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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ARIZONA

DEFENDERS OF WILDLIFE, *et al.*,

Plaintiffs,

v.

S.M.R. JEWELL, Secretary of the Interior, *et al.*,

Defendants.

Case No. 4:14-cv-02472-FRZ

DEFENDANTS' MOTION TO DISMISS

MOTION TO DISMISS

Pursuant to LRCiv. 7.2 and Fed. R. Civ. P. 12(b), Defendants, Sally Jewell, Secretary of the Interior, and the U.S. Fish and Wildlife Service ("Service" or "FWS") move to dismiss the Complaint for lack of jurisdiction and failure to state a claim. Plaintiffs purport to challenge the Service's failure to prepare a recovery plan for the Mexican gray wolf pursuant to Section 4(f) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(f). However, because the Service prepared a recovery plan in 1982, Plaintiffs' failure-to-act claim is, in reality, a challenge to the validity of the existing plan that is barred by the statute of limitations, 28 U.S.C. § 2401(a). To the extent Plaintiffs challenge the Service's failure to revise the existing plan, they have not stated a justiciable claim because the ESA does not mandate the revision of recovery plans. The Complaint should therefore be dismissed. In support of this motion, Defendants rely on the following Memorandum of Points and Authorities, the Declaration of Kevin W. McArdle and exhibits, and all other materials on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. The Endangered Species Act

The ESA provides for the listing of species as threatened or endangered. 16 U.S.C. § 1533. The Secretaries of Commerce and the Interior share responsibility for implementing the ESA. The Secretary of the Interior is responsible for administering the statute with respect to the listed Mexican gray wolf at issue in this case and discharges her responsibility through the Service. *See id.* § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b).

ESA Section 4(f) directs the Secretary to develop and implement a "recovery plan" for the conservation and survival of each listed species, "unless [she] finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). In 1988, the ESA was amended to require that recovery plans include certain provisions, if practicable. *See* Pub. L. 100-478, § 1003, 102 Stat. 2306 (Oct. 7, 1988). Specifically, as is relevant here, the statute now provides:

> The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable –
> ****
> (B) incorporate in each plan –
> ****
> (ii) objective, measurable criteria which, when met, would result in a determination … that the species be removed from the list [of threatened and endangered species]; …

16 U.S.C. § 1533(f)(1).

Section 11 of the ESA contains a citizen suit provision authorizing suit against the Service "where there is alleged a failure of the Secretary [of the Interior] to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). "[T]he nondiscretionary nature of the duty must be clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty." *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014) (interpreting analogous citizen suit provision in Clean Air Act, 42 U.S.C. § 7604(a)(2)).

B. The Administrative Procedure Act

Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, "[a]gency 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." *Id.* § 704. "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). "All of those categories involve circumscribed, discrete agency actions …" *Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 62 (2004).

"The APA provides relief for a failure to act in § 706(1): 'The reviewing court shall … compel agency action unlawfully withheld or unreasonably delayed.'" *SUWA*, 542 U.S. at 62 (quoting 5 U.S.C. § 706(1)). However, "the only agency action that can be compelled under the APA is action legally required." *Id.* at 63. "Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Id.* at 64.

C. Factual Background

The Mexican gray wolf was listed as an endangered subspecies in 1976. *See* 80 Fed. Reg. 2512, 2513 (Jan. 16, 2015) (Ex. A).[1] In 1978, the Service listed the entire gray wolf species in North America (south of Canada) as endangered, except in Minnesota where it was listed as threatened. *Id.* This 1978 listing at the species level subsumed the previous Mexican wolf subspecies listing. *Id.* However, the 1978 listing rule made clear that the Service would continue to recognize the Mexican wolf as a valid biological subspecies for purposes of research and conservation. *Id.*

A Mexican Wolf Recovery Team was convened in 1979 to write a recovery plan, which the Service approved in 1982. Ex. B ("Recovery Plan"); Ex. C at 1.3; Compl. ¶ 4. At the time, the Mexican wolf was considered extirpated from its historic range in the United States because there had been no confirmed wild wolf sightings since 1970. Ex. C at 1.3; 63 Fed. Reg. 1752, 1753 (Jan. 12, 1998) (Ex. D); Compl. ¶ 29. "Normal Mexican wolf populations were gone before an adequate body of scientifically acquired data was amassed on the subspecies." Ex. B at 23. Given the lack of data, the absence of wild wolf populations, and other factors, the Recovery Team found "no possibility for complete delisting of the Mexican wolf," *id.*, and decided instead to focus the Recovery Plan on those actions necessary to ensure species conservation and survival:

> The team feels that conserving and ensuring the survival of the Mexican wolf is the most that can be achieved today and has worded its prime objective accordingly: "To conserve and ensure the survival of [the Mexican wolf] by maintaining a captive breeding program and re-establishing a viable, self-sustaining population of at least 100 Mexican wolves in the middle to high elevations of a 5,000-square-mile area within the Mexican wolf's historic range."

Ex. B. at 23; 78 Fed. Reg. 35719, 35726 (June 13, 2013) (Ex. E).

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[1] "Ex. __" refers to the exhibits to the Declaration of Kevin W. McArdle, which the Court may consider in resolving this Motion because they are cited in the Complaint or subject to judicial notice. *See infra* at 5-6. The court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2006).

The Recovery Plan recommends actions to achieve the prime objective, providing cost estimates for most actions through the end of fiscal year 1984. Ex. B at 28-62. The Recovery Team acknowledged that the plan was "far from complete, lacking specifics and cost estimates for the later stages of [wolf] propagation and release projects." *Id.* at 1. The Team recommended that the plan "be periodically re-evaluated and amended in light of the progress of the recovery program." *Id.* at 1, 23. However, Plaintiffs' allegation that the Recovery Plan has an "expiration date" of September 30, 1984, Compl. ¶¶ 58, 83, is not supported by the cited portions of the plan. Rather, the September 30, 1984 date refers to the period through which cost estimates are provided for certain tasks designed to achieve the plan's prime objective. Ex. B at 20, 58-61. The Recovery Plan would only "expire" when revised or upon attainment of the prime objective, which "has … guided the recovery effort for the Mexican wolf in the United States" since the plan was published. Ex. C at 1.3; Ex. E at 35726, 35728, 35729; *see* Compl. ¶¶ 61, 84, 96.

In 1998, pursuant to the conservation recommendations in the Recovery Plan, the Service published a rule under ESA Section 10(j) authorizing the reintroduction of Mexican wolves into portions of Arizona and New Mexico. Ex. D ("10(j) Rule"); Compl. ¶ 31.[2] The Service found that wolf reintroduction in the relevant areas had the greatest potential to achieve the Recovery Plan's prime objective. Ex. D at 1753, 1754.

The Service has on several occasions stated that it intends to revise the Recovery Plan. Ex. D at 1753; Ex. C. at 6.3; Compl. ¶¶ 5, 56, 64-67, 85. Most recently, "[a] Recovery Team was convened in 2010 to begin the process of revising the Recovery Plan." Ex. C at 6.3; Ex. E at 35727; Compl. ¶¶ 5, 67. However, as the Complaint indicates, the Service has also moved forward with other actions to advance Mexican

[2] Section 10(j) allows the Secretary to authorize the release of an experimental population of an endangered species "outside the current range of such species if the Secretary determines that such release will further the conservation of such species." 16 U.S.C. § 1539(j)(2)(A). Such a population is generally treated as a threatened species rather than an endangered species, *id.* § 1539(j)(2)(C), which provides the Service with more management flexibility, Ex. D at 1752, 1754, 1755.

wolf conservation. *See* Ex. C at 6.3-6.7; Compl. ¶¶ 71-72. As is relevant here, on June 13, 2013, the Service issued a proposal to delist the gray wolf and list the Mexican wolf subspecies as endangered. Ex. A at 2513. The Service concurrently published a separate proposal to revise the 10(j) Rule to (inter alia) improve the effectiveness of the Mexican wolf reintroduction project and increase the potential for recovery. *Id.*; Ex. E.

On July 29, 2013, as a result of litigation brought in the United States District Court for the District of Columbia, the Service entered into a settlement with Plaintiff Center for Biological Diversity ("CBD"), requiring the Service to take final action on the proposed 10(j) Rule revisions by January 12, 2015. Ex. F; Ex. A at 2514. On January 7, 2015, the Service submitted the final revised 10(j) Rule to the Federal Register for publication. Ex. A at 2514. The Service concurrently published its final rule listing the Mexican wolf as an endangered subspecies. *Id.* at 2512; Ex. G. Plaintiffs CBD and Defenders of Wildlife have filed a separate lawsuit challenging the revised 10(j) Rule. *CBD v. Jewell*, No. 4:15-cv-00019-LAB (D. Ariz. filed Jan. 16, 2015).

Now that the rulemakings have been completed, the Service intends to "resume the recovery planning process to develop a revised recovery plan for the Mexican wolf." Ex. G at 2496; Ex. C at G.4; Ex. A at 2516, 2524, 2526, 2536, 2538, 2542-43.

D. Plaintiffs' Claims

The Complaint contains two claims for relief. First, Plaintiffs challenge the Service's alleged failure to "develop a scientifically sound, legally compliant recovery plan." Compl. ¶ 86. In particular, Plaintiffs allege that the 1982 Recovery Plan does not include "objective, measurable" delisting criteria allegedly required by the 1988 ESA amendments. *Id.* ¶¶ 82-83, 85. Plaintiffs further allege that "FWS's refusal to develop and implement a scientifically grounded and legally valid recovery plan for the Mexican wolf violates the plain requirements of Section 4(f) of the ESA." *Id.* ¶ 87.

Second, Plaintiffs allege that the Service's "continued failure to prepare a legally sufficient recovery plan constitutes 'agency action unlawfully withheld or unreasonably delayed' under the [APA], 5 U.S.C. § 706(1)." Compl. ¶ 98. Plaintiffs ask the Court to

order the Service "to prepare and implement a scientifically based, legally valid recovery plan for the Mexican gray wolf" within 12 months from the date of judgment. *Id.* at 42.

II. STANDARDS AND SCOPE OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) may take the form of a "facial attack" or a "factual attack." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where, as here, a facial attack is brought, "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "Whether subject matter jurisdiction exists therefore does not depend on resolution of a factual dispute, but rather on the allegations in [the] complaint." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "A court may consider not only the allegations in the complaint in a facial attack but also documents attached to the complaint and judicially noticeable facts." *CopyTele, Inc. v. E Ink Holdings*, 962 F. Supp. 2d 1130, 1135-36 (N.D. Cal. 2013) (citations omitted).

B. Federal Rule of Civil Procedure 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

Although a court generally may not consider materials beyond the pleadings under Rule 12(b)(6), a court may take judicial notice of matters of public record, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), and may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th

Cir.1994), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Evans v. Deacon*, No. 3:11-cv-00272-ST, 2015 WL 248412, at *2 (D. Or. Jan. 20, 2015).

Under these standards, the Court may properly consider the exhibits referenced in this Motion. Exhibit A (excerpts of revised 10(j) Rule), Exhibit D (excerpts of 1998 10(j) Rule), and Exhibit G (excerpts of 2015 listing rule) are final rules published in the Federal Register, the contents of which are subject to judicial notice. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1179 (9th Cir. 2002). Exhibit F (CBD settlement) is a Court filing subject to judicial notice. *Reyn's Pasta Bella, LLC v. Visa USA*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). Exhibit B (Recovery Plan), Exhibit C (excerpts of draft environmental impact statement for revised 10(j) Rule), and Exhibit E (excerpts of proposed revised 10(j) Rule) are public agency records subject to judicial notice that are referenced throughout the Complaint. Accordingly, the Court may consider all of the exhibits in resolving this Motion, and need not accept as true allegations in the Complaint that are contradicted by the exhibits. *Lazy Y Ranch*, 546 F.3d at 588.

III. ARGUMENT

A. Plaintiffs' Claims Are Barred by the Statute of Limitations

As Plaintiffs admit, "[i]n 1982, [FWS] issued the Mexican Wolf Recovery Plan." *Defenders of Wildlife v. FWS*, 797 F. Supp. 2d 949, 950 (D. Ariz. 2011); Compl. ¶ 4; Ex. B. The Recovery Plan establishes a prime objective "'to conserve and ensure survival of the Mexican gray wolves by maintaining a captive breeding program and reestablishing a viable, self-sustaining population of at least 100 Mexican wolves in a 5,000 square mile area within the subspecies' historic range.'" *WildEarth Guardians v. Lane*, No. Civ. 12-118 LFG/KBM, 2012 WL 6019306, at *2 (D.N.M. Dec. 4, 2012) (quoting Ex. B at 23); Compl. ¶¶ 4, 56. This prime objective has guided the Service's recovery efforts for the Mexican wolf, including the establishment of the captive breeding and reintroduction program, since the Recovery Plan was published in 1982. *See N.M. Cattle Growers v.*

FWS, No. Civ. 98–367M/JHG, 1999 WL 34797509, at *4 (D.N.M. Oct. 28, 1999); Ex. A at 2515, 2524; Ex. C at 1.3 - 1.4, 1.5 - 1.6; Ex. E at 35726, 35727; Compl. ¶¶ 61, 84, 96.

Thus, while the Complaint is styled as a challenge to agency inaction – FWS's purported failure to develop a valid recovery plan – Plaintiffs are in reality challenging the sufficiency of the existing plan. The central allegation underlying both of Plaintiffs' claims is that the Service has failed to "develop a scientifically sound, legally compliant recovery plan." Compl. ¶ 86. That is merely an alternative formulation of the claim that the existing plan is scientifically unsound and legally noncompliant. "The agency has acted ... Petitioners just do not like what the [agency] did." *Pub. Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988). This claim is time-barred.

Claims brought under the APA and ESA are subject to the six-year statute of limitation contained in 28 U.S.C. § 2401(a). *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991); *Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792, 812 n.16 (9th Cir. 2008). Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). "Because 28 U.S.C. § 2401 is a condition of the [Government's] waiver of sovereign immunity, courts are reluctant to interpret the statute of limitations in a manner that extends the waiver beyond that which Congress clearly intended." *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) (citations omitted). "The words 'every civil action' must be interpreted to mean what they say." *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995).

"A cause 'first accrues' when all events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to file an action." *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1038 (E.D. Cal. 2012). A challenge to the sufficiency of agency action under the APA or ESA generally accrues on the date the action is taken – here, in

January 1982, when the Recovery Plan was issued.[3] Compl. ¶ 4; Ex. B; *see Harris v. FAA*, 353 F.3d 1006, 1009-10 (D.C. Cir. 2004) (APA claim "first accrues on the date of the final agency action"); *Cal. Sea Urchin Comm'n v. Jacobson*, No. CV 13-05517 DMG (CWx), 2014 WL 948501, at *3 (C.D. Cal. Mar. 3, 2014) (same); *Ctr. for Biological Diversity v. EPA*, No. 11-cv-00293-JCS, 2013 WL 1729573, *22 (N.D. Cal. Apr. 22, 2013) (ESA claim first accrues on date action is taken in alleged violation of statute); *Ellis v. Bradbury*, No. C-13-1266 MMC, 2014 WL 1569271, at *12 (N.D. Cal. Apr. 18, 2014) (same). Plaintiffs allege no facts showing that their claims first accrued at some later point on or after November 21, 2008, within six-years of the filing of the Complaint.

The existence of the Recovery Plan is also a matter of public record documented in the Federal Register. *E.g.*, 57 Fed. Reg. 14427, 14428 (Apr. 20, 1992); Ex. D at 1753; 65 Fed. Reg. 43450, 43454 (July 13, 2000); 72 Fed. Reg. 44065, 44067 (Aug. 7, 2007). "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (citation omitted). Consequently, Plaintiffs were on notice of the existence of the Recovery Plan and could have timely filed, particularly in light of their claim that they have been closely involved in Mexican wolf recovery efforts for "decades." Compl. ¶¶ 12-17.

Plaintiffs cannot circumvent the statute of limitations by characterizing their claims as a challenge to agency inaction. "[C]ourts are inhospitable to claims of a 'failure to act' that are, in truth, merely 'complaints about the sufficiency of an agency's action 'dressed up as an agency's failure to act.'" *CBD v. Abraham*, 218 F. Supp. 2d 1143, 1157 (N.D. Cal. 2002) (quoting *Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999)). That is precisely the situation here: because the Service issued the

[3] For purposes of this Motion only, Defendants assume, without conceding, that but for the statute of limitations, the Recovery Plan could otherwise be reviewable under the ESA or APA. Should the Court deny this Motion, Defendants reserve the right to contest the reviewability of the plan on any other available grounds.

Recovery Plan in 1982, Plaintiffs' claim that no valid plan exists is simply a time-barred challenge to the existing plan. The statute of limitations "cannot be avoided merely by artful pleading." *Venegas v. Wagner*, 704 F.2d 1144, 1146 n.1 (9th Cir. 1983). Any contrary rule "would make a nullity of statutory deadlines. Almost any objection to an agency action can be dressed up as an agency's failure to act." *Pub. Citizen*, 845 F.2d at 1108); *see Sea Hawk Seafoods v. Locke*, 568 F.3d 757, 766 (9th Cir. 2009) (failure-to-act claim properly dismissed as improper attempt to plead around statute of limitations "because the essence of their complaint remains that the Secretary failed to conform to his responsibilities under the [relevant statutes] with regard to the specific regulations enacted"); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 933 (9th Cir. 2010) (allowing challenge to agency action to proceed under the guise of a failure-to-act claim "would undermine the important interests served by statutes of limitations").

Over a three-year period between 1979 and 1982, the Service considered the evidence and acted to comply with the ESA by publishing a recovery plan for the Mexican Wolf. Ex. B; Ex. C at 1.3. "From that time, [P]laintiffs had six years in which to air their disagreement. They did not. [There is] no reason to entertain their attempt to revive their disagreement by labeling the [agency]'s action[] as an ongoing failure to act." *Hells Canyon*, 593 F.3d at 934. The Complaint is time-barred and should be dismissed.[4]

B. The ESA Does Not Mandate Revision of the Recovery Plan

As the Complaint indicates, the Service has stated on several occasions that it intends to revise the Recovery Plan. Ex. D at 1753; Ex. C. at 63; Compl. ¶¶ 5, 56, 64-67. Most recently, "[a] Recovery Team was convened in 2010 to begin the process of revising the Recovery Plan." Ex. C at 6.3; Ex. E at 35727; Compl. ¶¶ 5, 67. However,

[4] Defendants' position is that 28 U.S.C. § 2401(a) is jurisdictional in light of *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), which held that the comparable statute of limitations in 28 U.S.C. § 2501 is jurisdictional. Accordingly, dismissal is appropriate pursuant to Fed. R. Civ. P. 12(b)(1). However, even if Section 2401(a) is not jurisdictional, *see California Sea Urchin Comm'n*, 20014 WL 948501 at *1 n.2, dismissal would be appropriate under Rule 12(b)(6).

the process was deferred due to other agency priorities, including the need to complete the new listing rule and the revised 10(j) Rule by the deadline contained in the settlement with Plaintiff CBD. *See* Compl. ¶¶ 71-72; Ex. F; Ex. A at 2514; Ex. C at 6.3-6.7. Now that those rulemakings have been completed, the Service intends to "resume the recovery planning process to develop a revised recovery plan for the Mexican wolf." Ex. G at 2496; Ex. A at 2516, 2536, 2538, 2543. Although Plaintiffs essentially allege that the Service has unreasonably delayed issuing a revised plan, *see* Compl. ¶¶ 93, 88-98, the claim is not justiciable under the ESA or APA because the ESA does not mandate that recovery plans be revised or updated.

The ESA citizen suit provision allows for judicial review only when a plaintiff seeks to compel the Service to perform a specific, non-discretionary duty imposed by Section 1533. 16 U.S.C. § 1540(g)(1)(C). "[T]he nondiscretionary nature of the duty must be clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty." *WildEarth Guardians*, 772 F.3d at 1182. The Court "must be able to identify a 'specific, unequivocal command' from the text of the statute at issue …; it's not enough that such a command could be teased out 'from an amalgamation of disputed statutory provisions and legislative history …" *Id.* (quoting *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008)).

Similarly, APA Section 706(1) provides for review of agency delay or inaction "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *SUWA*, 542 U.S. at 64 (emphasis in original). A court's "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command." *Hells Canyon*, 593 F.3d at 932 (emphasis added); *Zixiang Li v. Kerry*, 710 F.3d 995, 1003-04 (9th Cir. 2013). Thus, the applicability of both the ESA and APA "depends upon whether FWS has failed to act on a non-discretionary duty …" *Coos Cnty.*, 531 F.3d at 802, 809.

While Section 1533(f) directs the Service to "develop and implement" recovery plans (unless a plan would not promote species conservation), the statute imposes no duty

on the agency to revise existing plans. 16 U.S.C. § 1533(f). Similarly, while Section 1533(f) was amended in 1988 to require that plans incorporate "objective, measurable" delisting criteria, *id.* § 1533(f)(1)(B)(ii), nothing in the statute suggests that those requirements apply retroactively to already-completed plans. "Retroactive application of statutes is disfavored in the absence of clear contrary Congressional intent." *Chang v. United States*, 327 F.3d 911, 920 (9th Cir. 2003); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir. 2006). Section 1533(f) reveals no such clear intent. The plain language indicates that the 1988 amendments apply only when the Service is "developing and implementing recovery plans" (and only when "practicable"). 16 U.S.C. § 1533(f)(1). The statute, as amended in 1988, contains no specific, unequivocal mandate that the Service revise existing recovery plans to account for new information, to incorporate objective and measurable delisting criteria, or for any other reason.[5]

Nor is there any basis for reading a duty to revise recovery plans into the statute. First, Congress clearly understood the difference between the development of recovery plans, and the revision of existing plans. *See* 16 U.S.C. § 1533(f)(4) (requiring notice and opportunity for public comment "prior to final approval of a new or revised recovery plan"). Yet Congress decided to mandate only the initial development of such plans (unless the Service finds that a plan would not promote species conservation), leaving the revision of existing plans to the agency's discretion. *See id.* § 1533(f)(1).

Similarly, when Congress intended to mandate periodic reviews of other actions required under Section 1533, it made its intent explicit. For example, in Section 1533(c), Congress mandated that the Secretary "conduct, at least once every five years, a review of all species" listed as threatened or endangered, and revise the species' listed status as appropriate. *Id.* § 1533(c)(2). Section 1533(f) imposes no similar duty on the Service to

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[5] Even if the 1988 amendments did apply retroactively, the Service effectively determined that establishing objective, measurable delisting criteria was impracticable when it found "no possibility for complete delisting of the Mexican wolf." Ex. B at 23; Compl. ¶ 60. Any challenge to that finding is time-barred. *See supra* § III.A.

review and revise or update existing recovery plans. "[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citations omitted).

Finally, Congress's decision to leave the revision of recovery plans to the agency's discretion is consistent with the fact that recovery plans "are for guidance purposes only." *Fund for Animals v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996). While recovery plans "provide guidance for the conservation of [listed] species, they are not binding authorities." *Conservation Cong. v. Finley*, -- F.3d --, No. 12-16916, 2014 WL 7139676, at *1 (9th Cir. Dec. 16, 2014) (citation omitted). Both the nature of the guidance contained in a recovery plan, and the timetable for implementation, are left to the Secretary's discretion. *See Conservation Northwest v. Kempthorne*, No. C04-1331-JCC, 2007 WL 1847143, at *3-4 (W.D. Wash. June 25, 2007). "By providing general guidance as to what is required in a recovery plan, the ESA 'breathes discretion at every pore.'" *Fund for Animals*, 85 F.3d at 547 (citation omitted).

As a non-binding guidance document, a recovery plan is neither necessary nor sufficient to achieve species recovery. "[A]s with a map, it is possible to reach one's destination—recovery of the species—by a pathway neither contemplated by the traveler setting out nor indicated on the map." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012). A recovery plan "is a statement of intention, not a contract. If the plan is overtaken by events, then there is no need to change the plan; it may simply be irrelevant." *Id.* Thus, Congress appropriately vested the Service with discretion to decide whether to revise a recovery plan and, if so, to set the timetable for revision, consistent with the agency's other priorities and limited resources.

Because the Service issued a Recovery Plan for the Mexican Wolf in 1982, well outside of the statute of limitations, and because the ESA contains no specific, unequivocal command that the Service revise or update the existing plan, the Complaint fails to state a justiciable claim under either the ESA citizen suit provision or the APA.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be granted.

DATED: January 30, 2015

Respectfully submitted,

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