

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

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

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE; JAMES KURTH, in his official
capacity as Acting Director of the United States
Fish and Wildlife Service; and RYAN ZINKE, in
his official capacity as Secretary of the Interior,

Defendants.

Case No. 1:18-cv-01017-PAB

**FEDERAL DEFENDANTS' NOTICE
OF FILING OF WITNESS LIST**

Pursuant to the Court's June 12, 2018 Minute Order, the Federal Defendants hereby file their witness list, which includes the estimate of time required for cross-examining Plaintiffs' identified witnesses and conducting the direct examination of Federal Defendants' witness.

The Federal Defendants note that Plaintiffs' claims are governed by the Administrative Procedure Act's ("APA") standard and scope of review. *See WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 682 (10th Cir. 2015) (applying APA to review National Environmental Policy Act and Endangered Species Act claims). Under the APA, the Court must determine whether Defendants' actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). In so doing, the Court's analysis is limited to the Administrative Record that was before the agency when it took the actions challenged. *Id.* The U.S. Fish and Wildlife Service is currently compiling the Administrative Record

for this case, and intend to lodge the Administrative Record by June 26, 2018

Therefore, at any hearing regarding Plaintiffs' motion for a preliminary injunction, extra-record testimony cannot be offered to address Plaintiffs' likelihood of success on the merits of their claims. *See, e.g., Coal. of Concerned Citizens to Makeartsmart v. Fed. Transit Admin. of U.S. Dep't of Transportation*, No. CV 16-252 KG/KBM, 2016 WL 9150616, at *3 (D.N.M. July 15, 2016) (refusing to consider extra-record declarations in deciding whether plaintiffs were likely to succeed on the merits of their APA claims). Accordingly, the Federal Defendants intend to file a motion *in limine* prior to the hearing on the motion for preliminary injunction asking the Court to exclude expert testimony from Plaintiffs' witnesses as extra-record evidence that the Court should not consider in its analysis of whether a preliminary injunction is appropriate.

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/s/ Jessica M. Held

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CERTIFICATE OF SERVICE

I certify that on June 19, 2018, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon all Parties enrolled to receive such notice.

/s/ Jessica M. Held

Jessica M. Held

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

JUDGE PHILIP A. BRIMMER

Case No. Civil Action No. 18-cv-01017-PAB

Date: June 19, 2018

Case Title: Rocky Mountain Peace & Justice Center et al. v. United States Fish and
Wild Service et al.

DEFENDANTS' WITNESS LIST

<u>WITNESS</u>	<u>ESTIMATED LENGTH OF TESTIMONY</u>
1. David C. Lucas	30 minutes
	Mr. Lucas is generally available to testify in June and July.

DEFENDANTS' CROSS-EXAMINATION OF PLAINTIFFS' WITNESSES

<u>WITNESS</u>	<u>ESTIMATED LENGTH OF CROSS-EXAMINATION IF WITNESS IS PERMITTED TO TESTIFY</u>
1. Dr. Harvey Nichols	20 minutes
2. Dr. Mark Johnson	20 minutes
3. Dr. W. Gale Biggs	20 minutes
4. Dr. Marco Kaltofen	This witness did not provide a declaration in support of Plaintiffs' motion for a preliminary injunction, and was disclosed for the first time on Plaintiffs' witness list. Plaintiffs have not disclosed the expected scope of this witness's testimony. Thus, Defendants are not able to estimate the length of cross-examination. ¹
5. Dr. Michael Ketterer	This witness did not provide a declaration in support of Plaintiffs' motion for a preliminary injunction, and was disclosed

¹ Plaintiffs cite to a report entitled "Field investigation and laboratory report" by Dr. Kaltofen as Ex. 8 to the Motion for Preliminary Injunction (ECF No. 7).

for the first time on Plaintiffs' witness list. Plaintiffs have not disclosed the expected scope of this witness's testimony. Thus, Defendants are not able to estimate the length of cross-examination.

6. Toxicology expert

This witness did not provide a declaration in support of Plaintiffs' motion for a preliminary injunction, and was disclosed for the first time on Plaintiffs' witness list. Plaintiffs have not disclosed the expected scope of this witness's testimony. Thus, Defendants are not able to estimate the length of cross-examination.

7. Jon Lipsky

20 minutes

8. Elizabeth Panzer

This witness did not provide a declaration in support of Plaintiffs' motion for a preliminary injunction, and was disclosed for the first time on Plaintiffs' witness list. Plaintiffs have not disclosed the expected scope of this witness's testimony. Thus, Defendants are not able to estimate the length of cross-examination.

9. John Barton

This witness did not provide a declaration in support of Plaintiffs' motion for a preliminary injunction, and was disclosed for the first time on Plaintiffs' witness list. Plaintiffs have not disclosed the expected scope of this witness's testimony. Thus, Defendants are not able to estimate the length of cross-examination.

10. Randall Stafford

15 minutes

Federal Defendants reserve the right to call additional rebuttal witnesses to respond to evidence presented by Plaintiffs for the first time at the Hearing.