IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 17-cv-01210-CMA

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.

ORDER DENYING PLAINTIFFS' MOTIONS FOR RECONSIDERATION AND LEAVE TO AMEND AND GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Plaintiffs' Motion for Reconsideration of Preliminary Injunction, and in the Alternative, Permission to Appeal a Controlling Question of Law Inherent in the Court's Order (Doc. # 18); Defendants' Motion to Dismiss (Doc. # 20); and Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. #29). For the reasons stated below, the Court denies Plaintiffs' Motions and grants Defendants' Motion to Dismiss.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs commenced this suit on May 17, 2017 (Doc. # 1), and amended their Complaint on June 5, 2017 (Doc. # 11), seeking

- a declaratory judgment that Defendant United States Fish and Wildlife Service (the "Service") violated the National Environmental Policy Act ("NEPA"), the National Wildlife Refuge Systems Administration Act ("NWRSAA"), and Executive Order ("EO") 11990, and
- injunctive relief precluding the Service from commencing the construction of trails and a multipurpose facility for visitors on the Rocky Flats National Wildlife Refuge ("Refuge").

On May 31, 2017, Plaintiffs filed a Motion for Preliminary Injunction, and If Necessary, Temporary Restraining Order (Doc. # 6) asking the Court to delay the building and construction of trails and a multipurpose facility until the Service complies with its obligations under the NEPA, the NWRSAA, and EO 11990 by analyzing the environmental risks of opening the Refuge, a "former nuclear weapons manufacturing site," to the public. (Doc. # 6 at 1.) On June 20, 2017, the Court issued a minute order finding that the motion was "premature" because "[t]he relevant administrative actions [were] not final and Defendants provide[d] information that construction [would] not begin on the project until 2018, at the earliest." (Doc. # 16.)

On June 28, 2017, Plaintiffs filed a Motion for Reconsideration of the Court's June 20 Order contending that "[i]t is clear error for the Court to find a NEPA violation premature as long as an agency is engaging in substantial design activities before the

requisite NEPA analysis has occurred." (Doc. # 18 at 2.) The Plaintiffs further contend it would be "clear error for the Court to permit the agency to accept and expend the final installments of approximately $7M from [the Department of Energy]" before September 30, 2017. (Doc. # 18 at 3.)

On July 17, 2017, Defendants moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. Defendants argue that Plaintiffs' allegations are not yet ripe for adjudication because the Service has not issued a final agency action regarding the building of trails and multipurpose facility on the Refuge. (Doc. # 20 at 2.) Plaintiffs contend their allegations are reviewable because Defendants' "commitments to contracts" to building a multipurpose facility and trails as well as "expenditure of funds" constitute final agency actions that are ripe for review. (Doc. # 28 at 1.)

On August 22, 2017, Plaintiffs moved for leave to file a Second Amended Complaint pursuant to Rule 15(a). (Doc. # 29.) Plaintiffs' proposed Second Amended Complaint seeks to add a fourth claim under the Endangered Species Act ("ESA").

II. MOTION FOR RECONSIDERATION

A. LAW

Plaintiffs move for reconsideration of the Court's denial of a preliminary injunction under Federal Rules of Civil Procedure 59(e) and 60(b). (Doc. # 18 at 1.) The Federal Rules do not expressly provide for motions for reconsideration. *Hatfield v. Bd. of Cty. Comm'rs for Converse Cty.*, 52 F.3d 858, 861 (10th Cir. 1995). Instead, the rules permit the filing of either a motion to alter or amend the judgment under Rule 59(e) or a motion

seeking relief from the judgment under Rule 60(b). *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). Determining which rule applies to a motion "depends essentially on the time a motion is served." *Id*. If the motion is filed within 10 days of the district court's entry of judgment, it is treated as a motion to alter or amend the judgment under Rule 59(e); however, if the motion is filed more than 10 days after entry of judgment, it is treated as a motion for relief from judgment under Rule 60(b). *See Computerized Thermal Imaging, Inc. v. Bloomberg L.P.*, 312 F.3d 1292, 1296 n.3 (10th Cir. 2002); *Campbell v. Bartlett*, 975 F.2d 1569, 1580 n.15 (10th Cir. 1992). The standard of review for a motion filed under either rule is an abuse of discretion. *Computerized Thermal Imaging*, 312 F.3d at 1296 n.3.

In this case, Plaintiffs' motion for reconsideration was filed within 10 days of the Court's judgment.[1] Therefore, the motion is to be construed as one pursuant to Rule 59(e). Relief under Rule 59(e) is reserved for extraordinary circumstances and should only be granted due to (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. *Figueroa v. Am. Bankers Ins. Co. of Fla.*, 517 F. Supp. 2d. 1266, 1270 (D. Colo. 2006) (citing *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)); *Kennett v. Bayada Home Health Care, Inc.*, No. 14-cv-02005, 2016 WL 374231, at *2 (D. Colo. Feb. 1, 2016). As such, a motion for reconsideration is appropriate where the court has "misapprehended the facts, a party's position, or the controlling law." *Kennett*, 2016 WL 374231, at *2.

[1] This Court's judgment was entered on June 20, 2017 (Doc. # 16) and Plaintiffs' Motion for Reconsideration was filed on June 29, 2017 (Doc. # 18).

However, such motions are "inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion." *Servants of Paraclete*, 204 F.3d at 1012.

B. ANALYSIS

Plaintiffs argue the Court erred in finding that Plaintiffs' Motion for Preliminary Injunction was premature and the relevant administrative actions were not final based on information that construction would not begin until 2018, at the earliest. Plaintiffs contend their motion was not premature because the Service failed to perform the requisite environmental analyses before engaging in certain planning activities, such as entering into an agreement with the U.S. Department of Energy that authorizes the "design, construction, and operation" of a multipurpose facility and trails" and receiving and expending funds. (Doc. # 18 at 2–3.)

These contentions reargue the same issues that Plaintiffs previously raised and the Court thoroughly considered. (Doc. # 6-1 at 6–10.) Plaintiffs do not provide new evidence or legal authority that was previously unavailable; they merely rehash old arguments. Plaintiffs have failed to meet their burden under Rule 59(e). Accordingly, the Court denies Plaintiffs' Motion for Reconsideration.

III. REQUEST FOR CERTIFICATION

A. LAW

Plaintiffs request that the Court certify the question of ripeness of their injunction request to the Tenth Circuit for its review pursuant to 28 U.S.C. § 1292(b). Generally, appellate jurisdiction is limited to appeals from final decision of the district courts. *Kearns v. Shillinger*, 823 F.2d 399, 400 (10th Cir. 1987). However, 28 U.S.C. § 1292(b) permits a district court to certify certain orders for interlocutory appeal. Specifically, 28 U.S.C. § 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a **controlling question of law** as to which there is **substantial ground for difference of opinion** and that **an immediate appeal from the order may materially advance the ultimate termination of the litigation**, he shall so state in writing in such order. . . ."

28 U.S.C. § 1292(b) (emphasis added).

The Tenth Circuit and the U.S. Supreme Court disfavor interlocutory appeals, and it is entirely within this Court's discretion to certify an order for appeal under § 1292(b). *See Carpenter v. Boeing Co.*, 456 F.3d 1183, 1189 (10th Cir. 2006) ("Interlocutory appeals have long been disfavored in the law, and properly so. They disrupt and delay the proceedings below."); *State of Utah v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994) ("[T]he enlargement of the right to appeal should be limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action."); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) ("Unless a litigant can show that an interlocutory order of the district court might have a 'serious, perhaps

irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.").

B. ANALYSIS

An interlocutory appeal is not appropriate in this case. First, the phrase "question of law" used in 28 U.S.C. § 1292(b) does not refer to a particular application of facts to the law, but rather "has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Branzan Alt. Inv. Fund, LLLP v. Bank of N.Y. Mellon Tr. Co., N.A.*, No. 14-cv-02513, 2015 WL 6859996, at *1 (D. Colo. Nov. 9, 2015) (quoting *Cadorna v. City and Cty. of Denver, Colo.*, No. 04-cv-01067, 2007 WL 3216579, at *1 (D. Colo. Oct. 25, 2007)). Because such questions typically involve law that is unsettled, the Court should certify questions only when it is unsure of what the law is and not when there is merely a dispute as to how the law should be applied in a given situation. *See id*. The doctrine of ripeness is well-settled, and the application of that doctrine to these circumstances is not "difficult, novel, or a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions." *In re Grand Jury Proceedings June 1991*, 767 F. Supp. 222, 226 (D. Colo. 1991). The Court applied well-settled law to the specific facts of this case and reached a conclusion. The mere fact that Plaintiffs disagree with the Court's ruling does not create a substantial ground for certification.

Moreover, granting an interlocutory appeal in this instance will not materially advance the ultimate termination of the litigation but will, instead, result in protracted

litigation that would require extended and expensive proceedings. *Branzan Alt. Inv. Fund*, 2015 WL 6859996, at *2 ("This is not an extraordinary instance in which extended and expensive proceedings probably can be avoided by certifying an interlocutory appeal.") (internal quotations omitted). The Court has already found that the relevant administrative actions are not final because construction on the multipurpose facility and trails will not begin until 2018, at the earliest. Because granting an interlocutory appeal will delay, rather than expedite the ultimate outcome of the trial, the Court denies Plaintiffs' request for certification.

IV. MOTION TO DISMISS

A. LAW

1. Standard of Review

A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction takes one of two forms: a facial attack and a factual attack. *See Cunningham v. Univ. of N.M. Bd. of Regents*, 531 Fed. Appx. 909, 914 (10th Cir. 2013). On one hand, a facial attack looks only to the factual allegations of the complaint in challenging the court's jurisdiction. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a facial attack, the court must accept the allegations in the complaint as true. *Id*. On the other hand, a factual attack goes beyond the allegations contained in the complaint and challenges the facts upon which subject-matter jurisdiction depends. *Id*. at 1003. In reviewing a factual attack, the district court "may not presume the truthfulness of the complaint's factual allegations" and has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed

jurisdictional facts under Rule 12(b)(1)." *Id*. A court's reference to evidence outside the complaint does not convert a Rule 12(b)(1) motion into Rule 56 motion. *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987) ("Unlike the strict limitations under 12(b)(6) against considering matters outside the complaint, a 12(b)(1) motion is considered a 'speaking motion' and can include references to evidence extraneous to the complaint without converting it to a Rule 56 motion.").

In rare circumstances, however, a Rule 12(b)(1) motion to dismiss must be converted into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. *Holt*, 46 F.3d at 1003. The jurisdictional question is intertwined with the merits of the case if subject-matter jurisdiction is dependent on the same statute that provides the substantive claim in the case. *See Wheeler*, 825 F.2d at 259; *Kerber v. QWEST Pension Plan*, No. 05-cv-00478, 2006 WL 3093125, at *3 (D. Colo. Oct. 5, 2006) (citing *Holt*, 46 F.3d at 1003). In other words, the central focus is "whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000) (citing *Wheeler*, 825 F.2d at 259).

2. Ripeness

The issue of whether a claim is ripe for review bears on a court's subject-matter jurisdiction under the case or controversy clause of Article III of the United States Constitution. *Bateman v. City of W. Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996). Ripeness is a question of law and requires the court to evaluate "the fitness of the

issues for judicial decision" and "the hardship to the parties of withholding court consideration." *U.S. West, Inc. v. Tristani*, 182 F.3d 1202, 1208 (10th Cir. 1999). The doctrine of ripeness is all about timing and is intended to discourage premature adjudication of abstract disagreements. *Zbegner v. Allied Prop. & Cas. Ins. Co.*, 455 Fed. Appx. 820, 822 (10th Cir. 2011).

The doctrine prevents courts "from entangling themselves in abstract disagreements over administrative policies, and also … protect[s] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Los Alamos Study Grp. v. U.S. Dep't of Energy.*, 692 F.3d 1057, 1064 (10th Cir. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A claim is not ripe if it "involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Texas v. United States*, 523 U.S. 296, 300 (1998). The burden is on the plaintiff to provide evidence to establish that the issues are ripe. *Park Lake Res. v. U.S. Dep't of Agric.*, 197 F.3d 448, 450 (10th Cir. 1999).

One set of factors that courts use to determine ripeness is: (1) whether the issues involved are purely legal, (2) whether the agency's action is final, (3) whether the action has or will have an immediate impact on the petitioner, and (4) whether resolution of the issue will assist the agency in effect enforcement and administration. *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1231–32 (10th Cir. 2005). The absence of

a final agency action is dispositive because the Administrative Procedure Act ("APA") limits a court's review to final agency actions and actions made reviewable by statute. 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093–94 (10th Cir. 2004) (whether an issue is fit for review depends on whether the plaintiff challenges a final agency action).

An agency's action is final when (1) the action "mark[s] the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature" and (2) the action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations and internal quotation marks omitted); *see Los Alamos Study Grp.*, 692 F.3d at 1065 (quoting *Bennett*).

B. ANALYSIS

1. Standard of Review

Defendants' Rule 12(b)(1) motion raises a factual challenge to the existence of subject-matter jurisdiction because the challenge goes beyond the allegations alleged within the four corners of Plaintiffs' Amended Complaint. For instance, Defendants contend the Court lacks jurisdiction under the APA because the Service has not yet issued a final agency action subject to review as required by § 704 of the APA. Plaintiffs' Amended Complaint does not specifically address the § 704 requirements, nor does it allege facts to support its contention that there exists a final agency action.

Plaintiffs' arguments supporting ripeness are not introduced until Plaintiffs' response to Defendant's motion (Doc. # 28). Therefore, the Court need not presume the truthfulness of the Amended Complaint's factual allegations and has discretion to consider evidence outside the Amended Complaint.

With respect to the issue of conversion, the Court finds that converting the Rule 12(b)(1) motion into a Rule 56 motion would be improper because the jurisdictional question and the merits of the case are not intertwined. Specifically, the jurisdictional issue—whether Plaintiffs' claims that the Service failed to comply with the NEPA, the NWRSAA, and EO 11990 are ripe—does not require the Court to decide the substantive aspects of Plaintiffs' claims.

2. Ripeness

Plaintiffs assert that their claims are ripe because the Service made a final agency action by (1) entering into a Memorandum of Understanding ("MOU") as well as an Interagency Agreement ("IA") with the Department of Energy; (2) entering into a $524,000 design contract with MWH Americas, Inc.; and (3) having already accepted, received, and expended funds to support the building of the multipurpose facility and trails. The Court disagrees and finds that these actions do not constitute final agency actions subject to review under the APA at this time.

First, the MOA and the IA do not constitute final agency actions. The MOA sets forth a framework by which the parties will be able "to provide [the Refuge with] a Multipurpose Building, to include design, construction, and operation of the facility," (Doc. # 28-3 at 1), and the IA establishes a ceiling of funds that could be expended,

(Doc. # 28-4 at 10) ("The [IA] ceiling is established at $8,315,000.00."). None of the provisions in the MOA or IA bind or instruct the Service to construct a multipurpose facility. Further, the MOA divides the responsibilities of the parties into two Phases. In Phase I, the Service is required to provide "a conceptual design of the building and displays, cost estimate . . . , and schedule for construction." (Doc. # 28-3 at 2.) In "Phase II Construction," the Service is required to provide the Department of Energy for approval "a Final Design for the facility . . . prior to the commencement of construction." (Doc. # 28-3 at 2.) Defendants have provided ample information demonstrating that the Service has not finalized its decision about the location of the trails and the construction of the multipurpose facility. (Doc. ## 20 at 9, 20-1 at 4, 6.) Regardless of whether the Service is in Phase I or Phase II of the project, the existence of an MOA and IA alone do not constitute final agency actions.

Second, the Court finds that the presence of a design contract is not a final agency action under the circumstances of this case. Plaintiffs' arguments rest upon contingent future events that may not occur as anticipated. Defendants have repeatedly maintained that the Service has yet to issue a final decision regarding the construction of the multipurpose facility and trails on the Refuge. *Los Alamos Study Grp.*, 692 F.3d at 1063 (affirming motion to dismiss based on the district court's finding that the defendants "had made no decision formally allowing detailed design and construction and that . . . construction would not begin before completion of the [requisite NEPA-compliant analysis]"). This is partly because, as mentioned, the location of this project remains a moving target; the Service has not even fully examined "the site-specific

feasibility of where exactly the trails and trails crossings might occur." (Doc. ## 20 at 9, 20-1 at 4, 6.) And, although the Service is unsure about what form compliance will take, the Service maintains that it still intends to comply with all applicable compliance laws at the time of its decision-making. (Doc. # 20-1 at 4, 6.) A NEPA claim is not ripe "if there is still a real possibility that the agency will conduct further environmental analysis." *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1116–1117 (D.N.M. 2006), *vacated in part and reversed in part on other grounds*, 565 F.3d 683 (10th Cir. 2009).

Third, the Court finds the Service's expenditure of funds does not constitute an irretrievable commitment of resources because the funds have been going towards the design process—which is not final—and not to the construction of the facility and trails. In other words, the money spent on the project thus far is not yet indicative of whether the agency has made an irretrievable commitment of resources because the money has been spent only on planning, design, and analysis. *See Los Alamos Study Grp.*, 692 F.3d at 1063 (agreeing with the district court that "[a]lthough $210 million had been spent on the project during the prior six years," there was no final agency action because the money was spent on building design and analysis and spending "large amounts of money on design does not indicate that [an agency] has made an irreversible and irretrievable commitment of resources")*; see also Haw. Cty. Green Party v. Clinton*, 124 F. Supp. 2d. 1173, 1198 (D. Haw. 2000) (finding no irretrievable commitment although the Navy had spent $350 million over 20 years on a weapons system because "doing research and building a ship [to carry the system] do not mark

the consummation of agency decision making on deployment"). Moreover, cases finding that an agency has made a final, irreversible, and irretrievable commitment of resources have typically focused on the commitment of natural resources, not financial resources, which is Plaintiffs' assertion here. *See, e.g.*, *Friends of the Se.'s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (timber); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004) (oil and gas).

Finally, the Service provides evidence that no construction on trails or trail crossings will occur in 2017 and that no construction will occur on the facility until the summer of 2018. (Doc. # 20-1 at 4, 6.) Although the Court is not suggesting that construction must occur for Plaintiffs' NEPA, NWRSAA, and EO 11990 claims to ripen, Defendants' actions must, at minimum, be past the planning, designing, and analysis phase. Defendants should at least be certain where the trails and facility will be placed. Indeed, it is entirely possible that Defendants will spend money on designing this project just to have the Service halt it after conducting the required compliance reviews. If that were to occur, intervention by this Court would have been a futile waste of resources. Indeed, the Court should not adjudicate on matters that may change or may not occur as anticipated. *Los Alamos Study Grp.*, 692 F.3d at 1067 ("The present level of design work does not prevent [d]efendants from considering alternative designs.").

In sum, without a final agency action for this Court to review, Plaintiffs' claims are not ripe and must be dismissed.

V. MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Plaintiffs move for leave to file a Second Amended Complaint, which seeks to add a claim under the ESA—an Act that is designed to protect and conserve endangered and threatened species and the ecosystems upon which they may be conserved. 16 U.S.C. § 1531(b). Specifically, Plaintiffs' new claim alleges the Service violated Section 7(a)(2) of the ESA by failing to initiate and complete a formal agency consultation. Such consultation is required to insure that a proposed agency action will not "jeopardize an endangered or threatened species." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 644 (2007) (Section 7(a)(2) of the ESA "requires federal agencies to consult with agencies designated by the Secretaries of Commerce and the Interior") (internal quotations omitted).

In the Tenth Circuit, a motion for leave to amend should be denied only upon "a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *D.R. Horton, Inc.-Denver v. Travelers Indem. Co. of Am.*, 281 F.R.D. 627, 630 (D. Colo. 2012) (citing *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 (10th Cir. 2010)).

The Court finds that Plaintiffs' proposed Second Amended Complaint would be futile because adding the new ESA claim will not cure the above-mentioned jurisdictional deficiencies in Plaintiffs' Amended Complaint. *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir. 1992) ("Where a

complaint, as amended, would be subject to dismissal, leave to amend need not be granted.").

Plaintiffs argue that these jurisdictional issues, i.e. the non-existence of a final agency action as required under the APA, do not apply to their ESA claim because ESA claims are not subject to APA procedures. Plaintiffs contend that the ESA instead provides independent jurisdiction for citizen suits. The Court disagrees. The Tenth Circuit has made clear that "the APA governs judicial review of agency action challenged through the ESA citizen-suit provision." *Gordon v. Norton*, 322 F.3d 1213, 1219 (10th Cir. 2003) (affirming the dismissal of ESA claims on ripeness grounds based on jurisdictional deficiencies under the APA).

Accordingly, the Court denies Plaintiffs' request to amend the Complaint.

VI. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Plaintiffs' Motion for Reconsideration of Preliminary Injunction, and in the Alternative, Permission to Appeal a Controlling Question of Law Inherent in the Court's Order (Doc. # 18) is DENIED;

2. Defendants' Motion to Dismiss (Doc. # 20) is GRANTED;

3. Plaintiffs' Motion for Leave to Amend (Doc. # 29) is DENIED; and

4. Plaintiffs' claims, as set forth in the Amended Complaint, are DISMISSED WITHOUT PREJUDICE.

DATED: September 29, 2017

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge