agents on the trails
13 and/or multipurpose facility, including construction of the
14 public trails or the facilitation thereof.

15 And that's a very broad relief. And it would not be
16 in the public interest to foreclose the Service from conducting
17 planning activities for such actions like the potential
18 multipurpose facility. That's not a part of this case, their
19 argument at issue in the Environmental Action Statement.

20 I will now turn the lectern over to co-counsel that
21 will give you the defenses of the EPA claims.

22 *THE COURT:* Thank you, Ms. Held.

23 *MS. LAWRENCE-HAMMER:* Good morning, Your Honor. I am
24 Leslie Lawrence-Hammer with the U.S. Department of Justice.

25 And as my colleague, Ms. Held, explained, I will be

1 addressing plaintiffs' Endangered Species Act or ESA claims
2 today.

3 Your Honor, the ESA questions in this case are easy
4 ones. And I will show this by briefly addressing the elements
5 of the preliminary injunction standard as they specifically
6 relate to plaintiffs' ESA claims. And I will start with
7 plaintiffs' likelihood of success on the merits.

8 Plaintiffs are not substantially likely to succeed on
9 the merits of their ESA claims for two primary reasons. First,
10 this Court lacks jurisdiction to hear those claims; and second,
11 plaintiffs have the facts wrong.

12 As a threshold matter for plaintiffs to succeed on the
13 merits of their ESA claims, they must have standing to bring
14 them. In the context of a preliminary injunction, this means
15 plaintiffs must prove at a minimum that they at least have a
16 substantial likelihood of having standing.

17 Plaintiffs' standing is not subjected to some lower
18 standard of review as plaintiffs argued in their reply brief.
19 A lower standard would be applicable if this were, say, a
20 motion to dismiss, but it's not. It's a motion for preliminary
21 injunction, and the question is whether plaintiffs have
22 substantial likelihood of success on the merits.

23 Now, plaintiff's ESA claims all relate to the Preble's
24 Meadow Jumping Mouse. Specifically, plaintiffs allege that the
25 service failed to consult under ESA Section 7 to evaluate the

1 potential effects of the actions identified in the 2018 EAS or
2 the Environmental Action Statement, or I will call it the EAS,
3 on the Preble's Meadow Jumping Mouse or its critical habitat.

4 This means to prove they have standing, plaintiffs
5 must show they have an actual interest in the jumping mouse
6 that will be imminently injured by implementing the actions
7 identified in the 2018 EAS, and that this Court can issue an
8 order that will redress this actual injury.

9 Here plaintiffs made minimal attempts to show that
10 they have standing for their EAS claims. Their focus is
11 clearly elsewhere, Your Honor, in this matter. They make a few
12 vague allegations in their complaint, and they include two
13 short paragraphs in Mr. Randall Stafford's declaration. They
14 provided no evidence of any member ever having looked, seen,
15 studied, enjoyed the presence of a jumping mouse in any
16 location, including on the refuge, at any time; nor have they
17 provided any evidence of any member having any concrete future
18 plans to engage in these actions in any location at any time.

19 As a result, plaintiffs have not shown they have
20 standing to bring their ESA claims, and the Court lacks
21 jurisdiction to hear them.

22 Next, plaintiffs are not substantially likely to
23 succeed on the merits of their ESA claims for another key
24 reason, the wrong facts. Now, before I get into the details of
25 this factual error, it's important to understand a few basic

1 points about the ESA requirements for consultation.

2 ESA Section 7 requires federal agencies to consult
3 with the Service to ensure that their actions are not likely to
4 jeopardize a continued existence of any listed species or
5 result in the destruction or adverse modification of critical
6 habitat. Now, if an agency determines that its action may
7 affect a listed species or critical habitat, then the agency
8 must consult to further evaluate its actions.

9 Now, these consultations can be formal or informal.
10 Formal consultation is only required if an agency determines
11 that its actions are likely to adversely affect listed species
12 or critical habitat; otherwise, informal consultation is all
13 the ESA requires.

14 An informal consultation is much like what it sounds,
15 the informal process of discussions, e-mails, meetings and the
16 like that allow an agency to evaluate its actions and determine
17 their potential effect. If during this informal consultation
18 process an agency determines that its actions are not likely to
19 adversely affect listed species or critical habitat, the
20 consultation process ends and no further action is necessary.

21 Now, plaintiffs bring three separate ESA claims in
22 their complaint. It's important, Your Honor, to look at what
23 was actually pled in the complaint as opposed to the claims as
24 they sort of morphed through briefing and plaintiffs have seen
25 the arguments that defendants have made, because the arguments

1 plaintiffs are making today about what their ESA claims are are
2 very different than what their ESA claims actually are as
3 they're contained in the complaint. And as Your Honor knows,
4 the parties cannot use briefing to amend their complaint.

5 Now, as I have explained, the claims in the complaint
6 allege the Service failed to consult in any way under ESA
7 Section 7 to evaluate the effects of the actions in the 2018
8 EAS on the jumping mouse or its critical habitat, but they have
9 their facts wrong. The Service did consult under ESA Section 7
10 to evaluate the effects of the actions identified in the 2018
11 EIS on the jumping mouse and its critical habitat.

12 Specifically, because the Service determined that the
13 actions identified in the 2018 EIS may affect the jumping mouse
14 or its critical habitat, it conducted an informal consultation
15 to further evaluate the potential effects of its actions. Now,
16 during that informal consultation, the Service found that the
17 actions identified in the 2018 EIS were not likely to adversely
18 affect the jumping mouse or its critical habitat.

19 Now, once this conclusion was made, the 2018 informal
20 consultation was complete and no further actions were required.
21 And the Service completed its informal consultation in
22 March 2018. And as proof of this, the Service attached a memo
23 that documented the results of this consultation as Exhibit 3,
24 it's ECF 14-3 to its opposition to plaintiffs' motion.

25 Now, importantly, plaintiffs did not bring any claims

1 in their complaint that challenge the sufficiency of the 2018
2 consultation. They merely allege incorrectly that no
3 consultation regarding the 2018 EIS ever occurred and that this
4 alleged lack of consultation violated the ESA, but the Service
5 did conduct an ESA Section 7 consultation on the 2018 EIS.
6 Therefore, plaintiffs' claims are moot.

7 Now, faced with this fact, plaintiffs have made a very
8 limited attempt to salvage their ESA claims in their reply, but
9 they were unsuccessful. And I'm going to address these points
10 now, Your Honor, because the defendants have not had an
11 opportunity to put briefing before the Court, as plaintiffs
12 raised these in their reply.

13 First, plaintiff said that the 2018 consultation did
14 not fulfill an alleged requirement to conduct a biological
15 assessment. And Mr. Weiner referred to it as an environmental
16 assessment. That's a NEPA term. It's a biological assessment
17 to determine whether any listed species or designated habitat
18 are likely to be adversely affected by the 2018 EAS.

19 However, plaintiffs did not bring any claim in their
20 complaint that makes this allegation. Plaintiffs did not even
21 acknowledge that the 2018 consultation had occurred in their
22 complaint, so plaintiffs cannot now use their briefing or their
23 arguments to amend their complaint to bring a claim challenging
24 the sufficiency of the consultation that occurred. Therefore,
25 the Court should not consider this biological assessment

1 argument.

2 Moreover, Your Honor, plaintiffs' arguments on this
3 point are baseless. A biological assessment is a document that
4 evaluates the potential effects of an action on listed species
5 and critical habitat and determines whether any species or
6 habitat are likely to be adversely affected by the action.
7 There are no requirements that dictate what a biological
8 assessment must look like. Instead, the ESA says that the
9 contents of the biological assessment are discretionary and
10 depend on the nature of the action at issue.

11 Additionally, a biological assessment is not required
12 for every consultation. Here plaintiffs have made no argument
13 to show why a biological assessment should be required in these
14 specific circumstances. And regardless, the Service prepared
15 the functionally equivalent of a biological assessment during
16 its 2018 informal consultation.

17 And you can see that in the March 2018 memo that I
18 referred to that we attached as Exhibit 3 to our opposition
19 which shows the Service doing exactly what a biological
20 assessment is meant to do, evaluating the effects of the
21 actions identified in the 2018 EIS on listed species and
22 critical habitat and determining whether any such species or
23 habitat are likely to be adversely affected. And this is all
24 the ESA requires, Your Honor.

25 There is significant case law on this point, including

1 the First Circuit case *Water Keeper Alliance v. U.S. Department*
2 *of Defense*, 271 F.3d 21, a 2001 case. Plaintiffs' argument
3 that the Service somehow violated the ESA because it did not
4 title a document biological assessment during its 2018
5 consultation elevates form over substance and lacks any basis
6 in the ESA.

7 Next, plaintiffs also made a very cursory argument in
8 their reply that the Service failed to reinitiate consultation
9 under ESA Section 7 when critical habitat for the jumping mouse
10 was designated on the refuge in 2010. And you heard Mr. Weiner
11 briefly refer to this in his opening, Your Honor, but again
12 plaintiffs are getting the facts wrong.

13 In its 2018 consultation, the Service did evaluate the
14 effects of all its planned actions on the refuge on the jumping
15 mouse's critical habitat. This means plaintiffs' claim is
16 moot. The ESA consultation that plaintiffs say should have
17 occurred has, in fact, already occurred.

18 The Service is not also under some separate
19 requirement to consult generally regarding the designation of
20 jumping mouse critical habitat on the refuge separate from any
21 specific agency action that may affect critical habitat. And
22 this is the law in the 10th Circuit, Your Honor, under the 2007
23 case, *Forest Guardians v. Forsgren*, and that's at 478 F.3d
24 1149. It's a 2010 10th Circuit case.

25 These are the many reasons plaintiffs are not

1 substantially likely to succeed on the merits of their ESA
2 claims. I will just briefly address a few points on
3 irreparable harm that are specific to the ESA issues, Your
4 Honor.

5 As I have just explained when discussing standing,
6 plaintiffs have not shown any actual interest in the jumping
7 mouse that could be harmed in any way by defendants' actions.
8 And, importantly, plaintiffs have not shown that the actions
9 identified in the 2018 EIS will cause any harm whatsoever to
10 the jumping mouse. In fact, the Service concluded in its 2018
11 consultation that its actions were not likely to adversely
12 affect the jumping mouse or its critical habitat.

13 And plaintiffs presented no evidence to the contrary,
14 Your Honor. And according to their witness list, they will
15 present no evidence today that discusses the potential effects
16 of these actions on the jumping mouse. Therefore, plaintiffs
17 have not shown a risk of any irreparable harm that could
18 justify granting a preliminary injunction based on their ESA
19 claims.

20 Your Honor, when considering the ESA claims here, it's
21 important to look at what was actually pled in the complaint,
22 the evidence that's been put forward, and a limited, very
23 limited argument that plaintiffs have made in their briefing.
24 When you consider those things, you will see there is no basis
25 for granting a preliminary injunction based on plaintiffs' ESA

1 claims.

2 And that's all from defendants, Your Honor.

3 *THE COURT:* All right. Thank you,
4 Ms. Lawrence-Hammer.

5 For the people standing in the back, there are plenty
6 of seats, so if you could have a seat.

7 Is it Weiner or Weiner?

8 *MR. WEINER:* I go by Weiner.

9 *THE COURT:* Mr. Weiner, you can call your first
10 witness.

11 *MR. WEINER:* I will call Mr. John Barton to the stand.

12 (**John Barton** was sworn.)

13 *THE WITNESS:* I do.

14 *COURT DEPUTY CLERK:* Please state your name and spell
15 your first and last name for the record.

16 *THE WITNESS:* My name is John W. Barton. J-O-H-N,
17 last name B-, as in boy, A-R-T-O-N.

18 **DIRECT EXAMINATION**

19 *BY MR. WEINER:*

20 Q. Good morning, Mr. Barton. Thank you for coming to court
21 today.

22 Did you work at Rocky Flats?

23 A. I worked at Rocky Flats for 21 years.

24 Q. And what was your position there?

25 A. My main position was a radiation monitor. They changed the

1 title to radiation control technician.

2 Q. And roughly what were the years that you worked at Rocky
3 Flats?

4 A. From 1982 to 2003.

5 Q. I see. Were you there when Mr. Lipsky and the FBI raided
6 the Rocky Flats plant?

7 A. I was.

8 Q. What was your feeling about that?

9 A. I guess I thought they were Looney Tunes.

10 Q. So you didn't approve of the raid at that point?

11 A. I thought it was totally unnecessary.

12 Q. Okay. What did you do after you stopped working at Rocky
13 Flats?

14 A. I went to Los Alamos National Labs, spent nine more years
15 in Los Alamos as a radiation control technician.

16 Q. So if I add those up, is it fair to say you have spent
17 about 21 years as a radiological control person?

18 A. Correct.

19 Q. And do you have security clearance?

20 A. I am sorry?

21 Q. Do you have security clearance?

22 A. Yes, at a Q level.

23 Q. I am not sure I know what the security levels are, but
24 thank you.

25 Did you work with storage drums at Rocky Flats and

1 Los Alamos?

2 A. On a daily basis, I did.

3 Q. Can you tell us what was done to dispose of the plutonium
4 inventory at Rocky Flats?

5 A. Depending on the project, the one that I worked on was
6 called packing POCs, which was plutonium oxide that was
7 reburned or plutonium was reburned into an oxide, which is a
8 more stable form, into 200-gram containers, put into 55-gallon
9 white drums. Then they were sealed. Then they were shipped
10 either to Nevada test site or WIPP.

11 Q. And how would you test for radioactivity as part of your
12 job?

13 A. Depending on the isotope. Plutonium is an alpha emitter.
14 Americium is an alpha gamma emitter. Uranium is a beta gamma
15 emitter. Tritium is strictly a beta emitter. So there is
16 various instruments that you would use depending on which
17 isotope you wanted to stream for.

18 Q. And going back to the drums, how many drums would you pack
19 each night?

20 A. We would do 20 a shift. There were three shifts going, so
21 roughly 60 a day in this one particular location.

22 Q. Was that Los Alamos or Rocky Flats?

23 A. Rocky Flats.

24 Q. And what was done with the drums that you packed? By the
25 way, let me go back.

1 A. Once they were sealed? I'm sorry.

2 Q. What were the drums packed with?

3 A. The drums were packed with plutonium.

4 Q. And what was done with the drums after you packed them?

5 A. We surveyed them for contamination. We did external
6 radiation surveys on them so that when they were put in the
7 proper vehicle for transport, we followed all the federal
8 regulations. And then they were -- we signed the tags, filled
9 out the surveys, turned it over to shipping and they
10 transported it.

11 Q. Mr. Barton, have you reviewed the August 11, 2011 Fish &
12 Wildlife Service Memo on the State Clay Mine Pond?

13 A. I did.

14 Q. Have you looked at where the State Clay Pond Mine is
15 located -- excuse me, the State Clay Mine Pond is located?

16 A. Do you have a picture?

17 Q. Uh-huh.

18 *MR. WEINER:* Ms. Cording, if you could please call up
19 Exhibit 04.

20 *BY MR. WEINER:*

21 Q. Mr. Barton, can you read the map in front of you?

22 A. Everything in the yellow square and then there is a little
23 section carved out in the northwest corner.

24 Q. That's right. So I am going to -- you can see it's
25 Section 16 and surrounding area, so the area within yellow is

1 identified as the Section 16 parcel that I referred to in my
2 opening statement. Do you see that?

3 A. Uh-huh.

4 Q. And looking at the exhibit where the proposed Greenway
5 Trail is going, and that would be Exhibit 2 -- thank you -- can
6 you see that -- can you compare where the proposed Greenway
7 Trail is in relation to the Section 16 parcel?

8 A. So the squiggly line in the bottom lower left.

9 MR. WEINER: Ms. Cording, go back to the last image.

10 BY MR. WEINER:

11 Q. This exhibit shows where the State Clay Mine is, doesn't
12 it?

13 A. I believe so.

14 Q. If you look at the top, there is a little arrow pointing to
15 a greenish area and it says, State Clay Mine. Do you see that?

16 A. Right below Woman Creek, correct.

17 Q. So going back, once again, to the Greenway Trail, do you
18 know if there are any controls on the use of the Greenway Trail
19 that would prevent someone from going to the State Clay Mine
20 Pond?

21 A. Not that I read.

22 MR. WEINER: Ms. Cording, would you turn to our Figure
23 13 found at Exhibit 8.

24 BY MR. WEINER:

25 Q. Have you seen this figure which shows a discarded barrel at

1 the State Clay Mine?

2 A. I have.

3 Q. And what can you say about this particular barrel?

4 A. This barrel is suspicious in my mind because when we were
5 packing the contents of the drum, the interior inside of the
6 drum was the same color as the weathered outside once the white
7 had disappeared, so what I am saying is before the drum was
8 coated on the exterior side, it looked the same as the interior
9 did.

10 Q. So when you say suspicious, what do you mean by that?

11 A. I can't prove it because I didn't do any analysis, but it's
12 similar in nature to drums that were used.

13 Q. At Rocky Flats?

14 A. Yes.

15 Q. For disposal?

16 A. Yes.

17 Q. And Rocky Flats is right next door to where this pond is.

18 A. Yes.

19 Q. And you were talking about color. So would you say there
20 was a distinctive white color on this barrel? Is that what you
21 are telling us?

22 A. Correct.

23 Q. And what were you saying about the red?

24 A. The base coat of the barrel --

25 Q. The primer?

1 A. -- was coated inside and outside, and then the exterior was
2 coated white.

3 Q. I see. And do you see evidence of red paint in this
4 picture?

5 A. I do.

6 Q. And you see evidence certainly of white paint?

7 A. I do.

8 Q. And is this the kind of drum that would contain the
9 materials you were talking about before, specifically
10 plutonium?

11 A. It looks similar.

12 Q. And it's in the drum because of its radioactivity?

13 A. I am sorry?

14 Q. Why is it in the drum?

15 A. It's a containment.

16 Q. So the report that I referred to earlier that came from the
17 Fish & Wildlife Service dated August 11, 2011, and that's
18 Exhibit -- that's found at ECF No. 14-11, did that talk about
19 sampling of the State Clay Mine Pond, this particular pond
20 where the barrel was located?

21 A. It looked to my like it was for water quality standard
22 only.

23 *MR. WEINER:* Okay. Can we turn to -- can we call up
24 the state water quality standard section of ECF 14-11. It's
25 the last page, Ms. Cording.

John Barton - Direct

1 Q. So Mr. Barton, when you said that the water at the State
2 Clay Mine Pond was sampled apparently for I believe you said
3 water quality standards, it actually lists what was sampled,
4 doesn't it? At the bottom it says: Arsenic, cadmium, copper,
5 iron, lead, manganese, zinc, calcium and magnesium.

6 Are any radionuclides sampled for at the State Clay
7 Pond Mine that you can see in this exhibit?

8 A. No, sir.

9 Q. And do you think it should have been?

10 A. Yes.

11 Q. Why?

12 A. Because the drum is suspicious.

13 Q. And based on your experience, your 21 years of experience
14 working as a radiation control officer, did you come into
15 contact with situations where radiation or radionuclides had
16 gotten beyond the industrial zone at Rocky Flats and into the
17 surrounding environment?

18 A. Yes.

19 Q. Can you give us an example?

20 A. One example was the southwest -- or the southwest hillside
21 headed towards -- looking -- you would be looking towards
22 Dinosaur Ridge.

23 Q. And what happened?

24 A. In doing just random surveys for, you know, ground surveys
25 for the contractor, came across a field of half-buried ugly

1 green glove boxes with classified parts after laying all over
2 the side of the hill.

3 Q. Can you be more descriptive than classified parts? What
4 was in those glove boxes, Mr. Barton?

5 A. They would be parts of a weapon.

6 Q. What parts?

7 A. I'm probably not going to say that.

8 Q. Is it safe to say that part contained plutonium?

9 A. Either that or uranium 235.

10 Q. Are there other incidents that you are aware of where
11 plutonium -- you believe the plutonium escaped from the central
12 operating core of Rocky Flats into the surrounding area?

13 A. There was a public meeting held about the increased water
14 levels coming out of building 771 that -- actually was the
15 discharge below 771 building, which at one point was deemed the
16 most hazardous building on the DOE site, the complex. And the
17 concern was, well, maybe it's legacy contamination.

18 And I testified at the public meeting that perhaps it
19 was poor management skills and the fact that 11 workers had
20 received body burns, and uncontrolled contamination was
21 released to the environment through that remediation project.

22 Q. So water from 771 escaped into the environment. Is that
23 your testimony?

24 A. Correct.

25 Q. And where did it go?

1 A. Downstream.

2 Q. Where is downstream?

3 A. The Great Western Reservoir and Standley Lake.

4 Q. So past the refuge?

5 A. Eventually, it was.

6 Q. Mr. Barton, would you visit Rocky Flats if it was open to
7 the public?

8 A. I am sorry?

9 Q. Would you visit Rocky Flats Refuge if it was open to the
10 public?

11 A. Never.

12 Q. Why?

13 A. The taking down of Rocky Flats was a good thing, but they
14 didn't go far enough. A prime example is I believe everybody
15 is aware of the Mother's Day fire in 1969 in which a large
16 amount of plutonium was burned in a fire. The waste from the
17 fire was -- the building 777 and 776 had a second floor, a
18 first floor, a basement and a subfloor.

19 The waste from the fire was pushed into the
20 subbasement. The doors were closed and it was sealed shut.
21 When they remediated the buildings, they only took it down to
22 the foundations. So everything that was there, hundreds of
23 kilograms of plutonium are buried beneath the surface.

24 MR. WEINER: Thank you. No further questions of this
25 witness, Judge.

1 *THE COURT:* Thank you.

2 Cross-examination?

3 **CROSS-EXAMINATION**

4 *BY MS. HELD:*

5 Q. Good morning, Mr. Barton.

6 Now, I heard you say when you were talking with
7 Mr. Weiner that you did not conduct any analysis on the barrel
8 that was shown in the photo that he had you describe; is that
9 correct?

10 A. No radionuclide analysis.

11 Q. Did you see the barrel in person?

12 A. I am sorry, I have hearing aids, so --

13 Q. I am sorry. I will speak louder. Did you see the barrel
14 in person that was shown in the photograph that Mr. Weiner was
15 talking with you?

16 A. I did not.

17 Q. And do you have experience with barrels at facilities other
18 than Rocky Flats and Los Alamos?

19 A. No.

20 Q. You stated part of your role as a radiation monitor at
21 Rocky Flats was to fill out the forms to transfer the barrels
22 prior to shipping; was that correct?

23 A. Correct.

24 Q. And do you know where the barrels were shipped to?

25 A. It depended on the item that you were packing.

1 Q. How about the plutonium? Were you aware of where the
2 plutonium was shipped to?

3 A. It would go to either of two places, which would be the
4 Nevada test site for high level, and for lower level it would
5 go to WIPP.

6 Q. So based on your experience as one of the radiation control
7 monitors from 1982 to 2003, did you see any evidence that
8 barrels from Rocky Flats were disposed of at the State Clay
9 Pond?

10 A. I did not.

11 Q. You also talked to Mr. Weiner about a situation where you
12 found a box containing weapons parts that contained nuclear
13 material outside of what you have described as the central
14 operating core. Would you please describe to me what you mean
15 by the central operating core?

16 A. May I correct the statement that you made?

17 Q. Yes.

18 A. There was not one glove box. There was numerous glove
19 boxes.

20 Q. Numerous glove boxes.

21 A. I don't have the map in front of me. I would have to
22 actually be out on the site to give you an exact position of
23 it, but it was on a hillside away from Central Avenue to the
24 southwest where workers normally don't go.

25 Q. Do you have before you the map that Mr. Weiner was

1 referring to? It has on the bottom ECF No. 7-13.

2 A. If you could put it up for me.

3 Q. Do you have a copy there? Would you be able to turn to it?

4 It should be under the tab Exhibit 2.

5 A. Okay.

6 Q. Are you able to tell from this map an approximate location
7 of where you discovered the glove boxes?

8 A. If you look at the word Area --

9 Q. Yes.

10 A. Go south to the line that has a little jag up, straight
11 below that.

12 Q. Yes.

13 A. Somewhere just below that line.

14 Q. So it was within the light-colored area on the map.

15 A. Correct, but it wasn't in the industrial area with that --

16 Q. With the cross-section? It was right outside that?

17 A. Correct.

18 Q. So then it wasn't in the area that was transferred to the
19 Fish & Wildlife Service for use as the refuge?

20 A. No.

21 Q. And you also were discussing with Mr. Weiner a situation
22 with a building called building 771.

23 A. Correct.

24 Q. And you had described a situation where water had escaped
25 from building 771. When did that occur?

1 A. Unfortunately, the Department of Energy built upon two
2 natural springs, so the water was always there.

3 Q. Let me clarify my question. When did the release that you
4 were describing to Mr. Weiner occur?

5 A. Approximately 1993 to -- no, Kaiser Hill took over, so it
6 was when Kaiser Hill was there, so I would say about 1998.

7 Q. And you also described the Mother's Day fire in 1969.

8 A. Correct.

9 Q. And were you involved with the cleanup of the site, the
10 Rocky Flats Superfund Site, aside from your role as a radiation
11 control monitor?

12 A. Could you rephrase that? I guess I'm not sure what you're
13 asking.

14 Q. Sure. So aside from your role as a radiation control
15 monitor on Rocky Flats from 1982 to 2003, did you have any
16 other role in the cleanup that occurred there?

17 A. I started out as a metallurgical operator where you would
18 press metal shapes in a machine -- not a machine, but get it
19 ready for the machine. I went to an analytical lab technician
20 as I tested all the plutonium in various isotopes for purity.

21 And then in 1987 I became a radiation monitor. Then
22 they changed the name in 1992 to radiation control technician.
23 From that point on, from 1987 to 2003, I performed as a
24 radiation control technician.

25 Q. So you did not, then, perform any functions in -- functions

1 as part of the cleanup of the facility?

2 A. After 1987, I did.

3 Q. Well, would you please describe those?

4 A. I am sorry?

5 Q. Would you please describe those actions that you took as
6 part of the cleanup of the facility?

7 A. A lot of the first work was disposing of the interior of
8 the buildings so that you could get ready for the demolition of
9 the buildings. So that would mean that was the most highly
10 risky portions of the jobs where you would actually
11 decontaminate, size reduce, box, crate and drum the waste
12 material.

13 Before that you would have to clean the glove boxes
14 themselves. I didn't actually clean them. I monitored the
15 personnel that were doing the work to make sure that they were
16 safe, they weren't getting over exposed and they were not
17 contaminated. And once that portion was done, then it would be
18 boxed, crated, drummed and shipped depending on the levels.
19 Does that --

20 Q. Yes, that's fine.

21 A. Okay.

22 MS. HELD: I don't have any additional questions,
23 Mr. Barton.

24 THE COURT: Thank you.

25 Any redirect?

1 MR. WEINER: No. We are ready to excuse the witness.

2 THE COURT: Thank you, Mr. Barton. You may step down.

3 MR. WEINER: Plaintiffs would like to call our next
4 witness, Dr. Harvey Nichols, to the stand.

5 **(Harvey Nichols was sworn.)**

6 THE WITNESS: I do.

7 COURT DEPUTY CLERK: Please state your name and spell
8 your first and last name for the record.

9 THE WITNESS: My name is Harvey Nichols, H-A-R-V-E-Y,
10 N-I-C-H-O-L-S.

11 BY MR. WEINER:

12 Q. Good morning, Dr. Nichols. Thank you for being here.

13 Dr. Nichols, what is your education?

14 A. My education was completed over in Britain, a bachelor's
15 degree and Ph.D. in the United Kingdom, and then five years of
16 post-doctoral research at biologic department at Yale
17 University and the department of meteorology, University of
18 Wisconsin, Madison, then 40 years of teaching and research at
19 University of Colorado, Boulder. I have been retired emeritus
20 status for the last 10 years.

21 Q. Are you familiar with sampling and analyzing the results of
22 the sampling you do?

23 A. Yes, yes.

24 Q. After you retired do you keep up your work with the
25 University of Colorado doing committees or boards or things

1 like that?

2 A. They episodically call me to be in charge of chair
3 committees, yes.

4 Q. Are you still on the payroll at the University of Colorado?

5 A. Yes.

6 Q. Are you publishing?

7 A. Yes, most recently as last year in the Scientific Journal
8 of Nature and another nature archival international journal
9 called Pangaea.

10 Q. And do those publications deal with your biology work or
11 with the transport of small particles?

12 A. Yes. The two I mentioned published last year in Nature and
13 Pangaea specifically on the long distance transport of
14 particles, small particles.

15 Q. About how many publications over your career have you
16 authored?

17 A. Oh, more than 50.

18 Q. And have you ever given testimony before in court or before
19 the legislature?

20 A. Yes. I testified repeatedly before the state legislature
21 on the health and safety aspects of Rocky Flats, and then in
22 addition before the presidential commission which President
23 George H.W. Bush requested of Admiral Watkins that he put
24 together a commission. And the commission, which I believe was
25 called the Conway Commission, consisted of nuclear commanders,

1 commanders of nuclear vessels, submarines and aircraft
2 carriers. And they asked me to on a one-on-one basis to -- or
3 at least I was just the only witness that they called to
4 testify to the conditions at Rocky Flats.

5 Q. Was your testimony with regard to the transport of small
6 particles?

7 A. It was the whole health and safety aspect and the plutonium
8 particles that I had done research on at Rocky Flats under a
9 DOE contract. By the way, in addition there was the a
10 commission which was composed primarily of scientists, members
11 of the National Academy, and again I spoke to them
12 individually.

13 Q. And that again involved your work in biology and the
14 transport of small particles?

15 A. Yes, yeah.

16 MR. WEINER: Your Honor, at this point I would move to
17 have Dr. Nichols qualified as an expert in biology with an
18 emphasis on the transport of small particles.

19 THE COURT: I don't qualify witnesses like that just
20 because I think that 702 is all about opinions, not touching
21 people with magic wands in terms of expertise.

22 So you can go forward. You don't need to tender any
23 of the people as experts, but obviously lay whatever foundation
24 you think may be needed. And to the extent that the defendants
25 think that an opinion is unsupported, they can, of course,

1 object.

2 Go ahead.

3 MR. WEINER: Thank you, Your Honor.

4 BY MR. WEINER:

5 Q. Let's talk about the activities you were involved with
6 starting in 1975 at Rocky Flats.

7 First of all, who hired you?

8 A. Strictly speaking, in 1974, the ERDA, which later became
9 the Department of Energy, the senior biologist, Dr. Bill
10 Osborne, came uninvited into my lab and said he had been
11 watching the research that I was doing and would I please
12 accept a contract to do research and at Rocky Flats.

13 Q. And I am sorry, I missed that. Who was he working for?

14 A. Dr. Bill Osborne became a senior biologist for the
15 Department of Energy.

16 Q. So the Department of Energy hired you.

17 A. Yeah, yeah.

18 Q. And what were you hired to do?

19 A. To do research on airborne particles emanating, as they
20 thought at the time, as I thought, from what was then called
21 the hot spot. That is the 903 pad, the area where there were
22 the oil drum spills of plutonium-laced laid on.

23 Q. And how did you conduct this study?

24 A. First of all, I examined the air sampling equipment around
25 the perimeter, and I found it was inefficient in the collection

1 of small particles. I then went on to study the snowfall in
2 the winters of 1975, '76. And for each of the major snowfalls
3 I and my assistants sampled the snow, melted the snow, and
4 obviously I have to skip over some of the details, Your Honor,
5 but found by pressing the melted snow through very, very fine
6 microscopic filters or sieves, I was able to distinguish
7 different size ranges of particles.

8 They were then irradiated in the reactor and proved to
9 be radioactive particles present in great numbers as I examined
10 and counted on the microscope slide.

11 May I go on?

12 Q. You can.

13 A. I then asked the officials at the plant, "Why is the snow
14 radioactive? Why is it hot?" And they said, "Oh, there is a
15 uranium mine. That's where -- it's uranium dust." I said,
16 "Would you please do an analysis of this?" And they said, "No,
17 it would cost too much." I am afraid that was a deceptive
18 comment that they made to me because it turned out the uranium
19 mine was 5 miles away and was in a completely unsuitable
20 situation for contaminating Rocky Flats.

21 And if I can jump ahead for a moment, Mr. Weiner, what
22 I discovered some years later when questioning Rockwell, who
23 were the contractors, in fact, they knew as I was making my
24 collections of snowfall within a few hundred yards of the
25 exhaust stacks, Building 771, 776, 777, where they were

1 emitting tiny quantities of very small particles of plutonium.

2 And I discovered that by asking them directly in a
3 state capitol health committee hearing that was recorded. And
4 I was astonished. They just said yes. So it was a design
5 feature of their process that were pushing these tiny particles
6 through HEPA filters into the ambient air each and every day of
7 their operation for four decades.

8 Q. Going back to the work you specifically did in 1974 and
9 1975, you would sample the snow within the Rocky Flats
10 industrial area. And you determined --

11 A. No. When I started the work, I was not yet a citizen. I
12 became a citizen partly because I really wanted to report to my
13 representatives what was happening. So I operated in what is
14 now -- what was then called the buffer zone and is now called
15 the refuge.

16 Q. All right. So just let me summarize, if I may.

17 So you did some work for the Department of Energy, and
18 you sampled the snow to determine if there were radioactive
19 particles there. And I think you said you found radioactive
20 particles in great numbers; is that correct?

21 A. Yes.

22 Q. What are we talking about in terms of great numbers?

23 A. I went from the size of the snow section that we sampled or
24 melted and did this repeatedly, of course, and then
25 extrapolated from that approximate real time, if you understand

1 that real time or, in other words, contemporaneous collection
2 of particles, and then extrapolated that to the area of the
3 refuge, given that they were emitted -- they were emitting on a
4 routine daily basis. And I was as conservative as I could be
5 on all this. And the numbers originally I estimated to be in
6 the billions of plutonium particles per acre deposited over --

7 Q. Can you go back from the microphone a little bit because we
8 heard lots of "pas", but we didn't actually hear what you said.

9 A. Okay. So the extrapolation based on the real-time
10 measurements extrapolated for approximately 40 years of
11 operation was in the order of billions of plutonium particles
12 deposited per acre.

13 Q. Where did the plutonium --

14 A. If I may just continue. I just yesterday looked at more
15 evidence from a DOE study, and the figures are even greater
16 than that, actually astronomical figures.

17 Q. Where did the plutonium come from?

18 A. The operations of the plant.

19 Q. And what was the nature of the deposition of the particles?

20 A. It was quite varied. There were peaks and then there were
21 lower spots, but even the lower spots still in my
22 extrapolations were billions of particles per acre. In the
23 highest spots, and there is one in particular, it was
24 interesting, the maximum values over in the northwest, over in
25 the upwind area of the buffer zone, the refuge, closer, in

1 fact, to the Greenway Trail as it is now designated, and that
2 was the maximum, very, very high values of the order of
3 reaching towards a hundred billion particles per acre.

4 Q. So is it your testimony that there are some areas of the
5 refuge that contain a greater quantity of plutonium particles
6 than others?

7 A. Yes, yes.

8 Q. And is that a significant difference?

9 A. Yes. It shows the complexity and the variability of the
10 site.

11 Q. And in terms of orders of magnitude?

12 A. Certainly, orders of magnitude differ between the, quote,
13 lower spots and the higher spots.

14 Q. Were you able to -- oh, and I think you just testified that
15 there was -- is it fair to say a hot spot, do you use that
16 term, close to the trails? What word are you comfortable
17 using?

18 A. In terms of the distance from the location, the distance
19 from the trail?

20 Q. No, in terms of high quantities of plutonium particles.

21 A. Well, from the estimates, my original estimates were of the
22 order of almost a hundred billion plutonium particles per acre.
23 However, my examination of data yesterday suggest those figures
24 were orders of magnitude higher. And as soon as I saw those
25 figures, I felt slightly queasy, actually, because the numbers

1 are so great. I immediately knocked them down by three orders
2 of magnitude, again to be conservative, say let's count this as
3 just one-tenth of 1 percent of what I believe, what I
4 understood to have been deposited there.

5 *MR. WEINER:* Ms. Cording, can you call up Exhibit 1,
6 please. I am sorry, please make it Exhibit 2.

7 *BY MR. WEINER:*

8 *Q.* Dr. Nichols, you were starting to testify that you found
9 plutonium at higher levels, and I think you said near the
10 Greenway Trail. Can you use this map and point? You actually,
11 when you point you can draw a circle with your finger.

12 *A.* Would you do that on this map and tell us where you
13 found the highest quantity of plutonium particles.

14 *Q.* Can I put my finger on the screen?

15 *A.* You may put it on the screen and make a mark?

16 *THE COURT:* There should be a stylus up there, Doctor.
17 That might be easier.

18 *THE WITNESS:* I don't know if it will register, but I
19 can touch the screen. Okay, there. That's Y46 is what they
20 designated that sign as in the days that the plant was
21 operating.

22 *BY MR. WEINER:*

23 *Q.* For purposes of the record, you are reviewing a document;
24 is that correct?

25 *A.* I am looking at a map. I translated my site location from

1 the original report I gave to DOE. I have translated that onto
2 the trail map that's here before me.

3 Q. In other words, when you and I talked before your
4 testimony, I asked you to look at your own studies and see if
5 you could pinpoint a place where the Greenway Trail is that
6 correspond; is that correct?

7 A. Yeah. May I just clarify and say --

8 Q. No, the attorney -- she gets to object.

9 MS. HELD: Your Honor, objection to the extent that
10 the doctor here has paper before him that he has drawn on to
11 testify from, we would like that disclosed as an exhibit so
12 that we can review what he is relying on.

13 THE COURT: It's not necessarily admissible as an
14 exhibit, but you are certainly welcome to take a look at it.

15 Ms. Grimm, could you show that to Ms. Held.

16 Doctor, you can't talk at the time because we need to
17 have it on the record. We will just let Ms. Held take a look
18 at it.

19 MS. HELD: Thank you.

20 THE COURT: Go ahead, Mr. Weiner.

21 Let me tell the audience everyone needs to turn their
22 phones off, all right? We can't have -- a number of phones
23 have been going off. All phones have to be completely turned
24 off so that they don't ring, all right?

25 BY MR. WEINER:

1 Q. So, Dr. Nichols, I had asked you to circle on the exhibit
2 in front of you where the highest levels or quantities of
3 plutonium particles were that you determined in your studies,
4 and you were consulting a document, but now are you ready to do
5 what I had requested?

6 A. Could you repeat?

7 Q. Can you circle where the highest numbers of plutonium
8 particles were that you found?

9 A. Will this work if I just place my finger on the screen?

10 Q. Yeah, you can try it.

11 A. Okay. And again this is the Y46 location. That's DOE's
12 own Rocky Flats designation of Y46.

13 *MR. WEINER:* Should I be seeing something on my
14 screen?

15 *COURT DEPUTY CLERK:* I can change the color.

16 A. So again, it's in the northwest quadrant of the site which
17 is, in quotes, upwind.

18 *BY MR. WEINER:*

19 Q. As I look at this map, it's to the --

20 A. It's shifted over to the southeast a little bit.

21 *THE COURT:* Doctor, if you want, if you touch the
22 lower right-hand corner all the way down, it should clear that
23 and you can redraw it, if you wish.

24 *THE WITNESS:* Thank you. Can I use my nail?

25 *THE COURT:* Yes.

1 *THE WITNESS:* Okay. That's good enough.

2 *BY MR. WEINER:*

3 Q. Okay. And I see that as being to the southeast of the
4 access and egress points to the Lindsay Ranch loop. Do you see
5 the little line?

6 A. Yes.

7 Q. Were there other areas of high plutonium deposition based
8 on your own determinations?

9 A. Yes. If I can point --

10 Q. Yes, you can mark this up to your heart's content.

11 A. Okay, fine. This is from memory now, so I had some over
12 west of Indiana, east of Indiana, in fact, a little bit south
13 of there, to the south of the southeast corner. There were
14 sites that I was allowed to get closer to the hot spot as it
15 was then called the 903 pad, so approximately in this area,
16 okay?

17 There were eight sample sites that I repeated for
18 every snowfall, went back to and sampled immediately after the
19 snow had ceased. And you see that over in the ones that are
20 near Central Avenue close to Indiana Street, west and east of
21 Indiana Street, those are even closer to the entrance point of
22 the trail that Fish & Wildlife are planning.

23 Q. Is that called the east gate back in the time you were
24 sampling?

25 A. Right, yeah.

1 Q. Was that considered an area of high deposition of plutonium
2 because it was a road that hauled trucks which contained -- had
3 materials that might be radioactive?

4 A. My understanding was that it was primarily or solely the
5 result of movement of plutonium across from -- basically
6 eastwards from the what is the 903 pad, the oil spill area.

7 Q. I see. With respect to the plan to put public trails, what
8 does your research conclude with respect to the relative risks
9 of where to put trails?

10 A. Because this is a windy site and it's part of the NREL test
11 site for wind generation of power, and from what I know of
12 landscapes and from what I know of the re-suspension of small
13 particles, deflation and movement across the surface, I think
14 in each of those areas where I studied, I think there is a
15 considerable -- in fact, a high probability that people may
16 inhale these tiny particles.

17 The particles I measured, and without going into the
18 size ranges, unless Your Honor wishes that, the EPA said that
19 those are exactly the size ranges that are most liable to be
20 inhaled; and therefore, the risk of plutonium particle
21 inhalation is considerable.

22 MR. WEINER: No further questions at this time, Your
23 Honor.

24 THE COURT: Thank you.

25 Cross-examination?

1

CROSS-EXAMINATION

2

BY MS. HELD:

3

Q. Dr. Nichols, when was the period of time that you conducted your sampling program on Rocky Flats?

4

5

A. 1975 to 1977.

6

Q. And is it correct that you have not conducted any other sampling on Rocky Flats since 1977?

7

8

A. I attempted in the 1990s after operations had ceased to collect snow samples to test whether, in fact, it was the

9

10

emissions from the routine operations that were providing this hot snow, but, in fact, I was not able to get funding for that program and I got no results from those samples.

11

12

13

Q. You were talking to Mr. Weiner about how you extrapolated conclusions that there were billions of plutonium particles deposited per acre. Would you please describe to me what you mean by extrapolated.

14

15

16

17

A. Yes, to a layperson it may sound sort of risky or fuzzy or something, but, in fact, it's an excellent scientific way of dealing with this problem. I had the actual measurements of the snow that I had sampled, the size of the microscope slides, the numbers per microscope slide that were counted.

18

19

20

21

22

From that I said since the emission by Rockwell was on a routine daily basis they emitted this material for the whole of their operation, I said, okay. Let's take this and extrapolate to get some idea of the burden of plutonium

23

24

25

1 particles on the soil per acre. And again trying to be as
2 conservative as I could be, I happened by chance to have chosen
3 the time to sample at the low point, according to the DOE's own
4 emission data, the low point in their four-decade operation.

5 And in previous years the amount of plutonium emitted,
6 again from their own studies reported by Dr. John Till working
7 for the DOE, was many orders of magnitude greater than I found.
8 So if you can understand it, there was a graph where there was
9 a low point, and that happened to be by chance where I was
10 sampling, the time period. And so the rest of the time the
11 figures were much, much greater. So again, I am being as
12 conservative as I can.

13 Q. And you talk about finding various hot spots in your
14 sampling. Were those conclusions based on extrapolation or
15 sampling itself?

16 A. Those were done directly from the microscope slide counts
17 and the graphs which I have with me which have been reported to
18 DOE back in 1977.

19 Q. And when you refer to hot spots, what was the actual
20 measurement of plutonium that you found there, do you recall?

21 A. It was the great numbers of plutonium particles on the
22 microscope slide. I don't know what more to add. Just by
23 counting the entire microscope slide and registering all these
24 great numbers, at times on the graph and certainly in
25 particular at Y46, the site that's in the northwest we just

1 talked about, my -- the figures went you might say off the
2 scale.

3 My wife, ex-wife, was working with me on this. She is
4 a nuclear physicist and later became part of management of
5 Rocky Flats. I just looked at her handwriting last night on
6 the graph where there is an arrow saying hundreds more, so it
7 just showed how many, many of these particles there were on a
8 designated small area, which then it was feasible and
9 legitimate to extrapolate from that.

10 Q. But you are able to provide an actual number?

11 A. Yes, yes.

12 Q. Are you able -- what is that number, then?

13 A. Well, the graph is in my bag down at the bottom of the
14 chamber there. So as I say, what I remember is hundreds more,
15 you know, and I can't reproduce for you from memory. I have
16 got a picture of the shape of the graph in my mind. There is a
17 great peak on the graph paper.

18 Q. And did you do any analysis with regard to the sampling
19 values that you took in the seventies?

20 A. Which values?

21 Q. The sampling values that you found in the seventies when
22 you were talking about the hot spot values?

23 A. Sorry, there is something about the word just before values
24 which I am not catching.

25 Q. Did you conduct an analysis of the values of plutonium that

1 you found in your samples in relation to the EPA standards for
2 what's considered background analysis of plutonium versus
3 higher background amounts? Did you do any comparison in your
4 studies?

5 A. I am going to try to be helpful here. The response will be
6 rather broader than your question, I think.

7 Q. Just did you?

8 A. There are no standards. The standards do not apply because
9 I was making measurements, which Fish & Wildlife in a letter
10 that I got out of them by applying to Congressman Bob
11 Beauprez's office, who sent my inquiry to Fish & Wildlife, and
12 in 2003 they finally replied and said it seems that nobody else
13 has ever done such snowfall studies as you have, so there is no
14 comparison.

15 Q. In the map that you were drawing on for Mr. Weiner, the
16 dots that you placed on the map, none of those dots were
17 actually on a trail location, correct?

18 A. I think you are correct in that, but -- no, I will reply
19 more clearly. Where the entry point of the trail comes in on
20 Indiana Street, as I understand it, I have two samples even
21 closer to that point than I was able to designate on the map.

22 Q. But they weren't actually on the trail locations
23 themselves, though, correct?

24 A. It would be a matter of yards.

25 MS. HELD: Those are all the questions I have, Your

1 Honor.

2 *THE COURT:* Any redirect?

3 *MR. WEINER:* Just one question.

4 *THE COURT:* Go ahead.

5 **REDIRECT EXAMINATION**

6 *BY MR. WEINER:*

7 Q. What you know about the Fish & Wildlife Service's plans to
8 open a refuge to the public on September 15, do you know if
9 there are any limitations on people, bikers, hikers, horseback
10 riders, from getting off their bike or walking out beyond the
11 trail into the refuge at large?

12 A. I do not know. I imagine from the -- extrapolated from
13 that direction that there will be new material laid down on
14 these pathways, but the winds blow quite strongly in that area
15 and --

16 Q. That's not what I am asking. Do you know if there is
17 limitations on the visitors' ability to access areas beyond the
18 trail itself?

19 A. I -- I don't know. I don't know that, no.

20 *MR. WEINER:* No further questions.

21 *THE COURT:* All right. Thank you, Dr. Nichols. You
22 may step down.

23 *MR. WEINER:* At this point plaintiffs would like to
24 call Michael Ketterer.

25 *THE COURT:* Why don't we take a 10-minute break. Why

Michael E. Ketterer - Direct

1 don't we plan to reconvene at about 11:00. We will be in
2 recess. Thank you.

3 (Recess at 10:50 a.m.)

4 (Reconvened at 11:05 a.m.)

5 *THE COURT:* You can call your next witness.

6 *MR. WEINER:* Dr. Michael Ketterer, please.

7 **(Michael E. Ketterer was sworn.)**

8 *THE WITNESS:* I do.

9 *COURT DEPUTY CLERK:* Please state your name and spell
10 your first and last name for the record.

11 *THE WITNESS:* Michael E. Ketterer. Michael is
12 M-I-C-H-A-E-L. Ketterer is K-E-T-T-E-R-E-R.

13 **DIRECT EXAMINATION**

14 *BY MR. WEINER:*

15 Q. Good morning, Dr. Ketterer. Thank you for your attendance.

16 What is your education?

17 A. I have a bachelor's degree in chemistry from University of
18 Notre Dame and a Ph.D. in analytical chemistry from University
19 of Colorado in Boulder.

20 Q. So both in chemistry?

21 A. Both in chemistry, yes, sir.

22 Q. Where have you worked?

23 A. I worked for two years at the Gates Corporation in Denver,
24 six years for U.S. EPA in the Office of Enforcement, National
25 Enforcement Investigation Center in Denver, and then I worked

1 at three different universities.

2 Q. Which are the universities you worked at?

3 A. John Carroll University in Ohio, Northern Arizona University
4 in Flagstaff, and most recently Metropolitan State University
5 of Denver.

6 Q. Have you published -- what is your specialty?

7 A. One of the major areas I've worked on for the past 15 to 20
8 years is studies of plutonium in the environment.

9 Q. And have you published in the area of chemistry,
10 specifically plutonium?

11 A. Yes.

12 Q. And can you briefly describe what your papers dealt with?

13 A. Well, one of the things that I do as an analytical chemist
14 is I figure out how to measure it at low levels in the
15 environment and then study its fate, transport, where does it
16 come from, fingerprinting its origin and its behavior in the
17 environment, how does it move around, how does one use it as a
18 tracer of earth processes.

19 Q. And roughly how many papers have you published in this area
20 of plutonium in the environment or chemistry?

21 A. I would say something like 45 to 50 papers dealing directly
22 with plutonium.

23 Q. Have you provided consulting services in these areas?

24 A. Yes. I have worked for the government of Japan following
25 the Fukushima accident. I worked for Pacific Northwest

Michael E. Ketterer - Direct

1 Laboratories as a panelist, as a reviewer. I have done a
2 little bit of work for the International Atomic Energy Agency
3 and probably others, but those are a few.

4 Q. And have you testified previously?

5 A. Yes, sir.

6 Q. Do you recall what those cases were about or what their
7 names were?

8 A. 1989 when I was working for the U.S. EPA, I testified on
9 behalf of the Federal Government as an expert, and that was
10 *U.S. v. Bell Petroleum* in Western District of Texas, Midland,
11 Texas. And the subject of that was chromium in groundwater and
12 sources of chromium in groundwater for the government's
13 Superfund case.

14 Q. What is your current position?

15 A. I am retired and self-employed as a consultant. I am also
16 a professor of emeritus of chemistry at Northern Arizona
17 University.

18 Q. Were you in the courtroom when Dr. Nichols testified?

19 A. Yes.

20 Q. And based on Dr. Nichols' testimony -- let me go back. You
21 heard Dr. Nichols testify about plutonium that he had sampled
22 within the refuge itself. Do you recall that?

23 A. Yes.

24 Q. And he pointed to specific areas in the refuge where he
25 found the most numbers of plutonium particles. Do you recall

1 that?

2 A. Yes, sir.

3 Q. Based on Dr. Nichols' testimony, where would you expect to
4 find particles?

5 A. I would be of the opinion that you could find particles
6 anywhere and everywhere on the refuge.

7 Q. And what about off the refuge?

8 A. And also off the refuge. In fact, there is data that
9 support that.

10 Q. Whose data?

11 A. Well, there is recent study by a Marco Kaltofen which
12 identifies a hot particle that is off site, and it contains
13 americium 241. It's a high activity particle. And then I also
14 have some of my own results from sampling that I conducted in
15 the 2000 to 2003 time frame, properties East of Indiana Street
16 where I also found evidence for these hot particles.

17 Q. Tell us -- can you describe in more detail the sampling
18 that you did east of the refuge -- I am sorry, east of the
19 entire Rocky Flats area.

20 A. Right. In 2000 I collected a transect of samples along the
21 Indiana Street corridor, so on properties east of Indiana
22 Street, the road right-of-way, not on U.S. Government property.
23 And then in 2002 I collected a east/west transect of samples
24 from the -- I believe it's called the Colorado Hills open space
25 park or the City of Westminster's property, but that's directly

1 to the east of the former east gate of Rocky Flats.

2 Q. And plutonium comes from different places. Were you able
3 to identify where the plutonium that you sampled came from?

4 A. Yes, yes. What we do is measure the atom ratio or you
5 could call it the isotope ratio, isotope composition, and those
6 are different for plutonium from Rocky Flats versus the global
7 background. And in the case of the samples that I collected
8 near Rocky Flats, more than 90 percent of the plutonium is from
9 Rocky Flats.

10 Q. And you know this based upon an isotope analysis?

11 A. Correct, yes. We measure the two major isotopes 239 and
12 240, calculate a ratio of 240 over 239. If that's about 0.05
13 to 0.06, that's called weapons grade from Rocky Flats. If it's
14 0.18, in that proximity, that is the global fallout from
15 nuclear weapons tests in the fifties and the sixties. And in
16 the samples you are asking about, we were getting ratios of
17 0.05 up to maybe 0.07, so it's almost all Rocky Flats in
18 origin.

19 Q. Let me digress.

20 Do you know what the quantity associated with global
21 fallout is background radiation?

22 A. That has been measured and studied, and I have measured
23 that type of plutonium in places all over the world, thousands
24 of samples. There is a broad range of values, but in the
25 Colorado Front Range area one would probably expect in certain

1 soil less than 0.1 picocuries per gram.

2 Q. And what kind of values were you identifying just east of
3 the refuge that you've said came from Rocky Flats?

4 A. They went up to about 8 picocuries per gram, but they
5 ranged from, you know, slightly over .1 picocuries per gram up
6 to about 8 picocuries per gram.

7 Q. So an order of magnitude of two times -- eight times 10
8 minus two?

9 A. The highest samples would be, you know, a hundred or more
10 times the so-called global expectation, the background.

11 Q. You did that much better than I did, thank you.

12 You mentioned Dr. Kaltofen's studies. Do his studies
13 confirm your observations?

14 A. Yes, because he has not only identified the hot particle in
15 one sample from the east of the -- east of the refuge, and he
16 also has measured activities in picocuries per gram in soil
17 samples and found similar elevated values to the east of the
18 refuge property.

19 Q. When did his reports -- when were his reports published,
20 Dr. Kaltofen's?

21 A. I think I am referring to a 2018 study that was just
22 published.

23 Q. Have you looked at his study that we attached to our
24 papers? I think it was a 2014 study.

25 A. Yeah, if I can go back, there is one paper that talks about

1 the particle that's in 2018. It just came out. And then there
2 is an unpublished report that was done for the Rocky Mountain
3 Peace and Justice Center which I've examined, and that came out
4 in 2012 perhaps, and that study shows the elevated activities
5 in the soils east of the refuge.

6 Q. So Dr. Nichols testified about plutonium particles on the
7 refuge, and you have now testified about plutonium that you
8 have sampled off the refuge which you say came from Rocky Flats
9 operations. How would the plutonium get from one place to
10 another?

11 A. Most likely BON or windborne transport, in the air.

12 Q. And then being in the air, are you able to say whether
13 individuals would come into contact with the plutonium
14 particles that had migrated in the area?

15 A. Yes. These -- I would say that if an individual was out
16 walking around on the soil that contains particles, the
17 possibility exists that those particles can be entrained into
18 the air and then breathed in.

19 Q. And how likely is it that individuals outside of the refuge
20 will eventually inhale plutonium particles?

21 A. I can't really say about the odds. I think that that's a
22 possibility that that certainly exists.

23 Q. And is this a theoretical risk or an actual risk?

24 A. I think it's an actual risk because one would not want to
25 breathe in one of these particles.

1 MR. WEINER: Your Honor, Dr. Ketterer gave me a
2 diagram of the locations of his own sampling this morning. At
3 this point I would like to tender this as an exhibit and ask
4 Dr. Ketterer some questions about it.

5 THE COURT: How is it marked?

6 MR. WEINER: I think we should mark it as -- what's
7 our last exhibit? So Exhibit 13.

8 THE COURT: Well, on your exhibit list you already
9 have an Exhibit 13.

10 MR. WEINER: Exhibit 14, Your Honor.

11 THE COURT: That's fine. Do you need an exhibit
12 sticker?

13 MR. WEINER: I do.

14 THE COURT: Ms. Grimm will get one, and then if you
15 could show it to Ms. Held.

16 MR. WEINER: Yes. May I approach to give him a copy?

17 THE COURT: You may. Ms. Grimm will approach. You
18 can hand it up to her.

19 BY MR. WEINER:

20 Q. Dr. Ketterer, why did you give me this exhibit?

21 A. Well, I just wanted to document the results that I was
22 talking about from my analyses of these soil samples about 15
23 years ago.

24 Q. And what do the letters -- what do the letters mean?

25 A. Well, the letters are just markers to show the approximate

1 locations of different groups of samples. These were all soil
2 cores, 30-centimeter depth soil cores. And there were several
3 samples taken in the proximity of each of these marked
4 locations.

5 Q. Would you do us a favor and circle the area, the Rocky
6 Flats area, so we can see how close these samples are to Rocky
7 Flats. And tell us about the results. What do the results
8 show?

9 A. Well, let's start with the ones labeled G. Those are from
10 a control location, the Kathy Fromme Prairie outside of Fort
11 Collins. And they show typical background-like activities, as
12 I said, less than 0.1 picocuries per gram. The plutonium
13 isotope signature as I described is also --

14 Q. I see G, 0.38 to 0.50?

15 A. Correct.

16 Q. I think you said it was less than 0.1.

17 A. Correct.

18 Q. It's a little higher than 0.1?

19 A. No, it's less than -- 0.05.

20 Q. Thank you very much. You are right.

21 A. So those locations designated as G are indeed background
22 because they have not only low activities, but the isotope
23 signature matches what is global fallout plutonium, background
24 plutonium found anywhere on the earth surface.

25 Q. So what do the letters A through F signify?

1 A. A through F are the samples from the immediate east of the
2 Rocky Flats, what was then the facility which is now the refuge
3 property. And these are samples from locations that exhibited
4 impact from Rocky Flats. Deposition of plutonium from Rocky
5 Flats is beyond question in those locations.

6 Q. And when we were talking about samples hundreds of times
7 background, is this what you were referring to?

8 A. Yes, the samples from location A, which is just immediately
9 east of the former east gate of Rocky Flats, are, you know, on
10 the order of a hundred or more times what could be considered
11 the background range. A couple others of these samples are
12 showing levels like 5 picocuries per gram. And there are
13 others that are a factor of anywhere from several times to
14 several 10s of times higher than background in the activities.

15 I should make note that I am -- in these activities
16 this is the top 5 centimeters of soil, so it's a composite of
17 the top 5 centimeters of soil from these cores.

18 Q. So what's going on with sample B? There is quite a
19 discrepancy there.

20 A. Well, this is quite common in analyzing samples from the
21 proximity of Rocky Flats and other sites that exhibit hot
22 particles. If you get -- it's sometimes called the nugget
23 effect in sampling theory. If you happen to analyze a
24 subsample that contains one of these nuggets, you will get a
25 higher result. And that's precisely what's at work here.

1 The difference in the activity between the two
2 replicate determinations, we could count for that by saying
3 there is a particle of -- there is a plutonium rich particle in
4 one of the two subsamples of this RF-80 soil that was analyzed.

5 Q. So those represent the results from two different sampling
6 events at RF-80?

7 A. RF-80 is the name of the soil core. This is actually a
8 duplicate analyses of a separate 2-gram portion of the same
9 stuff out of the same bottle.

10 Q. So do you think there are nuggets like the one you found at
11 sample B on the refuge itself?

12 A. There have to be. In fact, the government's data -- the
13 government's data indicates very similar collocated differences
14 that come from this hot particle phenomenon.

15 Q. And is the nugget, the 5.2 picocuries per gram, is that --
16 did you analyze that to see if that came from Rocky Flats or
17 whether it might have been background using your isotope
18 analysis?

19 A. Essentially all of these samples are 90 plus percent Rocky
20 Flats in origin. And something like 5.2 or 8.8 is pretty close
21 to 100 percent Rocky Flats in origin. It directly matches the
22 weapons grade signature.

23 MR. WEINER: Your Honor, at this point I would move to
24 have this exhibit admitted into evidence.

25 THE COURT: Any objection to the admission of Exhibit

1 14?

2 *MS. HELD:* No, Your Honor.

3 *THE COURT:* Exhibit 14 will be admitted.

4 *MR. WEINER:* Can we also admit 14 with the hand finger
5 drawing, purple drawing?

6 *THE COURT:* I am not sure. Answer, no, but he can
7 recreate the lines on a hard copy if you want to do it that
8 way.

9 *MR. WEINER:* Okay. We will do that at lunch.

10 *THE COURT:* Well, he should do it now so that we
11 can -- the other side can see. So if you want to tender him --
12 I think he has -- he has a marked copy, so if we can get him a
13 marker, he can then reproduce that.

14 *MR. WEINER:* Can we make this Exhibit 15, then?

15 *THE COURT:* Do you need both?

16 *MR. WEINER:* Oh, no, you are right. We will stick
17 with Exhibit 14.

18 *THE COURT:* Okay. Why doesn't he go ahead and mark
19 that, and we can let Ms. Held take a look at it.

20 *BY MR. WEINER:*

21 *Q.* We have been using two terms interchangeably. We have been
22 using the term hot, hot spot, hot particle and nugget. Can you
23 help us differentiate between those three, if there is a
24 differentiation?

25 *A.* Well, I would usually think of the term hot spot to refer

1 to a geographic location that contains elevated concentration
2 or activity of some contaminant, but I am using the term hot
3 particle in the same manner that Dr. Nichols was talking about
4 the radioactive particles. What I mean are small particles of
5 high elevated radioactivity. In this case, I am referring to
6 specifically particles that contain plutonium, such as
7 plutonium dioxide or plutonium metal or other plutonium
8 compounds.

9 Q. And are hot particle and nugget synonymous in your mind?

10 A. Yes. The sampling theories talk about a phenomenon known
11 as the nugget effect where the results can be influenced by a
12 sporadic occurrence of small particles that contain something
13 like gold which gives elevated concentrations for the bulk
14 sample. But the nugget effect here -- well, let me back up and
15 say that the occurrence of these plutonium particles in the
16 proximity of Rocky Flats both on the refuge, as well as off
17 site, is an example of this nugget effect phenomenon. It's
18 just a specific case of it.

19 MR. WEINER: Thank you. No further questions at this
20 time.

21 THE COURT: Thank you.

22 Cross-examination?

23 **CROSS-EXAMINATION**

24 BY MS. HELD:

25 Q. Dr. Ketterer, are you being compensated for your time here

1 today?

2 A. No.

3 Q. And for your sampling that you conducted off of the Rocky
4 Flats Refuge, is it correct that you only took samples in 2000
5 and 2003?

6 A. I took samples in 2000 and 2002, and I have taken other
7 samples from off site Rocky Flats, but let's say in the
8 Colorado Front Range location in 2001, probably 2003. I would
9 have to refer to field notes to tell you exactly when.

10 Q. And you testified today that your data is generally
11 consistent with the government's data with regard to plutonium
12 levels on Rocky Flats. Is that fair to say?

13 A. Yes, in the respect that when I conducted this work, I was
14 thinking about the 1970 Krey Hardy study done by the U.S.
15 Government showing the existence of elevated activities of
16 plutonium to the east of the Rocky Flats site. And yes, I
17 agree my data are generally consistent with those earlier
18 findings and subsequent ones also.

19 MS. HELD: Thank you. Those are all the questions I
20 have.

21 THE COURT: Thank you.

22 Any redirect?

23 MR. WEINER: No, Your Honor.

24 THE COURT: All right. Dr. Ketterer, you may step
25 down. Thank you.

1 MR. WEINER: Your Honor, this is the time when we
2 would normally call Dr. Mousseau. We deviated a little from
3 our order.

4 THE COURT: That's all right. Do you think we will be
5 able to complete his testimony by noon, then, because that's
6 when we are going to break.

7 MR. WEINER: No, but I am sure he is amenable to
8 receiving a second phone call.

9 THE COURT: That's fine. And did you supply that
10 telephone number to Ms. Grimm? If not, could you give her a
11 number right now?

12 MR. WEINER: Yes.

13 THE COURT: Dr. Mousseau, this is Judge Brimmer. We
14 are in the United States District Court for the District of
15 Colorado. Can you hear me all right?

16 THE WITNESS: I can hear you just great.

17 THE COURT: We will probably go until about noon and
18 take a lunch recess. If we don't finish your testimony by
19 noon, would you be able to resume at 1:30 Denver time?

20 THE WITNESS: Absolutely.

21 THE COURT: Okay, great. I am going to have you take
22 an oath at this time that my courtroom deputy, Ms. Grimm, will
23 administer to you.

24 THE WITNESS: Okay.

25 **(Timothy Mousseau was sworn.)**

Timothy Mousseau - Direct

1 *THE WITNESS:* I do.

2 *COURT DEPUTY CLERK:* Please state your name and spell
3 your first and last name for the record.

4 *THE WITNESS:* My name is Timothy Mousseau. That's
5 T-I-M-O-T-H-Y, M-O-U-S-S-E-A-U.

6 *THE COURT:* Mr. Weiner, go ahead.

7 **DIRECT EXAMINATION**

8 *BY MR. WEINER:*

9 Q. Dr. Mousseau, I would say good morning, but I suspect where
10 you are it's afternoon?

11 A. We are at 1:30 now.

12 Q. Where are you testifying from?

13 A. I am testifying from my home in Columbia, South Carolina.

14 Q. Thank you. Let's start with your education. What is that,
15 Dr. Mousseau?

16 A. Yes. I have a Ph.D. in biology from McGill University.

17 Q. And what is your specialty?

18 A. These days it's primarily the biological effects of
19 environmental radiation.

20 Q. And how did you develop this speciality?

21 A. I developed it over the last 19 years or so doing studies
22 on biological systems living in Chernobyl and more recently
23 here Fukushima looking at the effects of radiation on these
24 specific biological systems.

25 Q. Have you published in this area?

Timothy Mousseau - Direct

1 A. Yes. I published a little more than a hundred papers
2 related to radiation effects and my total CV is I guess
3 approaching 210 or 20 papers now.

4 Q. That's a lot.

5 How much do you publish -- how many papers have you
6 published this year?

7 A. I think we're up to eight papers so far this year,
8 something like that.

9 Q. Have you been active with any academies or boards or
10 committees?

11 A. Yes, quite a few. Well, not quite a few, but a few,
12 starting with a couple of -- I've served on a couple of
13 different panels at the National Academy of Sciences in
14 Washington looking at -- the first one was looking at the
15 effects of radioactive water, tritium primarily, escaping from
16 nuclear power plants. And I was also on another panel
17 subsequent to that that was looking to -- attempting to study
18 the cancer rates surrounding nuclear power plants in the U.S.

19 More recently I have been on a site review panel of
20 the Savannah River site, which is not unlike Rocky Flats, and a
21 number of other review panels as well.

22 Q. Have you been active with any court proceedings involving
23 your specialty recently?

24 A. Most recently, yes. I have been involved in international
25 court disputes related to the health and safety of food exports

1 from the Fukushima region of Japan.

2 Q. And who do you represent in that dispute?

3 A. At the moment I am serving as an expert witness for the
4 government of Korea.

5 Q. What is your current position?

6 A. I am a full professor of biological sciences at the
7 University of South Carolina.

8 Q. Are you familiar with Rocky Flats, Doctor?

9 A. You know, a little bit. Certainly I know a little bit of
10 history, that it was one of the primary facilities used for the
11 production of nuclear triggers, the use of plutonium basically
12 related to that.

13 Q. And what were you asked by me to do?

14 A. I think you were primarily interested in my opinion of the
15 potential biological consequences of exposure to plutonium and
16 other contaminants from the Rocky Flats area, both to the
17 people on the refuge, as well as the folks that are off site.

18 Q. And in determining the risk of plutonium to people on and
19 off site, what assumptions did you make in reaching any
20 opinions on this?

21 A. Well, you know, again the fundamental assumptions are that
22 there is indeed plutonium in the soil of the site, that this
23 soil is suspended depending upon activities in the air, and
24 that this plutonium gets migrated off site and potentially is
25 ingested and inhaled by organisms, people primarily in and

1 around the area.

2 Q. Are there studies relating to the biological consequences
3 of exposure to plutonium that you've relied upon?

4 A. Yeah. There were quite a number of studies done related to
5 plutonium exposure primarily in the fifties, sixties and
6 seventies during the heyday of that industry, and again many
7 dozens of studies, mostly from folks at University of Utah and
8 the PNNL Labs in Washington, but also Rocky Flats area. These
9 studies, many of them made use of animal models, rats, but the
10 majority of them actually made use of dogs, primarily beagles
11 to look at the effects of plutonium.

12 Q. What is the most dangerous way to be exposed to plutonium?

13 A. I think the consensus from what I have studied is that the
14 inhaled plutonium contaminants are likely to be the most
15 dangerous way to be exposed to plutonium.

16 Q. Are children affected differently than adults?

17 A. You know, children and probably women are likely to be more
18 greatly affected. They are smaller and tend to be more
19 sensitive to contaminants in general.

20 Q. And is this significant in terms of activities that you
21 know are planned for the refuge, hiking and biking
22 specifically?

23 A. You know, possibly the -- you know, a number of different
24 factors come into play when attempting to assess the risks and
25 hazards of the kinds of contaminants. You know, first and

1 foremost, children and women are going to be closer to the
2 surface of the ground and so in terms of the potential direct
3 effects, but also in terms of suspended airborne particles,
4 they are more likely to be in proximity to it.

5 You know, children tend to be very active and, you
6 know, they are constantly running around. And so it's quite
7 possible that as a result of this increased pulmonary function
8 and higher average metabolic rates per weight, they might
9 actually be exposed to higher levels of the contaminant.

10 Q. Let's turn to the impacts of plutonium.

11 Is there a relationship between radionuclides and
12 carcinogens?

13 A. Absolutely. It's an absolute relationship. All
14 radionuclides are considered to be significant carcinogens,
15 including plutonium. And this is well-known from the
16 literature from the EPA and other government sources as well.

17 Q. Does the literature discuss or do you have knowledge about
18 a risk dose relationship?

19 A. Yeah. You know, again some of -- there is a significant
20 body of data that has been reviewed multiple times, but perhaps
21 the most rigorous review was conducted or published I think
22 about 12 years ago by the National Academy of Sciences, the
23 so-called Beir-7 report. That's B-E-I-R 7. And this group at
24 the National Academy collected all of the known data that was
25 available at that time and performed a pretty rigorous

1 analysis.

2 The panel was made up of the leading most prominent
3 experts in the field. And their very basic conclusions
4 included the fact that, you know, as the dose goes up, the
5 risks and hazards associated with radiation increase. And the
6 lower the dose, the lower the likelihood of harm to human
7 health.

8 You know, the second sort of general important
9 observation from this committee report is that the -- all of
10 the existing scientific evidence or there is certainly a
11 consensus of that, that there is something that approaches a
12 linear dose response relationship between exposure to radiation
13 and the development of radiation induced cancers in humans, as
14 well as other kinds of morbidities that are associated with
15 exposure to radiation.

16 And most importantly perhaps related to this case and
17 others like it is that the consensus really is, the scientific
18 consensus really is that there is no such thing as a threshold
19 below which effects, negative effects, negative health effects
20 are not seen. And, you know, to put that into simpler terms,
21 you know, at high doses there will be large effects. At low
22 doses there will be low effects or small effects, but there is
23 no threshold that leaks below where there will be no effects.
24 There is something approaching what we call a linear dose
25 response relationship.

1 Q. Based on this, have you drawn any conclusions about the
2 impacts and consequences to individuals on and off the refuge
3 who primarily inhale or ingest Rocky Flats plutonium particles?

4 A. Right. Well, you know, again based upon what we know at
5 this point, it seems like there is likely to be the potential
6 for many consequences, including cancer of various sorts, bone
7 and liver and kidney issues, other kinds of issues related to a
8 variety of noncancerous morbidity associated with impaired lung
9 function or impaired immunological function.

10 Some of the dog studies that were done showed very
11 clearly that life duration, the life span of these animals was
12 greatly shortened. Even if they didn't die directly from
13 cancer, their overall life span was shortened as a result of
14 impaired functioning in various ways.

15 So again, given that there is no such thing as a safe
16 level of radiation exposure, we could expect some of these
17 kinds of issues to effect exposed populations in the Rocky
18 Flats area.

19 Q. Doctor, is it more likely than not that a person exposed to
20 plutonium from the Rocky Flats Refuge will suffer increased
21 risk of health effects like those you've described?

22 A. Yes, very much.

23 Q. In 2006 and again in 2011, the Environmental Protection
24 Agency analyzed the toxicological risks to exposure to
25 plutonium contamination at Rocky Flats, and they determined

Timothy Mousseau - Direct

1 that the refuge as a whole is safe for unrestricted use and
2 unlimited exposure. So what is the basis for your saying that
3 there is a toxicological risk off site or even on site?

4 A. So the -- I think the EPA analysis that was done was
5 somewhat constrained in terms of what they were measuring and
6 the source of exposure they were considering. And I think what
7 we're talking about today is really a very different set of
8 circumstances where we're looking at the risks associated with
9 the dust that migrates both on and around the site, but also
10 off site.

11 My understanding is that the EPA looked primarily at
12 the radioactivity of soils and really didn't look at the amount
13 of re-suspension or the transport of the dust particles
14 certainly beyond the refuge area. And, you know, this is an
15 area that we have taken a great interest in in our research in
16 the Chernobyl region of the Ukraine where there is this
17 constant concern of the re-suspension of the radionuclides that
18 are in the surface there of the soil and particularly as
19 affected by forest fires in the region which can, you know,
20 again volatilize and re-suspend the radionuclides. And what we
21 have determined is this is potentially a very important
22 mechanism for the dispersal and dispersion of these kinds of
23 contaminants.

24 Q. What did you find with respect to the re-suspension of
25 plutonium particles in the dust at Chernobyl?

1 A. So again, the combination of empirical measurement and
2 modeling indicates that these fires and other kinds of
3 disturbance are a major source of re-dispersion, and that these
4 radioactive particles can be transported tens, hundreds, even
5 thousands of miles depending upon the meteorological
6 conditions, and that they represent a potential significant
7 increase in dose to populations, human populations, again
8 beyond even the exclusion zone of Chernobyl.

9 MR. WEINER: No further questions at this time, Your
10 Honor.

11 THE COURT: Thank you.

12 Cross-examination?

13 **CROSS-EXAMINATION**

14 BY MS. HELD:

15 Q. Hello, Dr. Mousseau.

16 A. Good afternoon.

17 Q. When you were conducting your analysis for Mr. Weiner, what
18 exactly did you review in coming to your opinions? You have a
19 list in front of you of the particular studies that you
20 reviewed. Are you able to provide that to me?

21 A. That's -- it's a very long list of papers that I extracted
22 from Google Scholar and through interlibrary loan through my
23 library. Perhaps one of the more interesting papers, though,
24 and more relevant papers that played a central part in some of
25 my opinions comes from a paper by Bair and Thompson that was in

1 the Journal of Science, which is the premier scientific, peer
2 review scientific journal for the United States published by
3 the Association for the Advancement of Sciences.

4 And this paper reviews -- it's entitled Plutonium:
5 Biomedical Research, and it reviews all of the toxicology
6 related to plutonium that they knew about at the time; and, you
7 know, key elements of this review by two very, very prominent
8 scientists from the PNNL, Pacific Northwest Laboratories in
9 Richmond, Washington, where a lot of this, most of this, much
10 of this kind research had been done.

11 You know, they suggested, for instance, that the
12 quote, inhalation is a more probable route of significant
13 deposition in man, as borne out by experience in the nuclear
14 industry. The fraction of inhaled plutonium that will be
15 deposited and retained in the lung will depend on the complex
16 matter of pharmaceutical and chemical properties, et cetera,
17 but the main thing is that the plutonium that reaches the
18 alveolar regions of the lung will be largely retained in the
19 lung or systematically redistributed within the body.

20 Q. And when was this paper published?

21 A. That paper was published in 1974. Now, the other sources
22 include the Beir-7 report that I mentioned that was published
23 in 2000 -- I want to say 2006. I might be off by a year or
24 two.

25 Q. And to avoid you having to go through a whole list of

1 reports, let me narrow my questions some.

2 Did you analyze the documents that were produced by
3 Department of Energy or the EPA regarding the cleanup at Rocky
4 Flats, such as the record of decision?

5 A. No, I have not reviewed those documents.

6 Q. And did you talk to anyone at EPA in coming to your
7 conclusions that there would be adverse effects to the public
8 use of trails on Rocky Flats?

9 A. I have not talked to anyone at EPA.

10 MS. HELD: Those are all my questions, Your Honor.

11 THE COURT: Okay. Thank you.

12 Redirect?

13 MR. WEINER: No, Your Honor.

14 THE COURT: All right. Dr. Mousseau, thank you very
15 much.

16 THE WITNESS: Thank you.

17 THE COURT: Do you have a witness who would be real
18 quick or should we go ahead and take the lunch recess at this
19 time?

20 MR. WEINER: They will all go past noon.

21 THE COURT: Why don't we go ahead and take lunch. Do
22 you think we are on track?

23 MR. WEINER: I think we are very much on track to --
24 did you say even 3:00 o'clock?

25 THE COURT: Yeah, the evidence would stop. Not just

1 your evidence, all the evidence would stop. That has to allow
2 for the defendants to put on their evidence.

3 *MR. WEINER:* We have three more witnesses. They are
4 fact witnesses and I don't expect them to take as long as the
5 expert witnesses.

6 *THE COURT:* Why don't you confer over the lunch hour,
7 confer with defendants, make sure that we look good in terms of
8 the evidentiary portion.

9 *MS. HELD:* Does Your Honor anticipate having closing
10 arguments prior to 3:00 as well or --

11 *THE COURT:* No. We are ending the evidence at 3:00 so
12 that we can have argument beginning at 3:00.

13 *MS. HELD:* Thank you.

14 *THE COURT:* Or we may take a break, but right after
15 that. So, yeah, confer just to make sure that we are good on
16 the time because to the extent that the defendants, they should
17 be able to have equal time if they need equal time.

18 So we will be in recess, then, until 1:30. Thank you.

19 (Recess at 11:54 a.m.)

20 (Reconvened at 1:31 p.m.)

21 *THE COURT:* All right. Anything about time, the
22 timing that I should worry about?

23 *MS. HELD:* Well, Your Honor, we are a bit concerned
24 with time. The federal defendants anticipate using
25 approximately 30 minutes for our direct examination of

1 Mr. Lucas. And we have conferred with plaintiffs' counsel and
2 Mr. Weiner believes that he will likely take 30 minutes as
3 well.

4 *THE COURT:* On cross-examination or on -- of
5 Mr. Lucas?

6 *MS. HELD:* Yes, on Mr. Lucas. And we would like to
7 reserve enough time in order to conduct a reexamination, so we
8 think 15 minutes, maybe even 30 may be necessary depending on
9 what direction Mr. Weiner's cross-examination will take. But
10 that would unfortunately mean that we would have to start right
11 now with Mr. Lucas. So we were wondering if the Court would be
12 willing to maybe extend the time for --

13 *THE COURT:* We are not extending it. So what that
14 means is essentially my guess would be 2:00 o'clock you are
15 going to be done, okay, from the plaintiffs. You have already
16 used more than half.

17 *MR. WEINER:* 2:00 o'clock? Well, we have probably 10
18 minutes per witness, so that's --

19 *THE COURT:* 2:00 o'clock.

20 *MR. WEINER:* That gives us a half hour for our
21 remaining witnesses?

22 *THE COURT:* Yeah. I mean, if we want to divide up the
23 time equally, you are already done.

24 *MR. WEINER:* True. Could we have 40 minutes?

25 *THE COURT:* Until 2:00 o'clock or you could have less

1 cross-examination time with Mr. Lucas. If you don't think you
2 have 30 minutes, then you could sacrifice on whatever end you
3 want.

4 *MR. WEINER:* So if we go over, it will take away from
5 cross, but we will try to be snippety and we are ready to get
6 started.

7 *THE COURT:* So what are we doing at 2:00, then?

8 *MR. WEINER:* At 2:00 if we go over, then that will
9 take time away from our cross exam. So you want to be ready
10 for closing at 3:00.

11 *THE COURT:* Yeah, the evidence is going to end at
12 3:00.

13 *MR. WEINER:* Okay. And if that means less time for
14 cross-examination, so be it.

15 *THE COURT:* On Mr. Lucas.

16 *MR. WEINER:* On Mr. Lucas.

17 *THE COURT:* That's fine.

18 All right. Then go ahead.

19 *MS. CORDING:* Your Honor, I would like to call
20 Elizabeth Panzer.

21 (**Elizabeth Panzer** was sworn.)

22 *THE WITNESS:* I do.

23 *COURT DEPUTY CLERK:* Please state your name and spell
24 your first and last name for the record.

25 *THE WITNESS:* Elizabeth Panzer. E-L -- did you want

1 me to spell it? Is that what you said?

2 *COURT DEPUTY CLERK:* Yes.

3 *THE WITNESS:* E-L-I-Z-A-B-E-T-H, Panzer, P-A-N-Z-E-R.

4 **DIRECT EXAMINATION**

5 *BY MS. CORDING:*

6 Q. Thank you for being here this afternoon, Ms. Panzer. I'm
7 going to try not to rush through questions, but if I am
8 speaking too quickly for the reporter or for you, Ms. Panzer,
9 please tell me to slow down, okay?

10 Where do you live, Ms. Panzer?

11 A. I live in Five Parks which is at 86th and Indiana.

12 Q. What's your address?

13 A. And 8340 Coors Street.

14 Q. Where is this location? Where is this in location to Rocky
15 Flats Refuge?

16 A. So I live 2 miles southeast of the border.

17 Q. So you live 2 miles from the refuge about?

18 A. Right.

19 Q. Do you have a family?

20 A. Yes.

21 Q. And who is your family? Who are they?

22 A. So my husband, and then I have three sons. So I have -- my
23 oldest is 17. My middle son is 14, and he actually has cancer.
24 And he is at chemo, actually, right now. And then my youngest
25 is 12.

1 Q. And can I assume that your family lives with you at your
2 home?

3 A. Yes.

4 Q. How long have you and your family lived at your home?

5 A. For 14 years, since 2004.

6 Q. So you live approximately 2 miles from the refuge.

7 What are your driving habits with regard to where the
8 refuge is?

9 A. Well, I consider it my neighborhood, basically, because we
10 can't go anywhere. We drive by it every day because Indiana is
11 our route to get places, Indiana or 86th, so every day we drive
12 by.

13 Q. How are you involved in this case, Mrs. Panzer?

14 A. I am a resident, next to it, basically. And it does
15 concern me of the building of the trails, as well as the
16 activity on the trails once they are open.

17 Q. Are you a member of any of the plaintiff groups in this
18 case?

19 A. The Peace & Justice Center.

20 Q. You are a member of the Peace & Justice Center?

21 A. Yes.

22 Q. What are your -- so kind of a preface to this, but what are
23 your main concerns with regard to the refuge?

24 A. I am concerned about the dirt. We live there and it's
25 common to have wind, high winds, and it's common to see big

1 dust clouds around the area. And, in fact, my son, my oldest
2 son two weeks ago took a picture, and we were actually pretty
3 far away because we were at Standley Lake, that parking lot on
4 the south side, and there was a huge dust cloud on the refuge
5 that we could see even that distance. So I am concerned about
6 if there are high levels of contaminants in that dust, if it's
7 disturbed, it for sure, with the wind pattern, the southeast
8 wind pattern that's very common, it will come to us.

9 Q. How do you think -- how do you think those contaminants are
10 going to come to you?

11 A. Well, first of all, the risk is when the soil is disturbed.
12 And the wind is the primary way, but if people are on and off
13 the trails, these are my neighbors that would be going, they
14 would be tracking it back into our neighborhood, into the
15 streets, into the shops in the area, as well as even the
16 schools.

17 And I can -- it can get into my house. Even if I
18 didn't want to go to the refuge, if it was open, I can't keep
19 out microscopic particles of possible contaminants out of my
20 house if my neighbors bring them into the neighborhood.

21 Q. So I understand you are saying that you are concerned even
22 if you don't visit the refuge, but just as a final question, if
23 the refuge were open, would you visit?

24 A. I would not simply because I do have a son with cancer and
25 I know what it's like to live that life. You -- people for

Elizabeth Panzer - Direct

1 some reason think they buy lottery tickets because they think
2 they are going to win the lottery, but they never think
3 anything bad is going to happen to them. So nobody ever
4 thinks, oh, one of my children might get cancer.

5 So the idea of the risks being very real and how they
6 can sometimes not go in your favor is all too real for me, so I
7 would not. My family would not go just because -- if it was a
8 0 percent chance that we were -- that there were no
9 contaminants and we were safe, sure, then it would be great
10 because it's beautiful there, but I wouldn't take that risk
11 right now, not with what we are doing, no, with the life we are
12 living.

13 *MS. CORDING:* Thank you, Ms. Panzer. I have no
14 further questions on direct.

15 *THE COURT:* Thank you.

16 Cross-examination?

17 *MS. HELD:* And the federal defense has no
18 cross-examination questions.

19 *THE COURT:* Thank you, Ms. Panzer. You may step down.

20 *MR. WEINER:* The plaintiffs call Jon Lipsky.

21 (**Jon Lipsky** was sworn.)

22 *THE WITNESS:* I do.

23 *COURT DEPUTY CLERK:* Please state your name and spell
24 your first and last name for the record.

25 *THE WITNESS:* My name is Jon, J-O-N, Steffen Lipsky,

Jon Lipsky - Direct

1 L-I-P, as in Paul, S-K-Y.

2 **DIRECT EXAMINATION**

3 *BY MR. WEINER:*

4 Q. Mr. Lipsky, thank you for being here.

5 What has been your occupation for most of your working
6 life?

7 A. Law enforcement.

8 Q. For any particular law enforcement agency?

9 A. I've worked for the FBI, the Federal Bureau of
10 Investigation, as a professional support employee. I was
11 rehired as a special agent and I retired as a supervisor
12 special agent.

13 Q. Did any of your work involve Rocky Flats?

14 A. It did.

15 Q. What in particular?

16 A. I was the affiant of the two search warrants in June of
17 1989 at Rocky Flats against the Department of Energy and
18 Rockwell International. And I also was the principal criminal
19 investigator for the FBI for that case.

20 Q. Has your work involving Rocky Flats continued?

21 A. It has.

22 Q. How so?

23 A. The criminal case started in 1987, ended in 1992, and then
24 I testified before a congressional subcommittee regarding the
25 prosecution of Rocky Flats. And just over the years I

Jon Lipsky - Direct

1 stayed -- I was involved for over 30 years.

2 Q. Do you conduct any activities for the Rocky Mountain Peace
3 & Justice Center involving Rocky Flats?

4 A. I do.

5 Q. What is that work?

6 A. I monitor from outside the perimeter fence, so as not to
7 trespass, both the Rocky Flats Wildlife Refuge and the Rocky
8 Flats Superfund site that's in the middle.

9 Q. Are you a member of the Rocky Mountain Peace & Justice
10 Center?

11 A. I am a member of the Rocky Mountain Peace & Justice Center.

12 Q. So how did you engage in this monitoring around the
13 perimeter?

14 A. Very carefully. I take note of the wind. I am well aware
15 of the Chinook winds that occur and know the blustery
16 conditions, but I also take note of what type of activity is
17 being published by the Department of Energy because they have
18 institutional controls that I can monitor. So it's a little
19 bit less informative by the Fish & Wildlife Service because
20 they don't necessarily communicate what they are doing on the
21 refuge, and from outside the fence I monitor at different
22 locations to see what kind of activity is happening.

23 Q. So literally within feet of the boundary line of the edge
24 of the refuge?

25 A. Yes.

Jon Lipsky - Direct

1 Q. How frequently do you do this?

2 A. I try to do it once a month.

3 Q. Do you have concerns about your health associated with this
4 activity?

5 A. I do.

6 Q. How so?

7 A. I am gravely concerned about inhaling particulates. If I
8 have got a sore on my hand like I do now, I will cover it with
9 a Band-Aid so that I don't, you know, get infiltrated with
10 plutonium. And I am also very aware that I could drag it back
11 home and expose my grandchildren even.

12 Q. What would be your concerns if the refuge were open to the
13 public on September 15th?

14 A. I am sorry, I didn't hear the whole question.

15 Q. What would your concerns be if the refuge were opened on
16 September 15th?

17 A. I worry about the displacement of the contamination that's
18 well-known, admitted to by the Department of Energy at Rocky
19 Flats. Rocky Flats National Wildlife Refuge was handed off to
20 the U.S. Fish & Wildlife Service, and there was absolutely no
21 action taken by the EPA, health department or DOE. There was
22 no remediation at the refuge.

23 And I am well aware of the fact that there is
24 respirable dust of weapons grade 239 at the refuge, and not
25 just the construction part of it, but it's also the people

Jon Lipsky - Direct

1 traipsing all over the refuge because -- I say all over the
2 refuge because U.S. Fish & Wildlife Service has advertised with
3 their new configuration into Section 16 that where it ends to
4 the west in Section 16, get off your bike and take a hike south
5 to the Caprock Mine. But the trail ends at the State Clay Mine
6 portion, so there is quite a distance.

7 And I did listen to earlier testimony, and it's absurd
8 that Fish & Wildlife Service would believe that no one would
9 leave the trail. Of course, they are going to leave the trail.
10 And that initial connector point on Indiana Street is in the
11 wind-blown area, and it's the most heavy contaminated area of
12 plutonium, the chief contaminant concern at Rocky Flats.

13 So that's all going to get kicked up into the air.
14 And I call it respirable dust because Dr. Carl Johnson called
15 it that. It's so small that it's easily inhaled and it's
16 inevitable. And with the latency period of the plutonium,
17 about the half life of 24,000 years, but the latency period of
18 plutonium, well, we won't really see any malady probably for 20
19 years, depending on the age of the person, of course.

20 Q. So speaking of the State Clay Mine Pond, did you hear
21 Dr. Barton, Mr. Barton's testimony?

22 A. I did.

23 Q. Did you hear his testimony about the white painted barrel?

24 A. Yes.

25 Q. Do you have experience to know what a white barrel would

1 mean in your work with law enforcement involving Rocky Flats?

2 A. Yes.

3 Q. And what is that knowledge?

4 A. It's -- it's a classic Rocky Flats nuclear materials
5 control drum, what they call an IDC or itemized detectable -- I
6 forget what the C stands for, but all radiological drums were
7 white. They were primed red and then they were painted
8 white. And it was either LLW for low level waste or TRU for
9 transuranic waste.

10 Q. Did you hear opposing counsel talk about sharing sessions
11 or listening sessions before a decision was made on the trails?

12 A. Yes.

13 Q. Did you attend any of these -- we will call them sharing
14 sessions?

15 A. I attended two.

16 Q. And were you allowed to share your views during these
17 sessions?

18 A. No, sir.

19 Q. Why not?

20 A. The Fish & Wildlife representative, particularly Mimi
21 Mather, made it clear at the beginning that the issue was not
22 for debate. The decision had been made and essentially my
23 opinion didn't count.

24 Q. When you say the decision had been made, what decision?

25 A. The decision to open the refuge for trails.

Jon Lipsky - Direct

1 Q. But there weren't actual trail configurations that you were
2 considering because those were just released in March of this
3 year; is that right?

4 A. The configuration of the trails was released in March of
5 this year, March 23rd. It was also similar to the one that was
6 in Mr. Lucas' declaration of June 9th, 2017. And the first
7 time I had ever seen that configuration was June 10th, 2017,
8 because none of the configurations in the four sharing meetings
9 or even before the Rocky Flats Stewardship Council on
10 April 4th, 2016, was not that configuration at all.

11 Q. So the configuration that we're examining today in the EAS
12 were not considered during those sharing sessions; is that
13 right?

14 A. Yes.

15 Q. And what would have happened if you had expressed your
16 opinions during these sharing sessions?

17 A. It was made clear that at the Boulder meeting on
18 December 6, 2016 at the YWCA there was a armed U.S. Fish &
19 Wildlife Service representative with a short jacket in uniform.
20 He was armed. And it was clear that that person would be
21 escorting me out if I opened my mouth.

22 Q. And that was the same for any member of the public who
23 talked about --

24 A. Of course.

25 Q. -- their concerns concerning the refuge?

Jon Lipsky - Cross

1 A. I am sorry I cut you off. Yes.

2 MR. WEINER: No further questions.

3 THE COURT: Thank you.

4 Cross-examination?

5 **CROSS-EXAMINATION**

6 BY MS. HELD:

7 Q. The Mr. Lipsky, you described to Mr. Weiner that you are
8 familiar with what the barrels that contained nuclear material
9 on the Rocky Flats looked like; is that correct?

10 A. Yes, ma'am.

11 Q. What experience do you have with the look and appearance of
12 barrels at other industrial sites?

13 A. Well, the other industrial sites when we got the first
14 conviction of knowing endangerment was Protex Industries at
15 Evans and Santa Fe. I also have experience with a company out
16 in Grand Junction that was smashing barrels and placing it
17 inside of vehicles to hide the barrels that were smashed and
18 also the contents that remained in them.

19 Over the years I have also done cases in Wyoming when
20 I worked here in Denver for nine years. That was between 1984
21 and 1993. And I would say that I have seen literally thousands
22 of barrels in my career.

23 Q. Is it possible that other places could have white barrels?

24 A. Yes.

25 Q. And is it fair to say that your concern, as you described

1 to Mr. Weiner, is that you do not want hiking use on the
2 refuge?

3 A. There is absolutely no reason to open the refuge to public
4 access.

5 MS. HELD: Thank you. Those are all the questions I
6 have.

7 THE COURT: Thank you.

8 Redirect?

9 **REDIRECT EXAMINATION**

10 BY MR. WEINER:

11 Q. So you were asked about the white barrels. What is your
12 general understanding of what a white-painted barrel means?

13 A. I am sorry.

14 Q. What is your general understanding of what a white-painted
15 55-gallon drum barrel means?

16 A. Why it leaks?

17 Q. White, what is your understanding of why they are white?

18 A. I could sit here and give you a bill of particulars, but
19 with the proximity of the former Rocky Flats nuclear weapons
20 plant, that self-licenses itself to bury waste, nuclear waste,
21 in their old buffer zone. And there has also been other kind
22 of accidents and other things that have happened that I have
23 studied over 30 years.

24 I think also, too, there was a level one survey in
25 August of 2011, and in that survey the people that put that

1 survey together missed several Superfund sites. For example,
2 in like 2009, the Colorado Department of Transportation put the
3 EIS together, and for the northwest corridor there are
4 literally scores of Superfund sites in and around Rocky Flats.
5 So I just want to point out that that was all missing in that
6 report, and the only thing that they sampled for was basically
7 heavy metals.

8 Q. So I am asking about the white barrel.

9 A. Right.

10 Q. What is your understanding of what a white barrel means, a
11 barrel painted white?

12 A. The picture, Figure 13 on Page 17 of that report does not
13 show the other side of that barrel, but a white barrel in that
14 proximity meant it was a Rocky Flats radioactive waste drum.

15 MR. WEINER: Thank you. No further questions.

16 THE COURT: Thank you, Mr. Lipsky. You may step down.

17 THE WITNESS: Thank you, Your Honor.

18 MR. OGDEN: We would call Randy Stafford as a witness.

19 (**Randal Stafford** was sworn.)

20 THE WITNESS: I do.

21 COURT DEPUTY CLERK: Please state your name and spell
22 your first and last name for the record.

23 THE WITNESS: My name is Randal Stafford, R-A-N-D-A-L,
24 S-T-A-F-F-O-R-D.

25 **DIRECT EXAMINATION**

1 BY MR. OGDEN:

2 Q. Mr. Stafford, where do you live?

3 A. I live at 10461 West Indore Drive in Littleton, Colorado,
4 the Ken Caryl area.

5 Q. Thank you. What's your current employment?

6 A. I am a software architect for Accenture.

7 Q. Are you a current member of the Rocky Mountain Peace &
8 Justice Center?

9 A. Yes, I am.

10 Q. How long have you been a member?

11 A. I have been following principals in Rocky Mountain Peace &
12 Justice Center for about six years, including Dr. LeRoy Moore
13 and Jon Lipsky. I formally joined the organization this year.

14 Q. Can you please describe your activities regarding the Rocky
15 Flats National Wildlife Refuge as a member of the Peace &
16 Justice Center?

17 A. I can. Primarily I have been engaged in research of the
18 history of the Rocky Flats nuclear weapons plant and refuge for
19 about six years now, reading all the available books and
20 researching studies of off-site soil contamination and public
21 health impact that have been conducted in the course of Rocky
22 Flats' history.

23 Q. Switching gears a little bit, generally speaking, do you
24 have a personal interest in animals and birds?

25 A. Yes.

1 Q. Can you describe your personal interest?

2 A. Sure. One of my experiences in particular with mice, my
3 former brother-in-law did his doctoral research at Berkeley on
4 the species of mice in the Carmel Valley of California that
5 were monogamous and in which the males raised the pups, both of
6 which are unique in the mammal world.

7 I also have an appreciation of birds, particularly
8 raptors. I live in a neighborhood that's a community wildlife
9 habitat from the National Wildlife Federation and generally log
10 the species of birds I see in my neighborhood.

11 Q. Thank you.

12 Have you ever personally visited the refuge?

13 A. No.

14 Q. Why not?

15 A. Because it hasn't been opened to the public until
16 September 2016, I believe, and I have not taken one of the
17 guided tours of the refuge since that time.

18 Q. Okay. Have you ever been in the vicinity of the refuge?

19 A. Yes, I have. I've ridden my road bike around all four
20 boundaries there, Indiana Street, Highway 128, Highway 72 and
21 maybe Highway 93. And I also drive near there frequently and I
22 have visited residents that live nearby.

23 Q. In your visiting around the boundaries of the refuge, have
24 you ever seen any animals or birds?

25 A. Yes.

Randal Stafford - Direct

1 Q. Can you describe or identify any of them?

2 A. Sure. Just about two weeks ago visiting a resident on
3 Alkire Street, I saw her nest of barn owls. When I used to
4 drive my bike around there I would see hawks in the sky. I
5 probably have seen deer from the roads when driving there. I
6 am a 54-year-old, third-generation Coloradan. I have driven
7 there a long time. And I can't remember specific instances,
8 but yes.

9 Q. Do you have a personal interest in the protection of
10 conservation of the animals and birds that live on the Rocky
11 Flats National Wildlife Refuge?

12 A. Yes, I do.

13 Q. Can you describe your personal interests?

14 A. As I mentioned, I have an appreciation of birds,
15 particularly the raptors, eagles, hawks, owls, and their food
16 that they feed upon, and so I am interested in the preservation
17 of that food web at the Rocky Flats National Wildlife Refuge.

18 Q. Does it give you personal enjoyment to see these animals
19 and birds?

20 A. Yes.

21 Q. Are you aware of any specific species on the national --
22 Rocky Flats National Wildlife Refuge that are protected under
23 the Endangered Species Act?

24 A. Well, I know that the Preble's Meadow Jumping Mouse and its
25 critical habitat is there.

1 Q. Do you have any particular concerns about the Preble's
2 Meadow Jumping Mouse on the refuge?

3 A. Well, yes. I am concerned that construction activities and
4 public access activities would disturb the critical habitat of
5 that species.

6 Q. Regarding the mouse, the Preble's Meadow Jumping Mouse, and
7 its critical habitat, do you have any concerns about the
8 opening of the refuge?

9 A. Well, yes. I believe that --

10 Q. Can you describe them?

11 A. If the refuge is opened to the public, I think there is a
12 possibility that the construction and use of the trails and the
13 grounds of the refuge will result in disruption of the habitat
14 and reproduction of that species of mouse with consequent
15 impacts on its predators as well and the food web.

16 Q. Do you believe that the Preble's Meadow Jumping Mouse or
17 its critical habitat may suffer irreparable harm from opening
18 the refuge to the public?

19 A. Yes, I believe it could.

20 Q. Can you describe what the irreparable harm you may --

21 A. I spoke with my former brother-in-law, Dr. David Ribble,
22 who is the former head of the biology department at Trinity
23 University in San Antonio, Texas, about this matter recently.
24 And he indicated to me -- he is an expert on mice and their
25 food web. He indicated to me that any disruption of that

1 particular species could result in disruption of its predators,
2 including, for example, great horned owls. And so my concern
3 is that not only the mouse, but also the raptor species that
4 prey upon it could be irreparably harmed by disruption of the
5 critical habitat from opening the refuge.

6 Q. Regarding visiting the refuge, what are your future
7 intentions?

8 A. If further testing proves that the refuge is safe, I might
9 consider visiting certain portions of it, but I would need to
10 further convince myself that it's safe to visit there.

11 Q. If the studies showed it were safe, would you visit it?

12 A. I would be interested in visiting the Lindsay Ranch portion
13 of it, for example, because I know that there are some of the
14 barn owls, for example, that I am interested in there, so I
15 would probably yes, if it was shown to be safe by further
16 study.

17 MR. OGDEN: Okay. Thank you. I have no further
18 questions.

19 THE COURT: Thank you.

20 Cross-examination?

21 **CROSS-EXAMINATION**

22 BY MS. LAWRENCE-HAMMER:

23 Q. Good afternoon, Mr. Stafford.

24 A. Hello.

25 Q. You just discussed the Preble's Meadow Jumping Mouse in

1 your testimony right now. Can you please tell us what you know
2 about the Preble's Meadow Jumping Mouse?

3 A. I know that it can jump 4 feet.

4 Q. Anything else?

5 A. That it is of a nocturnal genus of a genus zapus.

6 Q. When did you acquire this knowledge about the jumping
7 mouse?

8 A. I think I started learning about the Preble's Meadow
9 Jumping Mouse about a year and a half ago in relation to
10 another matter in development of the Rooney Valley.

11 Q. Can you describe that other matter and how that caused you
12 to gain knowledge about the jumping mouse?

13 A. Sure. There was a rezoning case in Jefferson County to
14 allow automobile dealerships in the Rooney Valley. And the
15 question came up in the rezoning case as to whether the Rooney
16 Valley was critical habitat for the Preble's Meadow Jumping
17 Mouse. And that's why -- that's how I first became aware of
18 that particular species.

19 Q. What was your involvement with that case?

20 A. I was opposed to the rezoning request.

21 Q. So you learned about the jumping mouse because you were
22 opposing rezoning in jumping mouse critical habitat?

23 A. Yes. And it turned out that it was not critical habitat in
24 the Rooney Valley.

25 Q. It was not critical habitat?

1 A. Yes, it was not critical habitat.

2 Q. And do you have any personal interest particularly in the
3 Preble's Meadow Jumping Mouse?

4 A. Just from the perspective of phenomena that occur in
5 nature. If I saw a mouse jump 4 feet, I would find that
6 interesting.

7 Q. And does the Preble's Meadow Jumping Mouse live on the
8 refuge?

9 A. It is my understanding that it does.

10 Q. And when did you first gain that understanding?

11 A. Sometime this year.

12 Q. And can you be more specific?

13 A. Well, probably sometime within the last seven months, maybe
14 within the last three or four months.

15 Q. Was it before or after plaintiffs filed this case?

16 A. I don't recall.

17 Q. Does the refuge contain Preble's Meadow Jumping Mouse
18 critical habitat?

19 A. My understanding is that it does.

20 Q. And when did you gain that understanding?

21 A. Sometime this year.

22 Q. And can you be more specific?

23 A. Sometime within the last three or four months.

24 Q. And before or after plaintiffs filed this case?

25 A. I can't recall.

1 Q. Have you ever looked for a Preble's Meadow Jumping Mouse?

2 A. No, I have not.

3 Q. Have you ever looked for a -- have you ever seen a Preble's
4 Meadow Jumping Mouse?

5 A. No, I have not.

6 Q. Have you conducted any research related to the Preble's
7 Meadow Jumping Mouse?

8 A. No, I have not.

9 Q. Have you ever studied the Preble's Meadow Jumping Mouse in
10 any capacity?

11 A. Other than cursory reading about it, no.

12 Q. And do you have any plans to look for the Preble's Meadow
13 Jumping Mouse in the future?

14 A. I may.

15 Q. Do you have any plans, concrete plans, to do that?

16 A. No, I do not have any concrete plans to do that.

17 Q. You described a concern that the Preble's Meadow Jumping
18 Mouse or its critical habitat would be irreparably harmed if
19 the refuge was open to the public; is that correct?

20 A. That's correct.

21 Q. You are aware that the refuge currently conducts public
22 tours; is that correct?

23 A. Yes, I am.

24 Q. Are you aware of any harm that's currently occurring to the
25 Preble's Meadow Jumping Mouse because of those tours?

1 A. No, I am not.

2 Q. Are you aware of any harm that's currently occurring to the
3 critical habitat of the Preble's Meadow Jumping Mouse because
4 of those tours?

5 A. No, I am not.

6 Q. You also say that you are basing your concern on the
7 jumping mouse because of conversations with your
8 brother-in-law?

9 A. Ex-brother-in-law.

10 Q. Your ex-brother-in-law. When did you speak to him about
11 the Preble's Meadow Jumping Mouse?

12 A. It was within the last two weeks.

13 Q. So at the time that you filed your declaration -- let me
14 back this up. Do you remember filing a declaration in this
15 case?

16 A. Of course.

17 Q. And at the time that you filed your declaration in this
18 case, what was your concern about irreparable harm to the
19 Preble's Meadow Jumping Mouse?

20 A. As I stated, it was about the Preble's Meadow Jumping Mouse
21 having an impact on its reproduction, its population, and upon
22 the raptors that prey on the Preble's Meadow Jumping Mouse.

23 Q. What was that concern based on?

24 A. That concern was based on driving away some of those raptor
25 species from the refuge, which I think would be a loss to the

1 attractiveness of the refuge.

2 Q. Why do you think it would drive away raptors?

3 A. Because if you one of their components of their diet was
4 reduced, it would force them to go elsewhere to look for things
5 to eat.

6 Q. And you gained that information about this concern about
7 the food chain from your brother-in-law, correct?

8 A. I vetted it with my brother-in-law, ex-brother-in-law.

9 Q. So when did you first become concerned about the impact on
10 the food chain?

11 A. Sometime in the last three or four months.

12 Q. Was that before or after plaintiffs filed this lawsuit?

13 A. I don't recall.

14 Q. You say you may visit the refuge in the future if you are
15 comfortable with testing about its safety to see raptors. Is
16 that your testimony?

17 A. That is correct.

18 Q. And would you visit just to see the Preble's Meadow Jumping
19 Mouse?

20 A. I probably would not visit just to see the Preble's Meadows
21 Jumping Mouse, no.

22 MS. LAWRENCE-HAMMER: Thank you. No further
23 questions.

24 THE COURT: Thank you.

25 Redirect?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REDIRECT EXAMINATION

BY MR. OGDEN:

Q. Mr. Stafford, do you experience personal enjoyment, spiritual fulfillment, scientific interest, just an overall sense of well-being from seeing birds and animals in the wild?

A. Yes.

Q. Would you experience those same feelings if a species were extricated from an area knowing it was no longer there?

A. No. To give you an example, I have seen great horn owls in Jefferson County only about three times in my life. I understand that they are present on the refuge. If they were to leave the refuge, I think that would be unfortunate.

MR. OGDEN: Thank you. No further questions.

THE COURT: Thank you. Mr. Stafford, you're excused.

Next witness?

MR. WEINER: We rest our case.

THE COURT: Okay. Then defendants, any witnesses?

MS. HELD: Yes, Your Honor. The defendants would like to call Mr. David Lucas.

(David Lucas was sworn.)

THE WITNESS: I do.

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE WITNESS: My name is David Lucas, D-A-V-I-D, L-U-C-A-S.

David Lucas - Direct

1 *MS. HELD:* Your Honor, as an initial matter, I am
2 going to confer with you if it would be possible for my
3 co-counsel and I to split up the direct examination of
4 Mr. Lucas with myself handling questions regarding plaintiffs'
5 NEPA and Refuge Act claims and my co-counsel handling ESA
6 matters?

7 *THE COURT:* Any objection on behalf of the plaintiffs?

8 *MR. WEINER:* No, Your Honor.

9 *THE COURT:* All right. You may.

10 **DIRECT EXAMINATION**

11 *BY MS. HELD:*

12 *Q.* Good afternoon, Mr. Lucas.

13 Would you please introduce yourself to the Court and
14 tell them what your role is at the Rocky Flats National
15 Wildlife Refuge.

16 *A.* Yes. Name is David Lucas. I am what's called the project
17 leader over the Colorado Front Range National Wildlife Refuge
18 complex. That includes all of our national wildlife refuges
19 and lands that we manage from Fort Collins down through the
20 metro Denver area. And that includes the Rocky Flats National
21 Wildlife Refuge.

22 *Q.* How long have you been in that position?

23 *A.* Six years.

24 *Q.* Now, as a manager for the Rocky Flats Refuge, what is the
25 purpose of the refuge?

1 A. Similar to many of our national wildlife refuges, the
2 purpose is for the Rocky Flats National Wildlife Refuge is
3 outlined in law by the U.S. Congress. So the Rocky Flats
4 National Wildlife Refuge Act of 2001 includes what we call
5 administrative purposes for managing the refuge.

6 And those generally include things like managing for
7 threat and endangered species, managing for native grasslands,
8 I believe there is a -- trust purpose. But also at the Rocky
9 Flats National Wildlife Refuge there is a purpose which says
10 that we will consider wildlife-dependent recreation.

11 Q. And is there a document that guides you in the management
12 of the refuge?

13 A. Yes. We have management plans. Many federal lands
14 agencies have management plans. Ours are called Comprehensive
15 Conservation Plans. And again, at all of our refuges we have
16 these. At the Rocky Flats National Wildlife Refuge we have a
17 CCP. It was finished in 2005, and that provides the overall
18 management direction. It's a very important document to us as
19 refuge managers.

20 Q. And could you just provide a brief overview of the process
21 that was used to create the CCP?

22 A. Yes. There is a policy and it is explained, but we
23 generally begin with public involvement and public scoping.
24 There is an associated Environmental Impact Statement. So over
25 the course of the years, there is teams that work on different

David Lucas - Direct

1 goals and different strategies to outline the biology, the
2 habitat management, the maintenance.

3 You know, at the Rocky Flats there is a specific
4 section specific to the Preble's Meadow Jumping Mouse. And
5 that ultimately culminates into a draft plan. We take
6 comments. We hold public meetings. And then it becomes a
7 final Environmental Impact Statement and it becomes a final
8 plan.

9 Q. And do you recall about how many years it took for the CCP
10 to be created here?

11 A. I was not involved with this particular CCP, but I think
12 when I went to the numbers, it was about four years.

13 Q. Now, you described that one of the public uses -- well, one
14 of the uses for the refuge is public use for wildlife-dependent
15 recreation. How has the public failed to use the refuge for
16 wildlife-dependent recreation since the issuance of the 2005
17 CCP?

18 A. Okay. Well, currently, as we have talked about, we do
19 offer guided tours once a month. Those are about 15 people on
20 each tour. They are always full. There is a waiting list. We
21 don't do it in the deep of the winter, so probably nine months
22 a year that we do these monthly tours.

23 In addition to that, we do have some other tours here
24 and there, and they're specific to needs. We had a reptile
25 bio-blitz not too long ago with the university, so there is

1 other folks that are out there doing scientific research, but
2 from a wildlife recreation standpoint it's mainly the guided
3 tours.

4 And that wildlife-dependent recreation is specifically
5 outlined in the National Wildlife Refuge System Administration
6 Act as amended by the Improvement Act. It identifies our
7 priority public uses, what we call the big six, hunting,
8 fishing, wildlife observation, interpretation, photography,
9 those things we expect will be most likely compatible with our
10 purposes on the wildlife refuge.

11 Q. On these monthly public tours that the refuge has been
12 offering, where are the tours -- where are the tours taken?

13 A. Currently they have been meeting at the west gate. They
14 get into a van and they drive to one of the locations like the
15 Lindsay Ranch. They are going to places where we are proposing
16 to open the trails to, you know, unguided use. So they are on
17 these existing roads that are now going to be trails.
18 Generally they have been down in the Lindsay Ranch area.

19 Q. So are the public tours currently being offered on the
20 sections of the trails that are outlined in the 2005 CCP?

21 A. Yes, that's correct.

22 Q. I would like you to look in front of you, and there should
23 be a document that's labeled Defendant's Exhibit 1 with a
24 blue --

25 A. Yes.

1 Q. Now, what document is this that's been marked Defendant's
2 Exhibit 1?

3 A. It's entitled, Environmental Action Statement. It's a
4 document I signed in March of 2018.

5 Q. Why did the Service create this document?

6 A. Well, environmental action statements are an easy tool for
7 us to document decisions that we make. We do quite a few
8 throughout the year. This one was based upon our decisions to
9 proceed with opening -- the additional opening of the internal
10 trails on the Rocky Flats National Wildlife Refuge.

11 We spent several -- I want to say 18 to 24 months
12 working with the public through a series of public meetings
13 where we were sharing basically what our intentions were in
14 terms of how we were going to implement the CCP. And we were
15 asking questions and trying to facilitate and get information
16 on how we could better improve implementation of the CCP when
17 it comes to these specific matters.

18 Q. So what changes to the CCP does this document document?

19 A. Okay. There is a couple minor changes. The first was the
20 CCP included language that on the southern half of the refuge
21 they would allow off-trail use. We decided that we would no
22 longer move forward with that. We were concerned about the
23 spread of noxious weeds and were also concerned about any
24 wildlife impacts, so we made the decision to limit use to
25 on-trail use only.

1 Second decision was we identified three areas that we
2 designated as sensitive wildlife areas. These areas are --
3 there will be no public access, but it also speaks to myself
4 and staff areas where we want to restrict even employee and
5 staff access. These are areas where wildlife comes first, and
6 they were designated for particular reasons, and that includes
7 a very large area in the northeast corner of Walnut Creek. It
8 also includes the Antelope Springs.

9 It also includes large patches of what we call the
10 tall upland shrubland habitat. And the final minor change was
11 the realignment of one trail, a couple trails throughout the
12 southern half with the general intention of responding to
13 public feedback and also looking at improvements to minimize
14 any potential effects to wildlife.

15 Q. Now, if you could turn to Page 7 of the Environmental
16 Action Statement, please.

17 A. Okay.

18 Q. And the map that's located on that page, does this show the
19 realignment sections of the trails?

20 A. Yes.

21 *MS. HELD:* Your Honor, I would like to approach the
22 witness and present a blown-up copy of this map that he could
23 point to the changes and describe them. Would that be
24 possible?

25 *THE COURT:* Yes. Do you need the easel for that?

1 *MS. HELD:* I was just going to prop it up on the
2 chair, but if the easel is available.

3 *THE COURT:* Ms. Grimm can help you with the easel.

4 *MS. HELD:* Is the Court able to see this, Your Honor?

5 *THE COURT:* Not really, but I have got a paper copy.

6 *MS. HELD:* Would I be able to hold it, Your Honor?

7 *THE COURT:* If you can point and hold at the same
8 time, sure.

9 *BY MS. HELD:*

10 *Q.* Mr. Lucas would you be able to --

11 *THE COURT:* The problem is amplification. So if you
12 have got a holder, do you mind going back to a microphone?

13 *BY MS. HELD:*

14 *Q.* So Mr. Lucas, would you be able to describe the locations
15 of the realignment of the trails we have been discussing?

16 *A.* Sure. So we began with the CCP, and this is very
17 consistent with what's in the CCP if you look at it. But the
18 major difference is this trail in the CCP was originally
19 designed to be cut over this hillside, drop down and pick up
20 another road that was right here, which takes folks directly to
21 the Department of Energy central operable unit. Based on
22 public feedback and our own evaluation, we agreed that that
23 probably was not the best idea, and we utilized the existing
24 road that goes east/west here for this change.

25 In addition, we did take advantage of the addition of

1 Section 16 as an opportunity to possibly explore the historic
2 Caprock Mine and, more importantly, take advantage of -- there
3 is two very steep drainages in Woman Creek and taking advantage
4 of 16 and the existing road beds in 16 and railroad beds, we
5 might be able to get up that other side and make it more
6 universally accessible to visitors.

7 In addition, on the north we looked at this road used
8 to go north/south right through designated critical habitat,
9 and took advantage of the opportunity to avoid designated
10 critical habitat and stay on the uplands a bit more. Those are
11 the major kind of differences. And they are not major, they
12 are minor changes.

13 But there is also this Walnut Creek loop that might be
14 envisioned as well to create a connection to the existing gate
15 to the north, so we have a couple of little tweaks to further
16 improve the visitor experience. Again, most of those were made
17 based upon public input at these meetings. They were given
18 maps to draw on and we reviewed what they drew on the maps.
19 And then we went out and evaluated that and looked at what
20 makes the most sense long-term.

21 Q. So what work will the Service be conducting on the trails
22 in 2018?

23 A. In 2018 we just have been putting signs up, trail markers,
24 to show the public which direction to go at various
25 intersections. We have installed a couple gates to limit

David Lucas - Direct

1 vehicle and pedestrian access to areas that we have no visitor
2 access, sprayed some weeds here and there, but that's generally
3 the work that's going on in 2018. And there won't be any work
4 in Section 16. That trail will not be opened in 2018.

5 Q. Now, with regard to Section 16, was that section of land
6 ever part of the Superfund site?

7 A. To my knowledge, no, it was never listed on the national
8 priorities list.

9 Q. And where did the Service obtain Section 16 from?

10 A. The Service obtained Section 16 in 2012 from the State of
11 Colorado.

12 Q. And when the Service does ultimately build a trail on
13 Section 16, what will that construction entail?

14 A. Yeah. You know, we manage multiple national wildlife
15 refuges for multiple purposes, and we take advantage of the
16 landscapes and the ideas and what we're trying to do at each of
17 those locations.

18 The Rocky Flats is a unique habitat type. It's
19 extreme canyons versus the Rocky Mountain Arsenal where we also
20 managed where it's nice and flat. So we can take advantage of
21 different things to figure out the best way to support
22 wildlife-dependent recreation. Our theory on Section 16 as
23 mentioned is the historic mine is -- you know, I think it's
24 turn of the century. It's interesting. So we wanted to give
25 folks the opportunity to be able to see history and what early

1 Colorado looked like. So my gut is we will most likely mow a
2 trail across that area and that will lead up to an existing
3 road embankment or trail embankment on the other side to get up
4 that slope.

5 *MS. HELD:* And those are all the questions that I
6 have. I am going to turn it over to questions from my
7 co-counsel.

8 *THE COURT:* All right.

9 **DIRECT EXAMINATION**

10 *BY MS. LAWRENCE-HAMMER:*

11 Q. Good afternoon, Mr. Lucas.

12 You have briefly mentioned the Preble's Meadow Jumping
13 Mouse in your testimony with Ms. Held. I assume you are
14 familiar with the Preble's Meadow Jumping Mouse?

15 A. Yes.

16 Q. And can you please describe it?

17 A. Well, it's a small rodent, as mentioned. It has big feet,
18 long tail. It can jump. It is found in Colorado and Wyoming
19 along the eastern side of the Rocky Mountains. It is a
20 federally threatened species under the Endangered Species Act.
21 It's slightly innate, as was mentioned earlier. It also
22 requires open sources of water. It is a habitat specialist.
23 It enjoys these deep ripe areas along the Front Range, willows,
24 cottonwood trees, shrubs with grasses nearby to provide them
25 what they eat.

1 Q. And you mentioned that the refuge contains designated
2 critical habitat for the Preble's Meadow Jumping Mouse,
3 correct?

4 A. That is correct. There is 35,000 acres, I believe, that
5 was designated in the state of Colorado. When they made that
6 decision, about 1,100 acres was designated on the entire Rocky
7 Flats site, so that includes Department of Energy and Fish &
8 Wildlife lands. And when we looked, it's about 700 acres of
9 designated critical habitat located on Rocky Flats National
10 Wildlife Refuge.

11 Q. Where on the refuge is that critical habitat located?

12 A. It's in the drainages, the Rock Creek, the Walnut Creek and
13 the Woman Creek drainages.

14 Q. When was this critical habitat designated?

15 A. It was 2010.

16 Q. Have the Preble's Meadow Jumping Mice ever been found on
17 the refuge?

18 A. They have.

19 Q. And when was the jumping mouse first found on the refuge?

20 A. 1991 was the first mouse that was caught.

21 Q. And when is it most recently been found?

22 A. I believe the last mouse that was found was 2003.

23 Q. When did you last survey for the jumping mouse?

24 A. In June of 2018. And we have been surveying for the last
25 five years.

David Lucas - Direct

1 Q. Did you conduct any consultation under Section 7 of the
2 Endangered Species Act to evaluate the potential effects of the
3 actions identified in the 2018 EAS on the Preble's Meadow
4 Jumping Mouse or its critical habitat?

5 A. Yes.

6 Q. When did you do that?

7 A. We started in February of 2017. And we have been
8 working -- and it all culminated in my decision in March of
9 2018.

10 Q. What type of consultation was that?

11 A. It was informal.

12 Q. And what did it involve?

13 A. Well, it involved beginning -- well, we started off,
14 obviously, with we were consulting on all species that are
15 listed under the Endangered Species Act, not just the Preble's
16 Meadow Jumping Mouse. So we looked at all of the species that
17 may occur on the Rocky Flats Refuge and worked our way down to
18 ultimately the Preble's Meadow Jumping Mouse is the species on
19 this refuge that it may affect.

20 We researched available literature, available reports.
21 We looked back on our previous consultation records because we
22 have done previous consultation on the Preble's Meadow Jumping
23 Mouse. We also then through that process consulted with U.S.
24 Fish & Wildlife staff with the Colorado Ecological Services
25 Field Office. And those biologists took several trips with us

1 on the refuge. We reviewed this habitat. And again, we are in
2 this habitat frequently. We are in these riparian corridors
3 quite a bit.

4 So during that period of time that year, a lot of
5 discussion, a lot of collaboration on trying to figure out, you
6 know, exactly what this decision would look like.

7 Q. And what were the results of the consultation?

8 A. Consultation was no effect for the majority of the species
9 found or potentially found on the refuge. It was a may affect
10 but not likely to adversely affect the Preble's Meadow Jumping
11 Mouse and its designated critical habitat.

12 Q. Why did you find that the actions were not likely to affect
13 the Preble's Meadow Jumping Mouse or its critical habitat?

14 A. Well, first, the decision is we are discussing trails and
15 these trails follow existing roadways. And those existing
16 roadways have very, very minor overlap with designated critical
17 habitat.

18 So we also determined there would be no major
19 construction activities associated with opening these trails.
20 We are using existing roads and using existing culverts as
21 crossings. And kind of from there the main other issue to
22 discuss is will people stay on trails and will they follow the
23 rules. And our opinion is that most people do follow the rules
24 and abide by refuge regulations. And if they don't, we will
25 enforce those rules.

David Lucas - Direct

1 So those three things were the main things that we
2 contemplated. But there have also been official effects, and I
3 am also required to think about the official effects to the
4 mouse. By opening the refuge, folks will have the opportunity
5 to come out and get further understanding of this endangered
6 species, further understanding of these sort of untouched
7 native riparian corridors that exist on the Rocky Flats
8 National Wildlife Refuge.

9 And in addition to that, we believe that by opening up
10 these trails we really will have a much better chance at early
11 detection and rapid response for invasive plants, which is one
12 of the real important factors for maintaining this habitat for
13 the Preble's Meadow Jumping Mouse.

14 Q. You just discussed one aspect of that was consideration of
15 off-trail use and the prohibitions thereof. Let's assume
16 someone goes off trail into the critical habitat. What's the
17 effect of the impact of that off-trail use on the jumping
18 mouse's critical habitat?

19 A. Well, first, we will deal with that. If we find an area
20 where people are cutting a corner and frequently cutting a
21 corner, we will come in and figure out a way to make them not
22 cut the corner, but it's generally trampling of grass. That is
23 what this habitat is, it's trampling of grass. So the grass
24 will grow back.

25 Q. And to circle back to what was involved in the consultation

1 of it, I want to focus on your considerations of critical
2 habitat. So to what extent did you consider the designation of
3 critical habitat on the refuge in your consultation?

4 A. Sure. The designated critical habitat is on all the maps.
5 As you can see on this map and every map that we published, it
6 is on the map as a hatched mark, so we are well aware of where
7 designated critical habitat is on the refuge.

8 From there we traveled and looked at these areas, and
9 we made these determinations for the designated critical
10 habitat that is associated with this 2018 Environmental Action
11 Statement. But further we went beyond that and went ahead and
12 took a look at all trails where there was intersections with
13 designated critical habitat and reviewed that as well.

14 Q. So your analysis of critical habitat and the potential
15 effects was not just limited to the minor changes in the 2018
16 EIS.

17 A. That is correct.

18 Q. Based on your analysis and your ESA Section 7 consultation,
19 will taking the actions identified in the 2018 EIS harm the
20 Preble's Meadow Jumping Mouse or its critical habitat?

21 A. No.

22 Q. And what do you base that on?

23 A. I base that decision on what we spoke about earlier and our
24 not likely to adversely affect determination. But No. 1, we're
25 not doing anything -- we are not doing any major construction

1 this year, so I don't expect that there would be any sort of
2 adverse modification or any type of a destruction of Preble's
3 Meadow Jumping Mouse habitat. And I think that it is -- any of
4 these decisions are very unlikely to harm mice.

5 *MS. LAWRENCE-HAMMER:* Thank you. No further
6 questions.

7 *THE COURT:* Thank you.

8 Cross-examination?

9 **CROSS-EXAMINATION**

10 *BY MR. WEINER:*

11 Q. Good afternoon, Mr. Lucas. Nice to see you again.

12 I think you just testified that based on your opinion
13 there will be no adverse impact to the Preble's Meadow Jumping
14 Mouse and its critical habitat.

15 A. It's not likely to have an adverse impact.

16 Q. But you have yet to design even the trail crossings that
17 are crossing some of the most critical of the critical habitat,
18 right?

19 A. That's actually incorrect. What we are talking about today
20 is the 2018 Environmental Action Statement, and those stream
21 crossings that are future oriented have not been designed, that
22 is correct, and there will be a future environmental
23 consultation that occurs on that.

24 Q. That's what I asked. The future stream crossings, you
25 don't know if they are going to be bridges or stones. You

1 haven't designed them yet.

2 A. That is correct.

3 Q. And yet they are going over critical habitat.

4 A. That is correct.

5 Q. So you don't really know what the impact would be to the
6 Preble's Meadow Jumping Mouse for a structure you haven't
7 designed yet.

8 A. That's not the decision we are talking about today, though.

9 Q. If you could answer my question, that would be helpful.

10 A. Well, could you please rephrase your question because I am
11 not understanding it.

12 Q. Okay. Could you read back my last question.

13 (The record was read by the court reporter.)

14 A. So that's a question. Something that I haven't design yet
15 I do not know the impacts, that is correct.

16 Q. I am a little confused about this. I am a little confused
17 about this public access issue. I didn't see in the EIS that
18 you were limiting the public from going off of, for instance,
19 the Greenway Trail. Are you?

20 A. Yes.

21 Q. So can you elaborate on that?

22 A. Yes. On all of our national wildlife refuges we have
23 regulations. Those regulations are found in the C.F.R. They
24 are posted at entrances. And off-trail use is not allowed on
25 pretty much all of our refuges at least here in the Front

1 Range.

2 Q. And how are you enforcing that?

3 A. We enforce that through typical law enforcement. If we see
4 somebody violating a rule, then there is the potential that
5 they could get a ticket for violating that rule.

6 Q. I see. So with respect to -- will the Caprock Mine be an
7 off-trail location?

8 A. It's not our understanding that it would.

9 Q. But currently there are no trails to the Caprock Mine?

10 A. Currently there are no trails to the Caprock Mine.

11 Q. And would you acknowledge that the State Clay Mine Pond is
12 in between the currently designated trail and the Caprock Mine?

13 A. Can you rephrase one more time?

14 Q. Sure.

15 A. Or restate?

16 Q. Sure. Isn't the State Clay Mine between this Caprock Mine
17 that you are encouraging folks to go to and the Greenway Trail?

18 A. What I see on the map is that it goes around the Caprock
19 Mine.

20 Q. Okay. Let's call up -- we are looking at the same exhibit.

21 A. Right.

22 Q. We need to call up Exhibit 2, please.

23 So my understanding is the Caprock Mine is down just
24 below the Greenway Trail; is that correct?

25 A. That's correct. It's a linear mine.

1 Q. And then -- I am sorry, I misspoke. So here is the Caprock
2 Mine, correct?

3 A. No. It is actually the entire -- that north/south strip
4 that you see that looks like a zipper going north.

5 Q. Okay. But the sign that says Caprock Mine and it's the
6 lower part of the zipper.

7 A. Correct.

8 Q. So the Caprock Mine goes down that far to where the words
9 Caprock Mine are.

10 A. Yes. It's probably a half mile long in the middle.

11 Q. And the State Clay Mine is that little area of blue just
12 below that circular, say, cul-de-sac area of the Greenway
13 Trail; is that right?

14 A. I believe they are the same mine. They may have two
15 different names.

16 Q. The State Clay Mine and the Caprock Mine are the same?

17 A. That would be my understanding.

18 Q. Well, you probably have a better understanding than most.
19 I see. So that you've heard the testimony today and you have
20 heard the testimony about the barrel.

21 A. Uh-huh.

22 Q. Is it your -- well, were you familiar with that exhibit
23 that analyzed the barrel and the State Clay Mine that was
24 prepared, I believe, by your predecessor?

25 A. Yes. So that's a typical process that we go through,

1 pre-acquisition survey of lands before they are acquired by the
2 U.S. Fish & Wildlife Service, so yes, I have looked at that
3 document.

4 Q. And would you agree that that barrel was white?

5 A. I don't have the picture in front of me, and it may be
6 worth putting it back up, but I did not see the barrel.

7 Q. The question still stands, do you agree that the barrel is
8 white?

9 A. I honestly can't tell. Figure 13 is a photocopy. It looks
10 grayish with some red.

11 Q. Would you agree that it's possible that this barrel located
12 next to Rocky Flats would contain radioactive contamination if
13 it is indeed white?

14 A. That's two questions, I guess, isn't it? You know, to me
15 this is the process. We go out and do title one surveys. This
16 title one survey allowed us to tell the State of Colorado to
17 have these things removed prior to our acquisition. So that's
18 kind of what I see on this photograph.

19 Q. So in the phase one survey, they tested for water quality
20 contaminants, but they didn't test for radionuclides, true?

21 A. That is true.

22 Q. So wouldn't it be the agency's responsibility to conduct
23 some testing on radionuclides in the pond if it suspected that
24 there may be radioactive materials leaking into the State Clay
25 Mine Pond?

1 A. So you are asking what the agency responsible for that
2 testing?

3 Q. I am just asking, Mr. Lucas, what would the next step be if
4 there was a concern that this was a white radioactive barrel
5 sitting at the State Clay Mine Pond.

6 A. When I read the document, I read that they spoke with
7 contaminant specialists with Rocky Flats' knowledge, and I
8 think that they would have made that determination and made the
9 correct determination.

10 Q. Well, but the determination was not to sample for
11 radionuclides.

12 A. That appears to be the determination they made, yes, based
13 on the information they had.

14 Q. Are you familiar with the EPA's 2011 letter that predates
15 you where the agency reached out to the EPA and CDPHE to
16 request an evaluation of certain exposure questions related to
17 the transportation corridor?

18 A. Is that the September 2011 memo that was addressed to me?
19 If it was, yes, I am familiar.

20 Q. All right. So did you reach out to the EPA to get any type
21 of formal evaluation of the impacts from the suspension of dust
22 on the trails that you have now located?

23 A. So we have a long collaborative relationship with both the
24 U.S. EPA and Colorado Department of Public Health and the
25 Environment. And they have been actively involved in this

1 process and participated in several of the sharing sessions,
2 including one where they presented on this issue.

3 Q. Is there a letter similar to the 2011 letter regarding the
4 current configurations of the trails?

5 A. There is not a letter.

6 Q. Really it's fair to say that the EPA hasn't taken your
7 current trail configuration and looked at whether or not that's
8 the safest location for the trails in light of the plutonium
9 activity at Rocky Flats.

10 A. I can't say what the EPA has done on their side, but we
11 have not spoken on that particular question.

12 Q. Are you familiar with Steve Berendzen?

13 A. What's the last name?

14 Q. B-E-R-E-N-D-Z-E-N.

15 A. Steve Berendzen, correct, yes.

16 Q. Who is he?

17 A. He was the former project leader, so he was in my position
18 before me.

19 Q. Your predecessor?

20 A. My predecessor.

21 Q. Are you aware that Mr. Berendzen chose to keep the refuge
22 trails well to the north of the location where you have planned
23 to put them?

24 A. I am not aware of that.

25 Q. Well, you know that the 2004 EIS located the multi-use

1 trail way to the north.

2 Can we show Exhibit 1, please.

3 A. I am not sure if that's correct.

4 Q. Let's take a look.

5 All right. So this is the trail configuration under
6 the 2004 EIS.

7 A. Right.

8 Q. Isn't the multi-use trail that trail up at the very top in
9 the northern section?

10 A. The map actually has two multiple use trails. If you see
11 there is one that says blue, hiking and biking only, and there
12 is one that is maroon, it says equestrian, hiking and biking.
13 The one that is maroon is on the southern half and enters at
14 the east -- the old east gate, around there.

15 Q. So at least as of 2004, this area that we've referred to
16 and that your predecessor actually referred to as the plutonium
17 plume or the wind-blown area, that did not have a multi-use
18 trail going through it.

19 *MS. HELD:* Objection, Your Honor. It's assuming facts
20 not in evidence. We have had no evidence that his predecessor
21 ever referred to some location as the wind-blown plume area.

22 *THE COURT:* Overruled. He can answer if he knows.

23 A. Well, I can't speak to what Mr. Berendzen had said, but
24 when I see the map, I see the trail at a very similar location
25 on -- at least intention on the eastern boundary. It's

1 attempting to cross Indiana Street at an existing area to make
2 connections with the city of Westminster. From there it comes
3 down south and ties into an existing gravel road, which is
4 basically what we have done.

5 *THE COURT:* I am going to give you six more minutes,
6 and then I will allow 10 minutes for any redirect.

7 *MR. WEINER:* Can I approach?

8 *THE COURT:* You may.

9 *BY MR. WEINER:*

10 *Q.* Mr. Lucas, I am handing you a document that appeared in the
11 administrative record of the *Superior* case. I would like you
12 to turn to a page in the lower right-hand corner. Actually,
13 let's first look at 14842, which is the third to the last page.
14 And it says there is a memo from Steve, and I think you
15 pronounce it Berendzen?

16 *A.* Berendzen.

17 *Q.* Is that right, on the bottom of Page 14842, this is a
18 message from Mr. Berendzen?

19 *A.* I see the bottom of 14842 is an e-mail from him and it kind
20 of cuts off. It's just a subject line.

21 *Q.* That's right. So the discussions I would assert starts on
22 the next page, and then it follows to the very last page.

23 *MS. HELD:* Your Honor, I object to this exhibit
24 because based on Mr. Weiner's statements, this was from an
25 administrative record in a different case.

1 *THE COURT:* He hasn't asked a question yet. Let's see
2 what the question is.

3 *BY MR. WEINER:*

4 Q. Okay. Didn't Mr. Branson say, and I will quote, "Alan
5 Gilbert wanted it to cross from Westminster open space further
6 south, but that would put it into the vicinity of the plutonium
7 plume and further away from our interest of going into Rock
8 Creek/Lindsay Ranch. I want to discuss this with Alan, but
9 first I would like your feedback confirming that we want to
10 propose an underpass, and your agreement that we prefer it
11 crossing the toll road further north beyond the plutonium
12 plume."

13 Do you see that language? Did you follow with me?

14 A. I can see that, yes.

15 Q. Is that not signed at the bottom Steve Berendzen?

16 A. That's what this document says.

17 Q. Okay.

18 *MS. HELD:* Your Honor, I resume my objection to the
19 inclusion of this exhibit because it's a document that was not
20 part of the administrative record and it's not a document that
21 Mr. Lucas wrote or received.

22 *THE COURT:* It goes to the weight, not the -- he just
23 asked a question not objected.

24 *BY MR. WEINER:*

25 Q. Mr. Lucas, I have handed you a document which is in

1 actually 2004, and it's the CCP EIS of 2004. And it's a
2 response to one of the comments from one of the commenters of
3 that NEPA process. Does this look familiar?

4 A. Yes. It's one of the appendices to the final Environmental
5 Impact Statement. That's what it appears to be.

6 Q. Right. And at the bottom there is some language from the
7 Service and I will read it. "The Service is aware of and
8 sensitive to public perceptions and concerns about residual
9 contamination on the eastern edge of the refuge. And
10 therefore, it does not propose a north/south trail on the
11 east/west side of the Indiana Street corridor.

12 Was that the position of the Service back in 2004?

13 A. Well, it appears so. It's in the document.

14 *MR. WEINER:* Okay. Can we call this up again,
15 Exhibit 2?

16 *BY MR. WEINER:*

17 Q. So I believe you testified that really the trails seemed to
18 be the same, but we see now on this Exhibit 2 that you're
19 proposing a public use trail directly through this area
20 outlined in orange. By the way, why is it colored orange?

21 A. I think it says in the box -- I am trying to read it -- it
22 says, "Proposed trail connection not included in this
23 determination."

24 Q. Yeah, that applies to a connection, but this whole box is
25 colored orange. I just wondered if you know.

1 A. That's why. This whole trail connection to the east is not
2 included in this determination. That's a future decision based
3 on the Federal Lands Access Program.

4 Q. So could you turn to Exhibit 3?

5 So now for the first time we can really see the 2004
6 trail system and now your 2018 trail system. We have this
7 whole section what's going through what's been referred to by
8 your predecessor as the plutonium plume. Would you acknowledge
9 that?

10 A. I see the section in both maps.

11 Q. I am saying where the trails go. The Greenway Trail now
12 goes through the plutonium plume; isn't that correct?

13 A. I am saying the trail going through that area in both maps,
14 on the top and bottom.

15 Q. What activities have you undertaken in furtherance of your
16 March 23rd decision?

17 A. What activities have I undertaken? We announced it. That
18 was the culmination of the public meetings and the sharing
19 sessions that we were working on. That's what was released on
20 March 23rd was a summary of the feedback received.

21 Q. Can I truncate this? Are you doing any on-the-ground work
22 at Rocky Flats right now, this summer, that implement your
23 decisions taken on -- on March 23rd, 2018?

24 A. Yes. As mentioned when we talked with Jessica, we are
25 putting in trail markers. We have put in a couple gates,

1 things of that nature.

2 Q. Porta-Potty?

3 A. We have not done that.

4 Q. And how many trail markers are you putting in currently?

5 A. I couldn't say. We purchased 80 and they haven't all been
6 put in.

7 Q. Aren't you undertaking sampling for the crossings pursuant
8 to a FLAP grant?

9 A. The Jefferson County partner group, which includes Boulder,
10 Broomfield, Westminster, all those folks are leading the effort
11 to develop a sampling and analysis plan to do some confirmatory
12 soil sampling at the locations of the FLAP crossings.

13 Q. Won't those be concluded under the current schedule in
14 October of 2018?

15 *MS. HELD:* Objection, Your Honor, to questions
16 regarding this FLAP grant because it's outside the scope of the
17 2018 Environmental Action Statement.

18 *THE COURT:* It seems so. Why is that relevant?

19 *MR. WEINER:* It's relevant because he wants to open
20 the refuge on September 15. I think that he has promised these
21 municipalities that first will come this confirmatory sampling,
22 which won't be done until October 18, and I am trying to
23 establish that that September 15 opening date could be put back
24 until October.

25 *THE COURT:* I will let that be the last question.

1 A. So what was the question?

2 *BY MR. WEINER:*

3 Q. It might take a couple questions getting there, but you
4 promised as part of the FLAP grant funding I think \$1.7 million
5 by various municipalities, that there will be some additional
6 sampling done, and that sampling is not scheduled to be done
7 until October of 2018. Why not just delay the opening of the
8 refuge until that's done?

9 A. Well, what you are speaking to right now, the October time
10 frame, is what's being driven by Jefferson County planning
11 group. The U.S. Fish & Wildlife Service agreed to do some
12 confirmatory soil sampling as it relates to construction
13 activities, construction of new trails, construction of new
14 buildings.

15 Q. Did you answer my question? Why not wait -- why not extend
16 your opening date from September 15 until when this
17 confirmatory sampling is done?

18 A. Well, from where I sit that confirmatory sampling is
19 occurring at the location of construction sites on the north
20 and the east, which are not part of this decision.

21 Q. But you could -- you could delay it until the sampling is
22 done.

23 A. Certainly.

24 *MR. WEINER:* Thank you, Your Honor.

25 *THE COURT:* Thank you.

1 Redirect?

2 MR. WEINER: Your Honor, as a housekeeping matter, I
3 would move to admit Exhibits 14 and 15.

4 THE COURT: Any objection to the admission of 14 and
5 15?

6 MS. HELD: I am not sure which one was 14 and which
7 one was 15.

8 COURT DEPUTY CLERK: 14 is already admitted.

9 MR. WEINER: 15 and 16. 15 was the first one I showed
10 him and 16 was the second one.

11 MS. HELD: I object to the e-mail chain, which was
12 Exhibit No. 15, as I stated earlier.

13 THE COURT: I will allow it for what it's worth, so 15
14 and 16 will be admitted.

15 **REDIRECT EXAMINATION**

16 BY MS. HELD:

17 Q. Mr. Lucas, you were here during Mr. Stafford's testimony,
18 correct?

19 A. Correct.

20 Q. And do you recall when Mr. Stafford discussed future stream
21 crossings?

22 A. I am sorry, I really don't. So he talked --

23 Q. I apologize. I misspoke. Mr. Weiner asked you some
24 questions about future stream crossings. Do you recall that?

25 A. I do recall that.

1 Q. And were those future stream crossings analyzed in the 2018
2 Environmental Action Statement?

3 A. They were not.

4 Q. And they haven't even been set yet; is that correct?

5 A. That is correct.

6 Q. Will the Fish & Wildlife Service conduct additional
7 Endangered Species Act consultation on any future stream
8 crossings?

9 A. Yes.

10 Q. Is the Service currently engaging in any Endangered Species
11 Act call consultations regarding possible future actions on the
12 refuge?

13 A. Yes.

14 Q. Now, with regard to the Section 16 parcel, has there been
15 any type of -- was there any remediation work done on the
16 Section 16 parcel prior to acquisition by the Service?

17 A. Again, U.S. Fish & Wildlife Service is not a cleanup
18 agency, but my understanding is that there was no remediation
19 on Section 16.

20 Q. Do you know, did the State of Colorado remove this barrel
21 prior to the Service acquiring Section 16?

22 A. It's my understanding that they removed the vehicle, the
23 trash, most of the debris, and they removed the barrel.

24 Q. So for the Rocky Flats Refuge, are there any use
25 restrictions imposed upon the land that comprises the Rocky

1 Flats Wildlife Refuge by EPA?

2 A. No. This is unlimited use, unlimited exposure. There are
3 no land use restrictions, no covenants.

4 *MS. HELD:* Those are all the questions I have, Your
5 Honor?

6 *THE COURT:* Thank you.

7 Mr. Lucas, you may step down.

8 Why don't we go ahead and take a 15-minute break. We
9 will plan on reconvening at 3:15, and we will have argument at
10 that time. The Court will be in recess. Thank you.

11 (Recess at 2:56 p.m.)

12 (Reconvened at 3:19 p.m.)

13 *THE COURT:* At this time I am going to take argument.
14 We will start off with plaintiffs. If the plaintiffs can focus
15 on the four preliminary injunction standards and why they
16 believe that they have met their burden under those.

17 Mr. Weiner, go ahead.

18 *MR. WEINER:* Your Honor, we have four prongs to
19 demonstrate for our preliminary injunction. Let's start with
20 likelihood of success on the merits.

21 We heard testimony to confirm that the trails have
22 been reconfigured into two new areas, both the Section 16
23 parcel and the wind-blown area. If this case had nothing
24 whatsoever to do with plutonium, that alone required
25 environmental assessment.

1 A federal agency can't willy-nilly put trails through
2 entirely new areas without conducting at least an environmental
3 analysis and making a determination of no significant impact.
4 Your Honor is very conversant with the notion, with the ideas
5 under NEPA, that an agency should prepare an environmental
6 assessment and only when it issues a FONSI should it proceed.

7 *THE COURT:* Under that theory would any change in the
8 trail be a trail going through a new area?

9 *MR. WEINER:* No, I don't think so.

10 *THE COURT:* So what's the difference here?

11 *MR. WEINER:* Because what is proposed now aren't minor
12 changes. So where you are having a significant extension of a
13 trail and putting a trail into a newly acquired piece of
14 land --

15 *THE COURT:* But the Service's response to that is that
16 Section 16 was never a part of the CERCLA area at all, so even
17 though, yes, it's going into a new area, there wouldn't be a
18 need for some type of an assessment.

19 *MR. WEINER:* Sure there is. Whenever an agency
20 decides to put a new trail through a new piece of land, it
21 should do an environmental assessment. And this new piece of
22 land is a sizable piece of land. It's another 640 acres,
23 10 percent of the entire size of the refuge, not to mention the
24 fact that there is that mine on it.

25 And we have the agency encouraging people to go to the

1 historic Caprock Mine. Normally putting aside all issues of
2 contamination, that's the kind of decision that requires an
3 environmental assessment. That's not a minor decision. If the
4 Fish & Wildlife Service were tomorrow to say, hey, let's go buy
5 this piece of land and let's put a trail to the historic
6 Caprock Mine, they would have to at least do an environmental
7 assessment.

8 I am at a loss for why this agency hasn't done an
9 environmental assessment. How long does it really take for
10 them to say there is no significant impact of us putting a
11 trail through the Section 16 parcel? And yet they haven't done
12 it. It almost -- it borders on a stubbornness that is
13 unbelievable, especially when we are dealing with the kinds of
14 issues that we are dealing with here.

15 But I stand by my point. Even if it was
16 uncontaminated land and they bought a parcel of land and they
17 put a trail to the historic Caprock Mine, they do an EA and a
18 FONSI in a second.

19 *THE COURT:* What about now focusing not on Section 16,
20 but on areas where the trails have arguably been reconfigured
21 on refuge land, where do you draw the line between significant
22 change and one that could be done through an exception?

23 *MR. WEINER:* So you know by the way we presented our
24 case that we believe that it's significant because they went
25 through the wind-blown area. So I would say in all candor that

1 if they were to have put the -- reconfigured the trail through
2 an area that did not have a suggestion of high levels of
3 plutonium, then that would probably be minor.

4 *THE COURT:* Mr. Lucas, in his testimony, he said that
5 back in 2004 --

6 *MR. WEINER:* Mr. Who? I am sorry.

7 *THE COURT:* Mr. Lucas, in his testimony.

8 *MR. WEINER:* Yes.

9 *THE COURT:* That there was already a plan for a trail
10 in the wind-blown area. So what about the reconfiguration of
11 the trail in that area? For instance, was there any suggestion
12 that it was drawn a particular way back in 2004 to avoid hot
13 spots or --

14 *MR. WEINER:* Yeah, those are the two exhibits that I
15 gave you. The initial idea when you read those two exhibits
16 are that they wanted access to the Westminster open space to
17 the south, but they wanted to do it in a way that avoided this
18 wind-blown area. And I don't think Mr. Lucas was a credible
19 witness when he said, oh, well, the new trail doesn't go
20 through the wind-blown area. It clearly does.

21 One merely needs to take a look at our Exhibit 1
22 versus our Exhibit 2, and you can see that they have routed
23 this trail directly through the wind-blown area, which is
24 something his predecessor promised wouldn't be done. And why
25 did they promise it wouldn't be done? Because of that

1 Department of Energy map which we have used as an exhibit which
2 shows the hot spots of plutonium, which are still there because
3 nothing has been remediated. So that isn't a minor decision.

4 *THE COURT:* So that Berendzen letter, e-mail -- let's
5 see what the date of that was. So that's November of 2011, but
6 back in 2004 or actually 2007, 2011 EPA says no restrictions on
7 use anywhere within the refuge. So why, even if there was some
8 talk back then, what would be the basis for avoiding trail
9 construction or the need to do some type of additional studies
10 if the expert agencies who know about that type of testing,
11 know about that type of exposure, have already said on a couple
12 of occasions it's fine.

13 *MR. WEINER:* You know, Your Honor, this is a similar
14 situation to situations involving lead, lead contamination.
15 Similar to plutonium, there is no safe amount of lead that
16 exists. Lead is harmful even in minute quantities. But we, as
17 a society, have decided that there is a certain level of lead
18 that we will tolerate in our projects around the country.

19 Now, just because an agency has said that the lead
20 standards -- that the lead doesn't exceed standards doesn't
21 mean that we take our child and put him by the window sill
22 unattended where he might ingest large portions of lead.

23 It's the same thing here. We don't place the trails
24 through areas of known plutonium contamination even if the EPA
25 said as a whole the refuge is safe because --

1 *THE COURT:* Well, but because of background levels of
2 plutonium contamination, you know, like the background sample
3 done in Fort Collins, do they do tests, environmental
4 assessments and build trails in Fort Collins? The problem is
5 that the argument kind of gets you too far. If there is no
6 safe exposure level, you mean you can't do anything? There is
7 no activity anywhere? And, you know, if the EPA says the
8 refuge is totally safe. The background levels -- not
9 background levels, but the exposure levels are so low that they
10 don't pose a threat to human health, if that's been a finding,
11 and I haven't heard anything to contradict that --

12 *MR. WEINER:* We are not trying to.

13 *THE COURT:* -- then why would the agency, because of
14 the levels that may be presumed to exist based upon the testing
15 that was previously done, have to, I don't know, recess or --

16 *MR. WEINER:* Take a hard look at the issue.

17 *THE COURT:* But why would they take a hard look?

18 *MR. WEINER:* So they need to take a hard look at the
19 issue despite what the EPA said for two reasons. One is what I
20 just mentioned before. The deposition of the plutonium is
21 heterogeneous, so some parts of the refuge have more plutonium
22 than others. So it's arbitrary and capricious for an agency
23 not to at least take that into account when deciding where to
24 put the trails.

25 You heard Mr. Lucas say, well, we're not going to put

1 the trails in areas where we could harm some of the habitat.
2 But for god's sake, shouldn't he at least take into account the
3 potential harm to human beings from plutonium on the refuge
4 when it's heavier in some places and lighter in the others?
5 That's only a rational thing to do.

6 *THE COURT:* But if the EPA says -- and you say you are
7 not challenging that -- back in 2004, 2005, well, maybe it's
8 seven -- because it's true, if you take a look at the testing,
9 they tested in different areas, and presumably they are testing
10 more in areas where there could be, for instance, wind-blown
11 contamination, so you're right, under the map of the testing
12 results would show that there are different concentration
13 levels in different places; but nonetheless, the agency says,
14 you know, the whole refuge is open to unlimited use.

15 If that's the case, even if there are variances in the
16 levels, then, you know, why would the variances dictate some
17 different type of administrative response, you know, because
18 they may not -- if you look at that EPA testing, you may come
19 to the conclusion, well, the differences aren't material to
20 risks to human health.

21 *MR. WEINER:* So the EPA said as a whole the refuge is
22 safe for unrestricted use and unlimited exposure as a whole, so
23 we do have a separate deposition rate. And we heard testimony
24 today that they looked at soils and not dust. So the testimony
25 you heard today is that it was the dust that would have

1 plutonium entrained within it that would be suspended that
2 would be inhaled.

3 Dr. Ketterer explained that it's the dust that causes
4 concern and that he has detected, and Dr. Mousseau said it's
5 the dust that they are finding causes a particular problem in
6 all of those Chernobyl studies he was talking about. So the
7 EPA dealt with soils. Here we are talking about the dust
8 that's created by the hiking and the biking and the horseback
9 riding. So that's one reason why we can't necessarily rely on
10 the EPA study.

11 And the second is --

12 *THE COURT:* Well, but let me ask you about that. So
13 the EPA back in 2007 met again. Both the Colorado Public
14 Health Department and the EPA said in 2011, you know, things
15 are good. But if they were calculating threats to human
16 health, then, you know, they are talking about like one chance
17 in a million of cancer, even if they are looking at plutonium
18 in the soil, they must be calculating the risk in some fashion.
19 You know, in other words, it's not eating the soil. It's not
20 putting the soil on you, that type of thing. They must have
21 been figuring or assuming that the exposure occurred in some
22 way. Do you know exactly what they were assuming?

23 *MR. WEINER:* Let's assume it's through ingestion and
24 inhalation both for argument's sake.

25 *THE COURT:* Yeah, I don't know the answer to that. I

1 was just assuming that even if they were just focusing on soil,
2 somehow they are assuming that it's getting -- maybe that it's
3 getting inside a human in some way enough that it would cause
4 some type of threat.

5 *MR. WEINER:* That's true, but what our experts were
6 referring to is an entirely different mechanism of exposure,
7 and that's the mechanism caused by activity on the soil that
8 suspends dust that gets off site that causes problems. The EPA
9 didn't look at that.

10 And unless it's entirely clear, Your Honor, why
11 shouldn't the Fish & Wildlife Service look at that? Really, if
12 we are talking about one of the most contaminated sites in the
13 world where plutonium is a significant issue, and we know it's
14 still there from the DOE map and we know it hasn't been
15 remediated, isn't that worthy of some type of analysis and
16 environmental assessment rather than the agency bury its head
17 in the sand both in 2004 and today and say, we know nothing
18 about plutonium.

19 I assert that for the agency to open Rocky Flats
20 without ever looking at the impacts of plutonium would be a
21 travesty, Your Honor.

22 *THE COURT:* Is there any -- because, once again, we
23 have got these reports previously from not the Fish & Wildlife
24 Service, but from agencies whose expertise is in assessing risk
25 to human health, and they say refuge is okay. So is there any

1 evidence that would suggest -- that would cause or should have
2 caused the Service to think this wind-blown contamination route
3 which could lead to inhalation and inhalation having a much
4 more deleterious effect on a person's health should they
5 breathe in plutonium is something that hasn't been looked at
6 that's outside the scope of the EPA's study, and therefore we
7 need to do this.

8 In other words, what I am saying is that is there
9 anything out there that would put the agencies on notice that
10 inhalation is so different that it's not accounted for in the
11 EPA's work back in 2007, 2011?

12 *MR. WEINER:* Can I try to shift your thought process
13 just slightly, Your Honor?

14 *THE COURT:* Sure.

15 *MR. WEINER:* And have you instead of ask the question
16 why doesn't this agency make a request to the EPA,
17 affirmatively asking, look, this is where we've decided to put
18 the trails. We do have a new configuration for this wind-blown
19 area. Is this the location that is safest to public health?
20 That's a question that was asked in 2011 pretty much when
21 they -- and they cite specific questions.

22 The agency reached out to the EPA and they said we
23 have some concerns about the different levels of plutonium that
24 were analyzed in different reports. We are now looking at some
25 underpass history that's now a transportation corridor. EPA,

1 what do you think? That's a rational thing for a federal
2 agency to do, and they haven't done it here.

3 At least in 2011 when you look at the case, they did
4 an EA. They talked to the EPA. But instead what we are
5 hearing instead is an agency that's refusing to acknowledge
6 that a barrel is white when it's clearly white, that's refusing
7 to do a minimal environmental assessment, that's trying to crib
8 their decision into this idea that it's a minor decision when
9 they've greatly modified the two, you know, opposite axes of
10 it.

11 I think that it's really incumbent upon this agency to
12 at least make a finding of no significant impact before it
13 opens the refuge to trails in plutonium contaminated,
14 acknowledged unremediated plutonium contaminated land. That's
15 a significant issue. If it's not a significant issue, fine,
16 let them make a finding of no significant issue like almost
17 every other agency does in every other circumstance.

18 We heard testimony -- this goes to the public
19 interest -- that the public is waiting to enter. Seriously?
20 We provided information in our briefs that show that seven
21 school districts have banned school children totaling 300,000
22 students are banned from going onto Rocky Flats, and he says
23 that the public is waiting to enter.

24 Well, if they are waiting to enter, why can't they
25 wait another month? Why can't they wait until October 15th

1 when the promised confirmatory sampling is going to be done?
2 There is really -- there is no reason that the balance of
3 equities doesn't rest in our favor, not only because of the
4 potential threat from this dust inhalation, and even if you
5 don't buy that, there is this notion of bureaucratic
6 momentum, which is that after they open the refuge, it's going
7 to make it very hard for them to honestly put into effect
8 whatever Your Honor says if you rule in our favor.

9 If you say go back and do an EPA analysis after
10 they've opened the refuge, what kind of EPA analysis is going
11 to come from that? So that bureaucratic formality of
12 September 15th is an important one to us, but it seems like a
13 ridiculous one to them. I asked Mr. Lucas, why do you have to
14 open it on September 15? Couldn't you wait until October 15?
15 And he said he could.

16 So they won't suffer much harm if we wait a couple of
17 weeks, a couple months at the most, until Your Honor rules on
18 the merits of our case.

19 We heard Mr. Barton describe the barrel on Section 16
20 is suspicious. We heard Mr. Lipsky confirm this. We heard
21 from Mr. Nichols about the considerable risk of inhalation of
22 particles through the dust, not like the EPA study that dealt
23 with soils, but through the dust. We heard Dr. Ketterer talk
24 about the contamination off site and this notion of nuggets, of
25 hot spots. They could be missed in an analysis done by the

1 EPA.

2 But I'll be honest, I don't think we are going to get
3 anywhere trying to cast aspersions on the EPA study. I think
4 honestly an agency, just like you said in your 2012 case, has
5 the right to rely on the expertise of an agency on a decision
6 the agency actually makes, so that's why I make the distinction
7 between soils and dust and why I make the distinction between
8 heterogeneous disposition of plutonium and homogenous
9 disposition of plutonium.

10 We heard Dr. Nichols describe the billions of
11 particles. Those are the kinds of particles that get into the
12 dust. We heard Dr. Mousseau talk about no safe threshold, no
13 threshold for plutonium, so even a few particles can cause a
14 problem and a health problem, and they are finding that in the
15 Chernobyl studies.

16 I don't understand the defense, the Department of
17 Justice's argument that there was a final decision and
18 therefore there is no jurisdiction for you to consider any more
19 decisions. I just don't get that. They are constantly
20 refining their decision. We heard Dr. Lucas, Mr. Lucas explain
21 that they --

22 *THE COURT:* It may have been in part a standing
23 argument, I'm not sure.

24 *MR. WEINER:* I'm not sure either because clearly they
25 are making new decisions all the time. They are refining their

1 decision. The hearing sessions, I think we will probably hear
2 from opposing counsel about how open the process has been, but
3 we heard from Mr. Lipsky that that process was not very open.
4 There were armed guards ready to escort people out if they
5 actually engaged in some kind of give-and take with the agency.

6 That would be great under NEPA and as well if they
7 have to do a consistency determination, there will be some kind
8 of public give-and-take in the process. If they do a full EIS,
9 they have to go through scoping and they need to involve the
10 public, which has been woefully driven away from this process
11 for 14 years. And if they do an inconsistency -- I am sorry,
12 compatibility determination for the trail CD, that is one that
13 requires a public process. That's why it's so important.

14 There has been no remediation of Section 16. We have
15 heard that.

16 So I think I've hit all of the points, merits,
17 irreparable harm, balance of equities. I addressed that and
18 public interest. I said in my opening that certainly an agency
19 should comply with its own environmental laws. It's in the
20 public interest for us to do so. And Your Honor knows by
21 looking at a packed courtroom and the numerous articles in the
22 paper not only that is this a controversial decision which
23 prohibits the use of a categorical exclusion, but also that the
24 public interest really is in this case, in this city, in this
25 state, demanding some type of responsible public review of the

1 decision to open the Rocky Flats Refuge. And only Your Honor
2 can make that happen.

3 *THE COURT:* Anything else, Mr. Weiner? I will give
4 you a chance for rebuttal argument as well.

5 *MR. WEINER:* Thank you.

6 *THE COURT:* All right. The defendants can split up
7 their arguments, if they wish, the way they did with their
8 opening, whatever way you want to do it.

9 *MS. HELD:* Thank you. My co-counsel, she will address
10 the Endangered Species Act first.

11 *THE COURT:* All right. Go ahead.

12 *MS. LAWRENCE-HAMMER:* Good afternoon, Your Honor. I
13 will be brief.

14 You heard from Mr. Weiner in his closing nothing about
15 the Endangered Species Act claims. We heard testimony today
16 almost exclusively about the NEPA claims. The only testimony
17 that was presented that related in any way to the Endangered
18 Species Act was that from Mr. Stafford.

19 And Mr. Stafford's testimony I assume ostensibly would
20 go to standing and irreparable harm, but showed neither of
21 those things. As to standing, Mr. Stafford expressed only a
22 vague interest in animals and birds. He had no specific
23 interest in the jumping mouse, no real concern about the
24 jumping mouse until just a few months ago when plaintiffs filed
25 this lawsuit. And he had no real reliable basis for his belief

1 that his alleged interest in the jumping mouse would be harmed
2 if the PI was granted.

3 He had some conversations with an ex-brother-in-law,
4 but that does not count under the robust ESA consultation that
5 the Fish & Wildlife Service conducted when it determined that,
6 in fact, implementing these actions on the refuge that are
7 challenged in this case were not likely adverse to the jumping
8 mouse or critical habitat.

9 *THE COURT:* Let me ask you a question about standing.
10 So are there cases out there that would suggest that the
11 recency of Mr. Stafford's interest in the jumping mouse means
12 that he doesn't have standing?

13 *MS. LAWRENCE-HAMMER:* I think it goes to the
14 robustness of said interest, and the interest actually has to
15 be in the jumping mouse. I don't believe we heard from
16 Mr. Stafford that he had had an interest in the jumping mouse.
17 He spoke about acquiring knowledge about the jumping mouse in
18 the last few months. He didn't even say he had plans to see it
19 in the future. He said he wouldn't go on the refuge to look
20 for it in the future.

21 So I think the recency on its own would not eliminate
22 someone from having standing to bring a claim, but I think
23 that's considered as part of the larger package of the interest
24 that he expressed. And you can look at our briefing on this.
25 There is a D.C. Circuit case, *Water Watch*, that speaks very

1 clearly to the specificity that's required when bringing an
2 Endangered Species Act claim to the actual species at issue.

3 And the standing is overlapping with irreparable harm
4 in terms of the ESA claim because it is the only evidence the
5 plaintiffs have put forward as to potential harm to the jumping
6 mouse is from Mr. Stafford's testimony. And again, as I said,
7 it's just secondhand information he has gotten from an
8 ex-brother-in-law and some unfounded fears that don't counter
9 in any way the Service's robust consultation, which we heard no
10 rebuttal of or expert testimony about at all, Your Honor.

11 I am not going to bother repeating all the arguments I
12 went over this morning except to say they stand un-rebutted.
13 The plaintiffs have failed to show that they are likely to
14 succeed on the merits under the ESA claim or there is any
15 irreparable harm specific to that claim. And I will allow my
16 colleague, Ms. Held, to address the those elements that relate
17 to the NEPA claim and also the public interest in general.

18 *THE COURT:* All right. Thank you.

19 Ms. Held?

20 *MS. HELD:* Your Honor, plaintiffs must meet all four
21 of the prongs of the preliminary injunction standard for the
22 Court to rule in their favor.

23 With regard to the merits prong, plaintiffs have not
24 shown through the evidence put on today that the Fish &
25 Wildlife Service violated NEPA when it issued the Environmental

1 Action Statement.

2 *THE COURT:* Well, of course, most of their evidence
3 went to irreparable harm. It wasn't so much a merits
4 presentation.

5 *MS. HELD:* Yes, but ask the jury if their witnesses
6 did focus on the irreparable harm standard. But their focus
7 was not on the potential irreparable harm that the opening of
8 the realigned trails would potentially cause, but trail use in
9 general.

10 For example, Ms. Panzer and Mr. Lipsky both testified
11 as to their concerns resulting from trail use in general and
12 the potential for dust in general from trail use, not just on
13 those specific readjusted portions. And Dr. Nichols, he has
14 admitted he has not conducted any testing of the Rocky Flats
15 area since the 1970s, and the testing that he conducted was on
16 snow and not soil or dust.

17 Likewise, Dr. Ketterer, he did not conduct any testing
18 that was after 2005. All of his testing also predated the
19 EPA's 2000 decision that the site should have no restrictions
20 on it. And he also further agreed that his testing was
21 consistent with the testing conducted by the government's.

22 And Dr. Mousseau also did not parse his testimony
23 between potential irreparable harm from the opening of trails
24 in general versus the opening of the trails on the adjusted
25 portions that were set forth in the EAS. And Dr. Mousseau did

1 not even review the cleanup documents that were issued by the
2 EPA, the Department of Energy, setting forth their proposed
3 remedy and the reasons for that and what exactly they did
4 consider.

5 *THE COURT:* Mr. Weiner says that at least as to.
6 Unit 16, because it wasn't ever part of the rule of decision or
7 the EIS back in 2004, 2005, that the Service had to at least do
8 some type of environmental assessment of the trail that now
9 goes through that section.

10 *MS. HELD:* Your Honor, with regard to the preliminary
11 injunction standard, with regard to irreparable harm, the
12 plaintiffs also need to show imminence. And as Mr. Lucas
13 testified, there is no trail work -- well, there is no trail
14 work that would be conducted in 2019 on the Section 16 portion.

15 *THE COURT:* But it's happening. It's going to happen
16 at some point, right?

17 *MS. HELD:* Yes. And Your Honor has already issued the
18 briefing schedule and it's an expedited briefing schedule. And
19 based on how this Court has expeditiously handled the case thus
20 far, I would expect that Your Honor would be issuing a decision
21 prior to the end of the year.

22 And also with regard to the eventual trail
23 construction on Section 16, Mr. Lucas described that the vast
24 majority of it would be just mowing.

25 *THE COURT:* Well, presumably the purpose of mowing is

1 to mark the trail, and that would then cause people to traipse
2 along the trail, probably then causing a trail, right?

3 *MS. HELD:* Well, Your Honor, I was actually just at
4 the refuge yesterday, and the way the soils are, they are very
5 hard. And the trails that I observed, if it's grass that's
6 mowed --

7 *MR. WEINER:* Your Honor, may I object to personal
8 testimony?

9 *THE COURT:* I will overrule the objection. Go ahead.
10 Did you go out to the mine site?

11 *MS. HELD:* No, I didn't. But, you know, today we are
12 talking about the preliminary injunction standard and --

13 *THE COURT:* Right. My question was Mr. Weiner's point
14 about the fact that because Section 16 didn't have any type of
15 an EIS, period, that the Service, given the fact that the trail
16 is now being routed into Section 16 or Unit 16, specifically
17 that there should be at least some type of environmental
18 analysis done in connection with that trail. What's the
19 response to that?

20 *MS. HELD:* Well, Your Honor, the EIS is required for
21 major federal actions.

22 *THE COURT:* What about any type of environmental
23 analysis as opposed to the word no?

24 *MS. HELD:* The Service did conduct an environmental
25 analysis when they issued the EAS, the Environmental Action

1 Statement. They determined that this fell under one of the
2 categorical exclusions and that they would be able to create
3 the Section 16 trail without having to do further analysis.

4 *THE COURT:* And what was that categorical exclusion?

5 *MS. HELD:* It is on Page 1 of Defendant's Exhibit 1.

6 *THE COURT:* Yeah, I guess -- I am assuming

7 Mr. Weiner's point was this can't be a minor change if you
8 haven't had any type of assessment of Unit 16, period.

9 *MS. HELD:* Well, as explained before, the Section 16,
10 it was never part of the Superfund site. And there is -- it's
11 my understanding that there is no critical habitat areas that
12 need to be considered and that the agency is relying on their
13 on-the-ground information to determine that the categorical
14 exclusion is adequate for the Section 16 portion.

15 *THE COURT:* Is there anything on the record that says
16 that the reason that it falls within a categorical exclusion is
17 because of the fact that it wasn't part of the CERCLA area to
18 begin with and it doesn't involve any critical habitat?

19 *MS. HELD:* Your Honor, I'm not sure if there is
20 anything in the record. I cannot point to a specific document
21 at this time. When we brief the merits, I am certain that we
22 will be able to more robustly assert that. The Section 16
23 portion does not need any further environmental review to build
24 a trail on it.

25 With regard -- once again, for the standard

1 preliminary injunction you need the imminence factor to be
2 fulfilled. And as Mr. Lucas testified, there won't be any
3 construction of trails on Section 16 until 2019 at the
4 earliest.

5 *THE COURT:* Isn't one of the issue for imminence a
6 likelihood of repeating the fact that it's going to happen?
7 His testimony was not that it won't happen. It's that' it's
8 going to happen. It's just it's not going to happen in 2018.

9 *MS. HELD:* As I said before, the merits decision will
10 probably be issued prior to then, so then we will know if this
11 Court decides that the environmental analysis for Section 16
12 was adequate or not.

13 *THE COURT:* All right.

14 *MS. HELD:* So I have already talked about the evidence
15 for irreparable harm and we've talked about the merits. And
16 now with regard to the public interest, as we discussed
17 earlier, the decision to open trails on the refuge was made
18 back in 2005. It's been a long process of public involvement
19 that led to that decision. And Mr. Lucas describes a series of
20 sharing sessions.

21 And these are sessions that were not required by law,
22 but as a good neighbor to the community, the refuge wanted to
23 keep them informed of their plans implementing the CCP. And
24 they made it clear that the CCP found that trails could be open
25 on the refuge and they would be open on the refuge, but the

1 Service still wanted to engage the community. And through that
2 engagement the Service made those minor adjustments for the
3 reasons that Mr. Lucas described, to be even more protective
4 for the environment and to make a better visitor experience.

5 As we explained, there are monthly public tours and
6 there are always waiting lists for these tours. And there are
7 a significant number of community members that want to access
8 this refuge and enjoy this piece of public stakes that have
9 been preserved.

10 *THE COURT:* Why wouldn't the Service need to comply
11 with the compatibility determination where it required that as
12 to the trails, they needed to be reevaluated within 10 years?

13 *MS. HELD:* Your Honor, for the Environmental Action
14 Statement the Service relied on the two other compatibility
15 determinations.

16 *THE COURT:* Yeah, the question is whether that was
17 appropriate. The plaintiffs' argument is that the trails
18 compatibility determination is the one that is most relevant.
19 After all, it's about trails, and therefore the failure of the
20 Service to do the evaluation within 10 years would, you know,
21 constitute some type of a regulatory violation. What's wrong
22 with that argument?

23 I mean, I know that the other things, education,
24 photography, are related, and as a matter of fact, the
25 compatibility determinations for both of those talk about that.

1 But, you know, this is the language from the trails
2 compatibility determination: The compatibility determination
3 for this use is subject to mandatory reevaluation in 10 years.

4 *MS. HELD:* Well, Your Honor, just because there is one
5 compatibility determination that may apply doesn't mean -- that
6 applies doesn't mean that the Service has to ignore the other
7 compatibility determinations that also apply.

8 *THE COURT:* Well, no one is talking about them
9 ignoring any because you could pay attention to all three of
10 them. You could do a trail reevaluation within the mandatory
11 10-year period, and then you could do the photography and
12 education reevaluation within the specified 15-year period.
13 There is nothing that would prevent the Service from doing all
14 three of those, right?

15 *MS. HELD:* No, there is nothing that would prevent the
16 Service from doing all three of those, but with the limited
17 resources that the Service has available --

18 *THE COURT:* But that's not the reason that's cited in
19 the -- does the Service cite the fact that it didn't have
20 enough money or resources to do the trail compatibility
21 assessment within the 10 -- the so-called mandatory 10-year
22 period?

23 *MS. HELD:* Well, Your Honor, there is nothing that
24 requires the Service to have that specific trail use
25 compatibility determination when trails are also a part of two

1 other compatibility determinations.

2 *THE COURT:* Well, take a look at the trail
3 compatibility 1. And I am looking at a document that's -- it
4 has a Bates stamp number of 001613, and there is a section on
5 stipulations necessary to ensure compatibility. And in
6 particular, No. 1 there, is that found in the photography or
7 the education compatibility decision?

8 *MS. HELD:* Your Honor, I do not have the compatibility
9 determinations in front of me at this time, but they are in the
10 record. And I would be able to submit a supplement with the
11 specific language in each of those determinations.

12 *THE COURT:* I know what they are.

13 My question to you is, you know, I am still trying to
14 figure out why the Service didn't comply, and then what the
15 effect, if any, of the Service not complying of the so-called
16 mandatory reevaluation is.

17 *MS. HELD:* Well, Your Honor, the fact the evaluation
18 would only be mandatory if the Service was relying on that
19 compatibility determination, and the Service isn't relying on
20 that compatibility determination. The Service is relying on
21 these two other compatibility determinations.

22 *THE COURT:* Yeah, that's my question about the
23 stipulations. If the Service isn't relying upon this, but now
24 it's proposing to open trails, then what's the source of the
25 information about trail use if it's not the trail compatibility

1 document?

2 *MS. HELD:* That would be the two other compatibility
3 determinations because they also found the trail use to be
4 compatible.

5 *THE COURT:* Well, I guess it kind of begs the
6 question, then, if it says compatibility determination for this
7 use, this use meaning the trails, it is subject to mandatory
8 reevaluation in 10 years, can the Service just ignore that?

9 *MS. HELD:* Well, the Service is able to rely on the
10 other compatibility determinations because they explicitly talk
11 about --

12 *THE COURT:* Then what does the word "mandatory" mean?
13 Why did the Service use the word "mandatory" if they can just
14 they can just ignore it and rely upon something else?

15 *MS. HELD:* Well, if the Service wanted to perhaps use
16 trail use for something other than the type of personally --
17 other than wildlife observation and photography, for
18 interpretation, environmental education, then those type of
19 trail uses would not fall under those compatibility
20 determinations.

21 *THE COURT:* Isn't it presumed for photography and for
22 educational purposes that the trails would be used? I mean,
23 that's why you are saying that they relied on, but if the
24 compatibility determination as to trails says that, you know,
25 there is a mandatory reevaluation in 10 years --

1 *MS. HELD:* Well, Your Honor, for example, if the
2 Service wanted to put a trail on the refuge that potentially
3 had no way of viewing wildlife or --

4 *THE COURT:* Well, of course that's not very likely, is
5 it?

6 *MS. HELD:* No, but --

7 *THE COURT:* Because the description of use with the
8 compatibility determination for trails is to provide access for
9 compatible wildlife-dependent recreational activities, wildlife
10 observation, wildlife photography and interpretation. So those
11 uses are integral to the trail system, right?

12 *MS. HELD:* Well, Your Honor, I think -- I don't know
13 if that compatibility determination for trail use itself is
14 limited to the trails only for wildlife observation and
15 education because we have these separate compatibility
16 determinations for the wildlife observation and for education
17 that allow trail use. I don't think trail use as a compatible
18 use for the refuge.

19 *THE COURT:* All right. Go ahead.

20 *MS. HELD:* Your Honor, I believe that I have gone
21 through the four preliminary injunction factors, and we
22 respectfully request that the Court deny plaintiffs' motion.

23 *THE COURT:* Well, in terms of whether or not there are
24 extraordinary circumstances, one of the Department of Interior
25 regulations would say that there are if there is highly

1 controversial environmental effects. So why doesn't that
2 exist?

3 *MS. HELD:* Well, Your Honor, the controversy over
4 potential environmental effects goes back to -- well, any type
5 of controversy would go back to the 2005 decision to open
6 trails on the refuge in general. And as we discussed before,
7 that decision has been made.

8 And as I talked about plaintiffs' witnesses that
9 testified as to irreparable harm, they did not distinguish
10 between their fears for irreparable harm from the general
11 opening of trails versus the opening of trails on these
12 adjusted locations.

13 *THE COURT:* And are there any court decisions that
14 would say that in terms of a highly controversial decision,
15 that a court or the agency, for that matter, takes a look to
16 see whether the controversy is essentially estopped because of
17 a previous decision that can now be -- can't be challenged?

18 *MS. HELD:* Your Honor, I am not currently aware of
19 any, but our argument isn't necessarily that the controversy is
20 estopped. It's just that we need to look at the decision
21 that's at issue, which is the Environmental Action Statement.
22 And plaintiffs have not shown that the controversy is over the
23 adjustments that are made in this action statement. Their
24 testimony has been controversy in general over just opening the
25 refuge.

1 And with regard to potential harms to the environment
2 and to the public health from opening the refuge, that is
3 something that has already been addressed and looked at and
4 thoroughly it's had a hard look in the 2005 CCP.

5 *THE COURT:* Yeah, but that's not the standard, is it?
6 I mean, even Mr. Lucas in the EAS identifies the factor as:
7 The proposed action is known or expected to cause significant
8 public controversy. I am looking at -- well, I am not sure the
9 Bates number, Page 10.

10 *MS. HELD:* I believe I misunderstand your question,
11 Your Honor, because for all of the questions he has answered
12 no.

13 *THE COURT:* I know, but one of the factors that he
14 looked at, he identified it as the proposed action is known or
15 expected to cause significant public controversy. And a
16 footnote to that decision is that identifies a small and often
17 vocal group contends everything, anything concerning the former
18 Rocky Flats site is controversial, the Service does not expect
19 there to be actual controversy over potential environmental
20 impacts of the very minor changes proposed to the CCP.

21 So, No. 1, it doesn't look like Mr. Lucas is
22 justifying his answer to that factor when he says no by -- this
23 was decided way back when, so we don't have to worry about it
24 now. Instead, what he is saying -- I am not sure what he is
25 saying, but what he appears to say is that there is one group

1 who is very vocal and, you know, suggests that they will oppose
2 anything, but what we're looking at is an actual controversy.

3 *MS. HELD:* Well, Your Honor, so when you look at the
4 language of that factor, it says the -- so the last phrase of
5 that says about the potential environmental impact of the those
6 actions, so the public controversy needs to be about the
7 potential environmental impact of the proposed action itself.
8 And so the proposed action here in the Environmental Action
9 Statement is merely the relocation of small portions of the
10 trails.

11 And as I described earlier, the controversy is not
12 about the relocations of the trails. The controversy is about
13 the opening of the refuge in general, and that's what
14 plaintiffs' witnesses that were here today to testify about
15 their irreparable harm standard, that is what they testified
16 to.

17 *THE COURT:* Go ahead.

18 *MS. HELD:* Do you have any other questions, Your
19 Honor?

20 *THE COURT:* I don't.

21 *MS. HELD:* Thank you.

22 *THE COURT:* Thank you.

23 Rebuttal on behalf of plaintiffs? Is it Mr. Ogden?

24 *MR. WEINER:* I have two points, and then Mr. Ogden is
25 our Endangered Species Act.

1 *THE COURT:* Right. Whatever order you want to go in.

2 *MR. OGDEN:* I am not sure I am clear on the time here.
3 How much rebuttal time do we have? 10 minutes?

4 *THE COURT:* At least 10 minutes. Go ahead.

5 *MR. OGDEN:* Great. I am just going to very quickly
6 hit the bullet points of the ESA issues that have come up in
7 the hearing here and the briefings.

8 First on the issue of standing, Mr. Stafford's
9 declaration and testimony here today clearly satisfies the
10 standards set forth in *Winter, Cottonwood Environmental Center,*
11 about what's required for standing in an ESA case. We have a
12 person who is aware and actively watches and enjoys birds and
13 wildlife. He has been around the refuge. He understands more
14 about the mouse than many people. And he understands its place
15 in the food chain and how it fits with how birds are affected
16 and other creatures.

17 *THE COURT:* I mean, not really. No. 1, there haven't
18 been any mice found since 2003, so presumably while there could
19 be some mice there, you know, any concern about them being an
20 important food source for raptors would have to be very
21 speculative. And he said he doesn't even want to and he
22 probably wouldn't even go on the refuge even if he thought it
23 was safe for the purpose of trying to observe a mouse.

24 *MR. OGDEN:* Let me respond to those two points.

25 First, in the monitoring report that Mr. Lucas

1 referred to, which is -- it's in the record at ECF 14-8, yes,
2 it does say that they haven't found any mice, but it also says
3 specifically here the Fish & Wildlife Service acknowledges that
4 "Although no Preble's' mice were found during this study,
5 several factors suggest they could still exist on the refuge."

6 *THE COURT:* No question about that. The question
7 really becomes standing, standing for Mr. Stafford. So what
8 would be -- why would he have standing if, you know, no mice
9 had been found recently? He doesn't go on the refuge. His
10 interest seems to be more focused on raptors and the food
11 chain. So why would that combine to get him to the point where
12 it could be considered under Supreme Court precedent to have
13 standing?

14 *MR. OGDEN:* Sure. Well, as to the abundance of the
15 mice, the Fish & Wildlife Service has to consider that they're
16 there. They have to consult on it. They acknowledge that they
17 could still be there. So they can't just say there are no
18 mice. We really are doing this out of --

19 *THE COURT:* They are not. I am not interpreting them
20 to say that. It's just that for purposes of Mr. Stafford, what
21 would -- how does his somewhat recent interest in the mouse
22 amount to standing?

23 *MR. OGDEN:* He has been familiar of mice in general in
24 the food chain. His work with his ex-brother-in-law indicates
25 that he has been aware of mice in particular. Now, perhaps he

1 has not been aware of Preble's Meadow Jumping Mice until his
2 most recent engagement in this whole other matter he was
3 involved in. And in this matter that doesn't exclude the fact
4 he is aware of the mice as part of the food chain.

5 He has a lifelong interest in birds and animals. He
6 has been around the refuge. He says he wants to see owls and
7 other birds and so forth. He has demonstrated that he is
8 interested in animals, in animals around the refuge.

9 And as to the question of whether he has actually seen
10 a mouse is not relevant because I am interested in and done
11 tons of work in sea turtles. Never seen them, but it doesn't
12 mean I don't have an interest in them that is more than casual.
13 Also we have to look at the fact that this is a place that has
14 been closed until very recently, just limited public tours, and
15 now they are talking about opening it to full access. So it
16 really hasn't been -- it's not like a national park.

17 *THE COURT:* It's not like he's had the opportunity to
18 look for it.

19 *MR. OGDEN:* Exactly. And to say he doesn't have the
20 intent to come back, I think it's perfectly reasonable to say,
21 well, I want to see if it's safe before I go back to do some
22 wildlife viewing.

23 So I think given the unusual facts of this case, which
24 in my experience are unique in standing questions, it's like
25 have you ever been to a place you are not allowed to go? And

1 would you go back there if maybe it's safe and you don't get
2 plutonium poisoning? I think he went pretty far in saying,
3 yeah, I have looked all around it and I would go back if they
4 made it safe.

5 And I think at this stage in the proceeding to throw
6 out the ESA claim on standing would be premature. The
7 defendants can still bring a 12(b) motion if they think that is
8 indeed a basis for excluding the ESA claims and we can fully
9 brief these issues. But to do it in the context of this early
10 stage of the proceeding I think is premature.

11 *THE COURT:* Well, standing being jurisdictional, it
12 can never be premature, can it?

13 *MR. OGDEN:* I believe since it is jurisdictional and
14 will go to whether the claim will survive or not, I think it
15 warrants a more careful look than is being given in this
16 proceeding which is focused really on other matters.

17 *THE COURT:* Judge Krieger just had one involving the
18 Colorado sheriffs and it involved firearm regulations, but she
19 went through the whole thing and then the 10th Circuit said no
20 standing.

21 *MR. OGDEN:* Well, and that is certainly something we
22 can certainly look at if we have the opportunity to really look
23 through the case law and come up with some -- a full briefing
24 on it. And if the case is dismissed, the preliminary
25 injunction as to the ESA claims would be dissolve if it's

1 granted, and we can go ahead and they would not be harmed by
2 that.

3 *THE COURT:* All right.

4 *MR. OGDEN:* But I would ask the judge to look at the
5 unusual circumstances of the access, no historical access,
6 unknown future access, unknown safety issues in considering the
7 standing arguments that defendants have advanced.

8 *THE COURT:* And then on issues other than standing, go
9 ahead.

10 *MR. OGDEN:* Certainly. I just want to skip to the
11 irreparable harm issue. Mr. Stafford did identify the
12 irreparable harm to his interests. His interests are seeing
13 birds and animals and potentially the mice on the refuge. And
14 he is concerned that if open, add the critical habitat, which I
15 want to point out the critical habitat has never been open to
16 the public before, so we are talking about going from zero
17 public access or very limited on these tours to now opening it
18 to the public. So this is a big change for this critical
19 habitat.

20 *THE COURT:* But the critical habitat under the EAS
21 isn't open to the public, is it? I mean, theoretically you
22 could have it on.

23 *MR. OGDEN:* I know some of the trails go right through
24 it. Many of the trails are right next to it. If Your Honor
25 would like, I can show you an exhibit.

1 *THE COURT:* Other than trail crossings, I guess.

2 *MR. OGDEN:* Some of the trails actually go right along
3 some of the spots.

4 *THE COURT:* Go ahead. What exhibit?

5 *MR. OGDEN:* First of all, critical habitat was
6 designated in 2010 after the original Section 7 consultation of
7 the original 2004 CCP refuge management plan. Now, when it was
8 designated, all the area outlined in red is now designated
9 critical habitat. And specifically, the trails -- I will put
10 up the Exhibit 1 in a second, but the trails are going to run
11 through some of this habitat down to the south, but up in the
12 top northwest corner the trails run in and out of the critical
13 habitat of the Rock Creek area. So the critical habitat is
14 much more extensive here on this map than it shows on
15 Exhibit 2, which we'll put up in a second just to show you the
16 trail configuration.

17 *THE COURT:* I am looking at it right now.

18 *MR. OGDEN:* So you can see on that map, it's kind of
19 hard to see the critical habitat because it's a little light
20 hatched area, but you can see especially down in here and up in
21 here there is a substantial amount of critical habitat that's
22 being affected by this particular action opening these areas to
23 public access.

24 So there is a likelihood of harm from the disturbance
25 the access may cause. The critical habitat, the purpose of it

1 is to promote the survival and recovery of the species. If you
2 now have people traipsing through critical habitat where
3 heretofore there had been no human presence except really the
4 refuge workers, so there is a substantial likelihood of harm
5 from the opening from zero public use to open public use.

6 Mr. Stafford did provide evidence that the concern
7 that he sees and irreparable harm he sees is from the
8 disturbance of the public access. This doesn't even include
9 the trail crossings that are going to be built or rebuilt or
10 whatever they are going to do because they are kicking that
11 down the road to a future time.

12 So critical habitat is actually more extensive and
13 more likely to be affected than the defendants are willing to
14 acknowledge. So that's the irreparable harm element I wanted
15 to hit.

16 Lastly, we have a question about really are any of
17 these claims still active. So our reinitiation claim, which
18 was our sixth claim in the complaint, talks about reinitiation
19 of consultation under 50 C.F.R. 402.16(d). That regulation,
20 Fish & Wildlife Service's own regulation, requires, mandates
21 the reinitiation of consultation when critical habitat is
22 designated. So therefore, at that time Fish & Wildlife Service
23 should have, was required to, reinitiate the 2004 CCP, Section
24 7 consultation.

25 They now are saying, their best arguments are

1 saying -- and it's acknowledged that that was never done. So
2 they are doing two things. One, of course, is they are
3 attacking our standing to bring the ESA claim in the first
4 place. Their second argument is they are trying to cobble
5 together these various project-level consultations and say
6 that's as good as what a reinitiation consultation would have
7 done.

8 However, reading the purpose of reinitiating
9 consultation when we have a new species listed in critical
10 habitat designated is that you take a look at all of the
11 potential past, present and future impacts to the critical
12 habitat. That is especially important in the consultations for
13 the management plan, which is what the CCP is. So all these
14 consultations afterwards, none of them have ever really looked
15 at the projects that were done before, baseline, what's
16 happening not only with that specific project, but also what's
17 under consultation for the future.

18 This EAS they have, it shows no consideration. The
19 fact that they have initiated a consultation for these future
20 trail crossings, that's not addressed in the EIS other than
21 saying we're going to look at it later.

22 So there has never been a programmatic analysis of all
23 CCP-planned impacts on the critical habitat. And the piecemeal
24 approach advanced by the defendants is inadequate under the
25 *Cottonwood Environmental Center* case in the Ninth Circuit. We

1 cited to that case on Page 10 of our reply brief, ECF-22.

2 *THE COURT:* And the response of the defendants in
3 argument made today is, yeah, it's in your reply brief, but
4 that goes beyond the scope of the complaint. Where is it in
5 the complaint because you can't expand the scope of the
6 complaint.

7 *MR. OGDEN:* It doesn't expand the scope of the
8 complaint.

9 *THE COURT:* Why not?

10 *MR. OGDEN:* It says they did not reinitiate
11 consultation upon the designation of critical habitat. That is
12 the ongoing 2004 CCP Section 7 consultation. They were, they,
13 the Fish & Wildlife Service, were required under their own
14 regulation to reinitiate consultation. It's a clear violation.

15 *THE COURT:* Well, isn't it a consultation that they --
16 that took place the informal -- are they claiming that it's the
17 informal consultation?

18 *MR. OGDEN:* You have to reinitiate informal or formal
19 consultations, and we cite cases in our brief to that effect.

20 *THE COURT:* And what they did, why is it inadequate?
21 Why is that informal consultation inadequate?

22 *MR. OGDEN:* Which informal consultation are you --

23 *THE COURT:* Well, they talk about the fact that they
24 did do a consultation. It was an informal consultation.

25 *MR. OGDEN:* The 2018 EAS Section 7 consultation?

1 *THE COURT:* Right.

2 *MR. OGDEN:* That's a project-level consultation. It
3 does not satisfy what would have been done with the
4 reinitiation of the 2004 refuge plan consultation because their
5 consultation does not analyze the past, present and future
6 effects.

7 And if you look at Section 50 C.F.R. 402.02 under the
8 definitions of what constitutes effects of the action, it talks
9 about different effects, and it also talks about what should be
10 in the environmental baseline, what is interrelated, what is
11 interdependent and so forth. So all of these things have to be
12 looked at as to the critical habitat. The way they are
13 managing the critical habitat now is they are just doing these
14 project-level analyses. Nothing was ever done to say what are
15 all these things doing to the critical habitat.

16 *THE COURT:* Anything else, Mr. Ogden?

17 *MR. OGDEN:* Unless you have any specific questions, I
18 think that will be it.

19 *THE COURT:* Thank you, Mr. Ogden.

20 *MR. OGDEN:* Thank you for your questions.

21 *THE COURT:* Mr. Weiner, did you have some more
22 rebuttal?

23 *MR. WEINER:* We don't.

24 *THE COURT:* I am going to give just a few minutes to
25 the defendants because a lot of what Mr. Ogden just said wasn't

1 really in the initial argument on behalf of plaintiffs.

2 MS. LAWRENCE-HAMMER: Thank you very much for that,
3 Your Honor.

4 I am going to stop where you left off. I think that
5 will be easiest in talking about this claim about critical
6 habitat being designated in 2010 and a need to reinitiate
7 consultation.

8 Your Honor hit on what I think is the most important
9 point, is that this consultation has, in fact, occurred. Now,
10 plaintiffs say, well, this was a project-level consultation?
11 This 2018 consultation didn't consider all the critical habitat
12 on the refuge. But you heard from Mr. Lucas and you can see in
13 the document itself that we submit as Exhibit 3 to our
14 opposition that it did.

15 That consultation looked in totality at the
16 designation of critical habitat on the refuge and the actions
17 planned and assessed their potential impact. And they really
18 did that even though they did not have to, Your Honor, because
19 we are not in the Ninth Circuit. We are in the 10th Circuit,
20 as you know. And the governing law is not *Cottonwood*. It's
21 *U.S. v. Forsgren*. And I mentioned that in my opening, Your
22 Honor.

23 *Forsgren* looked at a very, very similar situation to
24 that. Here it was the designation of the lynx was designated
25 as a species. There were very similar forest management plans

1 in place. There had been, like the CCP, there was a forest
2 management plan in place already that laid out a plan for the
3 forest. The lynx was designated. And plaintiff said, oh, you
4 need to go back and consult on this plan again.

5 And the 10th Circuit said no, you only do that when
6 there is an actual agency action implementing something
7 contained within the plan. And that's exactly what the Service
8 did here, Your Honor. There is a split on this between the 9th
9 and the 10th, and the 10th is what governs here. You will
10 notice in plaintiffs' briefing they cite no cases from the 10th
11 Circuit that support their position.

12 Backing up to irreparable harm, you heard from
13 plaintiffs' counsel that right now there is zero use on
14 critical habitat in the public. That's not accurate. As you
15 heard from Mr. Lucas, they have public tours that are on the
16 refuge that do sometimes go through critical habitat. So it is
17 a limited use indeed than would be when the trails were open,
18 but it is occurring, and the Service fully considered the full
19 extent of use of these trails on critical habitat. And there
20 is some discussion about what's the overlap here.

21 You heard a little bit from Mr. Lucas on this in his
22 testimony, but there is really three places where there is
23 overlap here between critical habitat and the trails that are
24 proposed. It overlaps on the southeast crossing of Woman
25 Creek. That's an existing culvert already, the north/south

1 crossing of Woman Creek, and it skirts Woman Creek as well, so
2 it's really on the periphery of these critical habitat
3 designations.

4 And you'll see in the Exhibit 3, the actual document
5 summarizing the consultation, that although this habitat is
6 designated critical habitat, it's not really suitable for the
7 mouse. The mouse needs to live near water and on like the
8 banks, the riparian areas around the water.

9 But when you draw a critical habitat designation, it's
10 done at a broad scale. When you get down and look on the land,
11 as the Fish & Wildlife Service did, and look at where the
12 actual trails are and the habitat is designated, it's not
13 habitat that a mouse -- is suitable for a mouse. It's a trail,
14 right? It's not like the creek itself or the banks thereof.
15 And that's all laid out in Exhibit 3.

16 And again, I am saying all this, Your Honor, it really
17 can only be considered in the context of irreparable harm
18 because plaintiffs in no way brought a claim challenging the
19 sufficiency of this consultation and its conclusion that it's
20 not likely to adversely effect the Preble's Meadow Jumping
21 Mouse. That's not part of their complaint. They didn't even
22 acknowledge that this 2018 consultation occurred.

23 Another point that was brought out was this idea that,
24 well, there are these future crossings that haven't been
25 considered, Your Honor, you know, and they are saying that it's

1 going to adversely affect the jumping mouse. That's not true.
2 These contemplated future crossings that have not even been set
3 yet, those are going to be subject to additional Endangered
4 Species Act Section 7 consultation. In fact, those
5 consultations are ongoing.

6 Those future crossings are not in the 2018 EIS. They
7 are not part of this case and they are going to receive a full
8 consideration. So the Service's current conclusion that the
9 actions in the 2018 EAS are not likely to adversely affect the
10 Preble's Meadow Jumping Mouse does not reach broadly into the
11 future and say these future actions won't have potential
12 impact. That's an analysis that's ongoing.

13 Going lastly to Mr. Stafford's testimony, just to
14 clarify, his testimony was that he had not looked for a mouse
15 anywhere. And I acknowledge that the refuge only recently has
16 become open and there are limits in your access to that, but he
17 has not tried to look for a mouse outside the refuge anywhere
18 else in the Front Range that would indicate he has an interest
19 in trying to find them.

20 He did say if it was safe, if it was safe, he still
21 would not go to try to find the jumping mouse. So this idea of
22 we are saying he should have been to a place that was closed
23 and now he has to go to a place that he is afraid of, it's not
24 really what the testimony brought out, Your Honor.

25 Those are all my points unless there was anything else

1 you wanted to ask me.

2 *THE COURT:* No, nothing else.

3 *MS. LAWRENCE-HAMMER:* Thank you again for the
4 opportunity.

5 *THE COURT:* Then we are all done, and the Court will
6 take the motion under advisement and issue a written opinion.
7 We will be in recess.

8 (Recess at 4:30 p.m.)

9 INDEX

10 WITNESSES

11 John Barton

12 Direct Examination By Mr. Weiner 28

13 Cross-examination By Ms. Held 38

14 Harvey Nichols

15 Cross-examination By Ms. Held 56

16 Redirect Examination By Mr. Weiner 60

17 Michael E. Ketterer

18 Direct Examination By Mr. Weiner 61

19 Cross-examination By Ms. Held 73

20 Timothy Mousseau

21 Direct Examination By Mr. Weiner 76

22 Cross-examination By Ms. Held 84

23 Elizabeth Panzer

24 Direct Examination By Ms. Cording 90

25

INDEX (Continued)

1					
2	Jon Lipsky				
3	Direct Examination By Mr. Weiner				94
4	Cross-examination By Ms. Held				100
5	Redirect Examination By Mr. Weiner				101
6	Randal Stafford				
7	Direct Examination By Mr. Ogden				103
8	Cross-examination By Ms. Lawrence-Hammer				107
9	Redirect Examination By Mr. Ogden				113
10	David Lucas				
11	Direct Examination By Ms. Held				114
12	Direct Examination By Ms. Lawrence-Hammer				123
13	Cross-examination By Mr. Weiner				129
14	Redirect Examination By Ms. Held				143

EXHIBITS

16	Exhibit	Offered	Received	Refused	Reserved	Withdrawn
17	14		72			
18	15		143			
19	16		143			

REPORTER'S CERTIFICATE

21 I certify that the foregoing is a correct transcript from
 22 the record of proceedings in the above-entitled matter. Dated
 23 at Denver, Colorado, this 9th day of August, 2018.

24

25

S/Janet M. Coppock