

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

Civil Action No. 1:23-cv-3294 RMR

COLORADO CONSERVATION ALLIANCE,
a Colorado Nonprofit Corporation,
CHRISTOPHER JURNEY,
and MICHAEL CLARK,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
COLORADO PARKS AND WILDLIFE COMMISSION,
COLORADO DIVISION OF PARKS AND WILDLIFE,
DAN GIBBS, in his official capacity as Executive Director
of the Colorado DEPARTMENT OF NATURAL RESOURCES,
and JEFF DAVIS, in his official capacity as Director of
COLORADO DIVISION OF PARKS AND WILDLIFE.

Respondents.

and

DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL
DIVERSITY, HUMANE SOCIETY OF THE UNITED STATES,
WESTERN WATERSHEDS PROJECT AND WILDEARTH
GUARDIANS,

Respondent Intervenors.

**PETITIONERS' MOTION TO TAKE JUDICIAL NOTICE AND MEMORANDUM IN
SUPPORT**

Petitioners Colorado Conservation Alliance, Inc. ("CCA"), Christopher Journey, and
Michael Clark (collectively the "Petitioners") hereby notify the Court that they bring this

Motion to ask the Court to take judicial notice of the Colorado Gray Wolf Annual Report published by Colorado Parks and Wildlife (“Annual Report”), and specifically, of the fact provided in the Annual Report that USFWS provided Colorado Parks and Wildlife with a Wolf Compensation and Conflict Mitigation Grant in the amount of \$109,000.00. Pet’rs. Appx. at 4-15; 10 (Annual Report). Counsel for the Petitioners discovered this information on November 14, 2024. Pet’rs. Appx. at 2, ¶ 4 (Declaration of Gary R. Leistico (Nov. 21, 2024) (“Leistico Decl.”)). The Annual Report was originally released on September 4, 2024. *Id.* Counsel for the Petitioners met and conferred with opposing counsel regarding this Motion via email on November 15, 2024. *Id.* at ¶ 5. All Respondents and Respondent-Intervenors oppose this Motion.

ARGUMENT

I. THIS COURT SHOULD TAKE JUDICIAL NOTICE OF THE ANNUAL REPORT AND THE FACT THEREIN PROVIDING THAT USFWS PROVIDED CPW WITH A WOLF COMPENSATION AND CONFLICT MITIGATION GRANT IN THE AMOUNT OF \$109,000.00.

Petitioners respectfully request this Court to take judicial notice of the Annual Report and the fact provided therein that USFWS provided Colorado Parks and Wildlife with a \$109,000.00 Wolf Compensation and Conflict Mitigation Grant. Pet’rs. Appx. at 4-15; 10 (Annual Report). Under Federal Rule of Evidence 201, “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Additionally, “[t]he court: (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary

information.” Fed. R. Evid. 201(c). Finally, “[t]he court may take judicial notice at any stage of the proceeding.” Fed. R. Evid. 201(d).

The purpose of judicial notice is to permit a Court to make a finding of fact in the absence of record evidence. See *United States v. Boyd*, 289 F.3d 1254, 1258 (10th Cir. 2002); see also *Horton v. Davis*, No. 13-cv-01089-REB-NYW, 2015 WL 7294815 at *1 (D. Colo. Nov. 19, 2015). “The effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and, in effect, directing a verdict against him as to the fact noticed.” *Boyd*, 289 F.3d at 1258 (quoting *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 074, 1083 (7th Cir. 1997)). Federal Rule of Evidence 201 applies to adjudicative facts, not legislative facts. See *U.S. v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998). “Adjudicative facts are simply the facts of the particular case,” while legislative facts “have relevance to legal reasoning and the lawmaking process” and “are established truths, facts or pronouncements that do not change from case to case but apply universally.” *Id.* (additional citations omitted). Accordingly, “[t]he contents of an administrative agency’s publicly available files...traditionally qualify for judicial notice, even when the truthfulness of the documents on file is another matter.” *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012) (citing *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006).

Additionally, a request for a Court to take judicial notice is not precluded in cases where review is generally limited to an administrative record. For instance, in *American Bankers Ass’n v. National Credit Union Admin.*, the American Bankers Association

“ABA”) sued the National Credit Union Administration (“NCUA”) for approving an expanded community charter which the ABA alleged violated NCUA’s own regulations. 347 F.Supp.2d 1061 (D. UT 2004). In relevant part, the ABA requested the Court to take judicial notice of certain facts not included in the administrative record. *Id.* at 1065-66. NCUA argued that the Federal Rules of Evidence did not apply to the case because the court must treat a review of administrative action as an appeal, and that ABA was using Fed. R. Evid. 201 to “circumvent the rule requiring review in administrative appeal cases to be based on the administrative record developed by the agency.” *Id.* at 1066.

The Court disagreed. First, it explained that the Tenth Circuit has in numerous instances taken judicial notice on appeal, and therefore Fed. R. Evid. 201 was applicable to the case. *Id.* Second, the Court explained that it could determine whether judicial notice was appropriate under the facts of the case by examining—in addition to judicial notice criteria—the criteria for supplementing an administrative record. *Id.* The Court pointed out that “[s]upplementation of the administrative record may only be allowed if the party can establish that: ‘(1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; or (5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong.’” *Id.* (quoting *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1028 & n.1 (10th Cir. 2001), *cert denied* 534 U.S. 1127

(2002)). The Court ultimately determined that it would take judicial notice of all facts presented by the ABA. *Id.* at 1066-68 (“[w]hile the evidence of a new MSA would not directly indicate whether a determination was right or wrong, it is clearly relevant and may weigh heavily on a finding that the matter should be remanded to the NCUA for further review.”; “The court concludes that all of the materials Plaintiffs seek to introduce are typical of materials of which a court may properly take judicial notice. The sources are reliable and relevant to the decision-making process employed by the NCUA. The content of the materials are not such that they are in dispute. The fact that the materials may dispute NCUA findings or demonstrate that the decision-making process was flawed does not make them unworthy of judicial notice. Rather, such characteristics make them appropriate for supplementation of the administrative record.”).

In this case, taking judicial notice of the Annual Report and the fact provided therein that USFWS provided Colorado Parks and Wildlife with a \$109,000.00 Wolf Compensation and Conflict Mitigation Grant is appropriate. First, this is a report created and published by Respondents in this case. The accuracy of the report and the information therein therefore cannot reasonably be questioned in this matter. Additionally, Petitioners are requesting the Court to take judicial notice of this document and associated information and Petitioners are providing the entirety of this information to the Court. Pet’rs. Appx. at 4-15; 10 (Annual Report); Fed. R. Evid. 201(c). There are no timing issues because this is a live controversy, and the Court may take judicial notice at any stage in the proceeding. Fed. R. Evid. 201(d). Petitioners are further requesting the Court to take judicial notice of adjudicative facts; not legislative facts. The Annual Report is

based on, and is relevant to, the facts of this specific case. It is not, for instance, a document founded on legal reasoning, the lawmaking process, nor is it information that would apply “universally.” *Wolny, supra*. The Annual Report is rather an agency’s public file, which traditionally qualifies for judicial notice. *Winzler, supra*.

Moreover, the Court is not precluded from taking judicial notice of the Annual Report and facts contained therein simply because this is a case based on review of an administrative record. *American Bankers Ass’n, supra*. This information further meets multiple criteria for supplementing the administrative record. Initially, the first criterion is “(1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials.” *Id.* Colorado’s Wolf Restoration and Management Plan provides that “[s]eparate funds for compensation and conflict minimization (nonlethal or lethal) can provide opportunities for specific kinds of funding sources. For example, federal livestock demonstration funds can be used for livestock loss compensation, and APHIS nonlethal funding as well as private donations could support conflict minimization.” FWS_0014087.¹

The record, however, does not contain information indicating how much money USFWS would provide to Colorado. An extremely significant part of this case is about how much federal involvement was present in Colorado’s wolf introduction efforts. See *e.g.*, ECF No. 73; *Zeppelin v. Federal Highway Admin.*, 293 F.Supp.3d 1267, 1284 (D. Colo. 2017) (if a non-federal entity accepts federal funding or participates in a federal

¹ This document is included in Petitioners’ recently filed appendix and is accessible to the Court. See ECF No. 86.

process, it may be subjected to federal requirements). The Annual Report provides a definitive amount that USFWS provided Colorado in the first year of its wolf introduction process, which is directly relevant to how much federal involvement was and is present in Colorado's wolf introduction overall. The record does not provide any specific amounts, and only notes that federal funding *may* be present. Accordingly, Respondents' decision to not conduct an analysis under the National Environmental Policy Act of 1969 ("NEPA")—and whether this decision is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with law under the Administrative Procedure Act—for wolf introduction cannot be explained or reviewed properly or adequately without this definitive information regarding federal funding. The first criterion is therefore satisfied.

Additionally, the fifth criterion is "(5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong." The Court in *American Bankers Ass'n* took judicial notice of information under this criterion even though the information "would not directly indicate whether a determination was right or wrong," because the information was "clearly relevant and may weigh heavily in a finding that the matter should be remanded to the NCUA for further review." *American Bankers Ass'n*, 347 F.Supp.2d at 1068. The same is true here. The evidence came into existence after Respondents introduced wolves in Colorado. Pet'rs. Appx. at 2, ¶ 4 (Leistico Decl.). As noted above, it is also directly relevant to whether Respondents should have undertaken an environmental analysis under NEPA for wolf introduction in Colorado because it is direct evidence of federal funding supporting wolf introduction. It may also weigh heavily in a finding that Respondents should have conducted an environmental analysis under

NEPA for wolf introduction in Colorado, and their decision not to therefore violates the APA. Accordingly, the fifth criterion is also satisfied. Petitioners respectfully request this Court to take judicial notice of the Annual Report and the fact provided therein that that USFWS provided Colorado Parks and Wildlife with a \$109,000.00 Wolf Compensation and Conflict Mitigation Grant.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to grant their Motion.

Respectfully submitted November 21, 2024.

/s/ Gary R. Leistico
Gary R. Leistico
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2024, I electronically served a true and correct copy of the foregoing PETITIONERS' MOTION TO TAKE JUDICIAL NOTICE by filing it with the Clerk of Court using the CM/ECF system.

/s/ Gary R. Leistico
Gary R. Leistico