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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| Center for Biological Diversity; Defenders of Wildlife,<br><br>Plaintiffs,<br><br>vs.<br><br>Sally Jewell, Secretary of the Interior; United States Fish and Wildlife Service,<br><br>Defendants. | No. _____<br><br>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF |

## INTRODUCTION

1. The Mexican gray wolf (Canis lupus baileyi) is one of the most endangered mammals in North America and has been listed under the Endangered Species Act since 1976. This "lobo" of Southwestern lore is the most genetically distinct lineage of wolves in the Western Hemisphere. Like wolves elsewhere across the United States, this smaller subspecies of wolf of Mexico and the American Southwest was driven to near extinction as a result of government predator-control efforts in the early to mid-20th century. Once reduced to only seven individuals in a captive breeding program, the United States Fish and Wildlife Service ("FWS" or "the Service") reintroduced the Mexican gray wolf into the wild in 1998. But as of December 2013, only an estimated 83 wolves lived in the wild in a single, genetically-depressed population in a small area of eastern Arizona and western New Mexico. Even if wolf numbers in the reintroduced population have increased in the past year, they remain far below the numbers that experts recommend as necessary to ensure successful recovery of the wolf.

2. The reintroduced population has not flourished, in significant part because, to date, FWS has imposed numerous restrictions on the Mexican gray wolf reintroduction program that impede efforts to bring this rare subspecies back from the brink of extinction. Under FWS's management, introduction of captive Mexican gray wolves into the wild is infrequent; Mexican gray wolves are constrained to an arbitrary geography; and the killing and removal of Mexican gray wolves—regardless of those wolves' genetic significance to the population—is widespread. By FWS's own estimation, the

reintroduced population "is not thriving" and remains "at risk of failure." U.S. Fish & Wildlife Serv., Mexican Wolf Conservation Assessment 14, 62, 78 (2010) [hereinafter 2010 Conservation Assessment].

3. This case challenges the FWS's January 16, 2015, revised rule governing the management of the wolf as an experimental population and the adequacy of the environmental impact statement on which it relies. See generally FWS Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, to be codified at 50 C.F.R. § 17.84(k) (Jan. 16, 2015) [hereinafter Final Rule]. The rule, promulgated under section 10(j) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1539(j), contains a number of measures that will continue to impede Mexican gray wolf survival and recovery. In particular, it imposes limitations on both the size of the experimental population and the geographic range of the Mexican gray wolf that conflict with the conclusions of recognized wolf experts. The revised rule also loosens provisions governing the removal or killing of Mexican gray wolves, depressing both wolf numbers and genetic diversity.

4. Instead of relying on the best available science to frame these problematic provisions, FWS apparently acceded to demands by Arizona state wildlife officials for new limitations on the Mexican gray wolf population and its range, as well as demands for increased wolf removal to protect deer and elk, the wolves' natural prey, based on determinations by state officials that the wolf's impacts on deer or elk are "unacceptable." In doing so, FWS agreed to provisions that will impede the recovery and

threaten the very survival of this critically imperiled species and further institutionalized fundamental management flaws that have hindered Mexican gray wolf recovery to date.

5. Many of the rule's flaws stem from FWS's persistent failure to complete a scientifically grounded, legally valid recovery plan for the Mexican gray wolf subspecies. The ESA requires a recovery plan to organize and coordinate efforts to safeguard endangered species from extinction and restore them from their imperiled state. FWS released a document styled as a "Recovery Plan" for the Mexican gray wolf in 1982, but characterized it as "far from complete" and admitted that it did not fulfill the ESA's requirement for recovery planning; instead, it was intended only as a temporary, stopgap measure.

6. Indeed, the 1982 document does not address many of the critical issues that continue to imperil the Mexican gray wolf, and fails to lay out a comprehensive recovery program. Yet 32 years later, FWS still has not completed a legally compliant recovery plan for this critically imperiled subspecies and has prematurely terminated recovery planning processes for the wolf three times. Most recently, FWS in 2010 convened a team of many of the world's top wolf scientists to assist with the development of a recovery plan consistent with the best available scientific information. However, when that science subteam produced a draft recovery plan in 2012 that called for establishing additional Mexican gray wolf populations in the wild, FWS effectively suspended the planning process. As a result, there was no overarching plan for the wolves' recovery in place to guide the provisions of FWS's new revised rule.

7. Because of the deleterious consequences of FWS's long-delayed recovery planning, the Plaintiffs in this case are parties to a related lawsuit filed in this Court on November 12, 2014, alleging that FWS's failure to prepare a legally required recovery plan for the Mexican gray wolf violates section 4(f) of the ESA, 16 U.S.C. § 1533(f), and constitutes agency action unlawfully withheld and unreasonably delayed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). Defenders of Wildlife v. Jewell, Case No. 4:14-cv-2472-FRZ. In that case, Plaintiffs request the Court to order FWS to complete a scientifically grounded, legally valid draft recovery plan for the Mexican gray wolf, requiring a draft plan within six months of this Court's judgment and a final plan within six months thereafter. Such a plan would provide needed guidance on critical issues such as establishment of additional populations and geographic range expansion sufficient to ensure wolf recovery as required by the ESA. And it would preclude the kind of deleterious ad hoc decision making that has plagued the Mexican gray wolf recovery program to date—and that is further manifested in the detrimental provisions of FWS's new revised ESA section 10(j) rule.

8. The revised rule violates the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). FWS's failure to take a "hard look" at, and incorporate, the best available science in its environmental impact statement, and its failure to analyze reasonable, scientifically supported alternatives, violate NEPA and ultimately undermine the wolves' recovery.

9. In view of the fatal flaws in both the process and the substance of the section 10(j) rule, Plaintiffs ask the Court to set aside the challenged portions of the Rule and remand them to the Service for a new rulemaking that fully complies with NEPA and the APA.

## JURISDICTION AND VENUE

10. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question) and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02 and 5 U.S.C. § 706 (APA). Defendants' sovereign immunity is waived pursuant to the APA, 5 U.S.C. § 702.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District. Additionally, Plaintiff Center for Biological Diversity is headquartered in Tucson, Arizona, and Plaintiff Defenders of Wildlife has an office in Tucson from which it conducts much of its work on the Mexican gray wolf.

12. This case should be assigned to the Tucson Division of this Court because the Mexican gray wolf occurs within the counties of this Division, FWS management activities related to the wolf occur within these counties, and Tucson is the location of the headquarters office for Plaintiff Center for Biological Diversity and the Southwest office for Plaintiff Defenders of Wildlife. L.R. Civ. 77.1(a), (c).

## PARTIES

13. Plaintiff Center for Biological Diversity (the "Center") is a nonprofit organization dedicated to the preservation, protection and restoration of biodiversity, native species and ecosystems. The Center was founded in 1989 and is based in Tucson, Arizona, with offices throughout the country. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues and has more than 50,000 members throughout the United States and the world, including over 3,400 members in Arizona and New Mexico. The Center has advocated for recovery of the Mexican gray wolf since the organization's inception, and maintains an active program to protect the species and reform policies and practices to ensure its conservation. The Center brings this action on its own institutional behalf and on behalf of its members. Many of the Center's members and staff reside in, explore, and enjoy recreating in Southwestern landscapes, including those occupied by the Mexican gray wolf.

14. Plaintiff Defenders of Wildlife ("Defenders") is a national nonprofit conservation organization headquartered in Washington, D.C., with offices throughout the country, including a Southwest office in Tucson, Arizona. Defenders has more than 394,000 members, including more than 12,000 members in the southwestern states of Arizona and New Mexico. Defenders is a science-based advocacy organization focused on conserving and restoring native species and the habitat upon which they depend, and

has been involved in such efforts since the organization's establishment in 1947. Over the last three decades, Defenders has played a leading role in efforts to recover the Mexican gray wolf in the American Southwest.

15. Plaintiffs have a long-standing interest in the preservation and recovery of the Mexican gray wolf in the American Southwest. Plaintiffs and their members place a high value on Mexican gray wolves and recognize that a viable presence of these wolves on the landscape promotes healthy, functioning ecosystems. Plaintiffs actively seek to protect and recover the Mexican gray wolf through a wide array of actions including public education, scientific analysis, advocacy, and when necessary, litigation. In particular, the Center for Biological Diversity filed a petition and then litigation against the Service for its failure to revise the agency's prior ESA section 10(j) rule for the Mexican gray wolf, resulting in a settlement agreement which led to the rule revision process challenged in this complaint. Plaintiffs have participated and provided extensive comments during every stage of the 10(j) rule revision, including providing comments on the proposed rule and on the preliminary, draft and final environmental impact statements.

16. Plaintiffs and/or their members use public land in the American Southwest, including lands that FWS has designated as the Mexican Wolf Experimental Population Area ("MWEPA"), and lands outside of the MWEPA which contain suitable habitat for Mexican gray wolves. Plaintiffs use these areas for a wide range of activities, including recreational pursuits such as hiking, fishing, camping, backpacking, hunting, horseback

riding, bird watching, wildlife watching (including wolf watching), spiritual renewal, and aesthetic enjoyment. Plaintiffs and/or Plaintiffs' members have viewed or listened to Mexican gray wolves and found signs of wolf presence in Arizona and New Mexico, and have planned specific outings in order to search for wolves and indications of wolf presence. By adopting rule revisions that fail to conserve the Mexican gray wolf and ultimately threaten its very survival in the wild, the Service's actions will harm Plaintiffs' interest in viewing wolves and maintaining a healthy ecosystem. Furthermore, by violating the public notice and comment procedures of NEPA and including new information for the first time in the final environmental impact statement, the Service has harmed Plaintiffs' right to meaningfully participate in the agency's decision-making process. Accordingly, the legal violations alleged in this complaint cause direct injury to the aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests of the Plaintiffs and/or Plaintiffs' members.

17. Plaintiffs' and/or Plaintiffs' members' aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests have been, are being, and, unless their requested relief is granted, will continue to be adversely and irreparably injured by Defendants' failure to comply with federal law. These are actual, concrete injuries that are traceable to Defendants' conduct and would be redressed by the requested relief. Plaintiffs have no adequate remedy at law.

18. Defendant Sally Jewell is the United States Secretary of the Interior. In that capacity, Secretary Jewell has supervisory responsibility over the United States Fish and Wildlife Service. Defendant Jewell is sued in her official capacity.

19. Defendant United States Fish and Wildlife Service is a federal agency within the United States Department of the Interior. The Service is responsible for administering the ESA and NEPA with respect to terrestrial wildlife species and subspecies including the Mexican gray wolf.

## LEGAL BACKGROUND

### A. The Endangered Species Act

20. The Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). Congress passed this law specifically to "provide a program for the conservation of ... endangered species and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

21. To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as "endangered" or "threatened" pursuant to ESA section 4. Id. § 1533. The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6). A "threatened species" is "any species which is likely to become an endangered species

within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20). The term "species" is defined to include "any subspecies of . . . wildlife." Id. § 1532(16).

22. Once a species is listed, an array of statutory protections applies. For example, ESA section 7 requires all federal agencies to ensure that their actions do not "jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification" of its "critical habitat." Id. § 1536(a)(2). Section 9 and its regulations further prohibit, among other things, "any person" from intentionally "taking" listed species, or "incidentally" taking listed species, without a permit from FWS. See id. §§ 1538-1539. FWS must also "develop and implement" recovery plans for listed species "unless [the agency] finds that such a plan will not promote the conservation of the species." Id. § 1533(f)(1). While the ESA imposes numerous provisions to safeguard the survival of listed species, its overriding goal of conserving such species "is a much broader concept than mere survival. The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species." Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004) (quotations and citation omitted).

23. Section 10(a)(1)(A) of the ESA, 16 U.S.C. § 1539(a)(1)(A), authorizes the Secretary of Interior to permit, "under such terms and conditions as he shall prescribe," "any act otherwise prohibited by [section 9 (i.e., a taking)] . . . for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations

pursuant to subsection (j) of this section. . . ." See also 50 C.F.R. § 17.81(b). However, any such permit may be granted only if the Secretary finds that its issuance "will be consistent with the purposes and policy" of the ESA. 16 U.S.C. § 1539(d). Those purposes and policies mandate the "conservation"—meaning the recovery—of threatened and endangered species. Id. §§ 1531(b), (c)(1).

24. Section 10 also authorizes the Secretary to release a population of a threatened or endangered species into the wild as an "experimental population." 16 U.S.C. § 1539(j). Pursuant to section 10(j), before authorizing the release of an experimental population, the Service must determine that the release of such a population will further the conservation of that species. Id. § 1539(j)(2)(A). The Service must also identify the population and determine, on the basis of the best available information, whether the population "is essential to the continued existence" of the species. Id. § 1539(j)(2)(B). An "essential experimental population" is one "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild." 50 C.F.R. § 17.80(b). "All other experimental populations are to be classified as nonessential." Id.

25. An experimental population deemed essential is entitled to the full array of the ESA's substantive protections, but a nonessential experimental population is not. 16 U.S.C. § 1539(j)(2)(C). FWS sometimes relies on its section 10(j) authority to designate a species as "nonessential experimental"—as it did in this case—to avoid the ESA's strict

protective provisions in an effort to gain support from those who would otherwise oppose the species' reintroduction.

26. While a nonessential population under ESA section 10(j) does not receive the full protections of the Act, "each member of an experimental population shall be treated as a threatened species" except as otherwise specified. 16 U.S.C. § 1539(j)(2)(C). ESA section 4(d) authorizes the Service to issue regulations to govern the management of threatened species, but all such regulations must "provide for the conservation"—i.e., recovery—"of such species." Id. § 1533(d). The regulations that govern the Mexican gray wolf experimental population, pursuant to section 10(j) of the ESA, are found at 50 C.F.R. § 17.84(k). As described below, the 10(j) rule at issue in this case revised this rule to include measures, such as a population cap, limitations on the wolf's geographic range, and the liberalization of rules that allow for lethal and non-lethal removal of wolves, without satisfying NEPA's requirements that it rely on the best available science and take a hard look at whether the rule would satisfy the objective of the ESA – to recover the species.

27. In sum, the ultimate legal litmus test for any ESA section 10(j) regulation or section 10(a) permit is whether it provides for and facilitates the recovery of the affected species.

**B. The National Environmental Policy Act**

28. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Congress enacted NEPA in 1969, directing all federal agencies to

assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's core precept is simple: look before you leap. Id. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.2(f), (g), and 1506.1. Under NEPA, each federal agency must take a "hard look" at the impacts of its actions prior to the point of commitment, so that it does not deprive itself of the ability to "foster excellent action." See 40 C.F.R. § 1500.1(c). In this way, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.

29. NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") whenever they propose to take a "major federal action" that "may significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS is a "detailed written statement" that "provide[s] full and fair discussion of significant environmental impacts" and "inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. §§ 1502.1, 1508.11. An EIS is "an action-forcing device" that "insure[s] that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government." Id. § 1502.1. The scope of the EIS is defined by the purposes and mandates of the statutory authority under which the action is proposed. In this case, the sufficiency of the EIS must be evaluated with reference to the ESA's requirement to recover listed species.

30. NEPA's implementing regulations require each federal agency to disclose and analyze the environmental effects of its proposed actions, using "high quality" information and "[a]ccurate scientific analysis" "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). The agency must ensure the "scientific integrity[] of the discussions and analyses in environmental impact statements." Id. § 1502.24. The purpose of these requirements is to ensure that the public has information that allows it to question, understand, and, if necessary, challenge the proposal being considered by the agency.

31. Agencies must also "use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." Id. § 1500.2(e). The alternatives analysis is "the heart of the environmental impact statement." Id. § 1502.14. Agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives" in an EIS that serve the purpose and need of the project. Id. § 1502.14(a). This discussion is intended to provide "a clear basis for choice among options by the decisionmaker and the public." Id. § 1502.14.

32. NEPA mandates that agencies prepare an EIS through a two-stage process, first preparing and soliciting public comment on a draft EIS that fully complies with NEPA's environmental analysis requirements. See id. §§ 1502.9(a), 1503.1(a)(4). Agencies must next prepare a final EIS that responds to comments received by the agency regarding the draft EIS. Id. §§ 1502.9(b), 1503.4(a).

33. "If the final action departs substantially from the alternatives described in the draft EIS, however, a supplemental draft EIS is required" to ensure that the opportunity for meaningful public comment is not frustrated by an agency "bait and switch" approach to decision-making. Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1045 (9th Cir. 2011). Thus, an agency must issue a "supplemental" EIS whenever it "makes substantial changes in the proposed action that are relevant to environmental concerns." Id. § 1502.9(c)(1)(i).

**C. The Administrative Procedure Act**

34. The APA confers a right of judicial review on any person adversely affected by final agency action, and provides for a waiver of the federal government's sovereign immunity. 5 U.S.C. §§ 701-706.

35. Upon review of agency action, the court shall "hold unlawful and set aside actions ... found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id. § 706(2). An action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Further, "the agency must . . . articulate a satisfactory explanation for its action including a

rational connection between the facts found and the choice made." Id. (quotations and citations omitted)).

## FACTUAL ALLEGATIONS

36. This case concerns a federal rulemaking process that represents a continuation of deleterious ad hoc decision making by the FWS concerning the management and recovery of the Mexican gray wolf. The FWS has never yet prepared a comprehensive, legally compliant recovery blueprint for the Mexican gray wolf, but instead has affirmatively impeded essential and statutorily required recovery planning processes while imposing a series of problematic management prescriptions for the wolf's only wild population. Those management prescriptions have not only failed to adequately facilitate the recovery of this extremely rare subspecies, but all too often have actively interfered with recovery measures identified as necessary in the best available scientific information and – in its more candid moments – even by the FWS itself. The challenged rulemaking continues that pattern of deleterious agency conduct. Still lacking the guidance that would be provided by a valid recovery plan, FWS has accorded undue deference to demands imposed by Arizona state officials for management measures that will not only continue to interfere with Mexican gray wolf recovery but will also endanger the Mexican gray wolf's very survival.

### FWS'S STOPGAP AND ABORTED RECOVERY PLANNING EFFORTS

37. The absence of a legitimate agency blueprint for Mexican gray wolf recovery underlies the ongoing challenges facing the subspecies' recovery program. As