Cochise County
Board of Supervisors

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AGENDA FOR SPECIAL BOARD MEETING
AND POSSIBLE EXECUTIVE SESSION
Monday, February 23, 2015 at 4:00 p.m.
BOARD OF SUPERVISORS EXECUTIVE CONFERENCE ROOM
1415 MELODY LANE, BUILDING G, BISBEE, AZ 85603

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the Cochise County Board of Supervisors and to the general public that the Board of Supervisors will hold a meeting open to the public for the purpose of deciding whether to go into executive session. If authorized by a majority vote of the Board, the executive session will be held immediately after the vote and will not be open to the public.

ANY ITEM ON THIS AGENDA IS OPEN FOR DISCUSSION AND POSSIBLE ACTION

ROLL CALL
Members of the Cochise County Board of Supervisors will attend either in person or by telephone, video or internet conferencing.

ACTION

Board of Supervisors
This executive session is authorized under A.R.S. § 38-431.03, Subsection (A), paragraph 3 and 4.

1. Authorize Cochise County participation in a lawsuit against U.S. Fish and Wildlife regarding the Environmental Impact Statement for the Rule 10(j) Mexican Gray Wolf Reintroduction Program.

   Pursuant to A.R.S. § 38-431(A)(3) and (A)(4), the Board may go into executive session for legal advice with the attorney of the public body and to consider its position and instruct its attorney regarding the public body's position regarding pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.

   Attachments
   CBD v Jewel 2 --Complaint pgs 1 - 17
   Coalition Motion to Intervene and Dismiss
   Complaint pgs 17 - 35
   Complaint pgs 35 - 51
   Joint Powers Agreement -- AZ NM Coalition of Counties
   Mexican_wolf_recovery_plan_complaint filed by Defenders and CBD
   Petition for Review of Agency Action filed by AZNM
   USFW Motion to Dismiss Complaint of Defenders and CBD

Pursuant to the Americans with Disabilities Act (ADA), Cochise County does not, by reason of a disability, exclude from participation in or deny benefits or services, programs or activities or discriminate against any qualified person with a disability. Inquiries regarding compliance with ADA provisions, accessibility or accommodations can be directed to Chris Mullinax, Safety/Loss Control Analyst at (520) 432-9720, FAX (520) 432-9716, TDD (520) 432-8360, 1415 Melody Lane, Building F, Bisbee, Arizona 85603.

Cochise County Board of Supervisors
1415 Melody Lane, Building G Bisbee, Arizona 85603
520-432-9200 520-432-5016 fax board@cochise.az.gov

AI-2256 **1.**

Special / Executive Session Board of Supervisors Meeting3

Meeting Date: 02/23/2015

Lawsuit against BLM Mexican Wolf

Submitted By: Arlethe Rios, Board of Supervisors

Department: Board of Supervisors

Presentation: No A/V Presentation

Recommendation:

Document Signatures:

# of ORIGINALS Submitted for Signature:

NAME of PRESENTER: Britt Hanson

TITLE of PRESENTER: Chief Civil Deputy County Attorney

Mandated Function?:

Source of Mandate or Basis for Support?:

Information

Agenda Item Text:

Authorize Cochise County participation in a lawsuit against U.S. Fish and Wildlife regarding the Environmental Impact Statement for the Rule 10(j) Mexican Gray Wolf Reintroduction Program.

Pursuant to A.R.S. § 38-431(A)(3) and (A)(4), the Board may go into executive session for legal advice with the attorney of the public body and to consider its position and instruct its attorney regarding the public body's position regarding pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.

Background:

n/a

Department's Next Steps (if approved):

n/a

Impact of NOT Approving/Alternatives:

n/a

To BOS Staff: Document Disposition/Follow-Up:

n/a

Attachments

CBD v Jewel 2 --Complaint pgs 1 - 17

Coalition Motion to Intervene and Dismiss

Complaint pgs 17 - 35

Complaint pgs 35 - 51

Joint Powers Agreement -- AZ NM Coalition of Counties

Mexican_wolf_recovery_plan_complaint filed by Defenders and CBD

Petition for Review of Agency Action filed by AZNM

USFW Motion to Dismiss Complaint of Defenders and CBD

Timothy J. Preso (Montana Bar No. 5255)
Earthjustice
313 East Main Street
Bozeman, MT 59715
tpreso@earthjustice.org
Fax: (406) 586-9695
Phone: (406) 586-9699

Heidi McIntosh (Utah Bar No. 6277)
Jessica Townsend (Colorado Bar No. 46895)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
hmcintosh@earthjustice.org
jtownsend@earthjustice.org
Fax: (303) 623-8083
Phone: (303) 623-9466

Attorneys for Plaintiffs Center for Biological Diversity and Defenders of Wildlife

Andrea Santarsiere (Idaho Bar No. 8818)
Center for Biological Diversity
P.O. Box 469
Victor, ID 83455
asantarsiere@biologicaldiversity.org
Phone: (303) 854-7748

Attorney for Plaintiff Center for Biological Diversity

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity; Defenders of Wildlife, Plaintiffs, vs. Sally Jewell, Secretary of the Interior; United States Fish and Wildlife Service, Defendants.	No. _____ 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

IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF ARIZONA

Defenders of Wildlife; Center for Biological Diversity; Endangered Wolf Center; David R. Parsons; and Wolf Conservation Center,

Plaintiffs,

v.

Sally Jewell, Secretary of the Interior, and United Fish and Wildlife Service,

Defendants.

Civ. 14-02472

MOTION FOR INTERVENTION; AND
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Pursuant to Federal Rules of Civil Procedure, Rule 24(a), (collectively Parties in Intervention") move this Court for permission to intervene as defendants in the above-captioned matter. Proposed Intervenors should be granted leave to intervene as of right because (1) they have timely filed this Motion to Intervene, (2) they have multiple interests in the outcome of this litigation, (3) their interests will be impaired if Plaintiffs' case is successful;, and (4) their interests will not adequately be represented by the existing parties. In support of this Motion to Intervene, the Parties in Intervention submit the following pleadings, which are incorporated herein by reference:

- Memorandum of Law in Support of Motions to Intervene and to Dismiss for Failure to State a Claim;
- Declarations of Parties in Intervention: Protection American Now, New Mexico Farm and Livestock Bureau, Colorado Farm Bureau, Utah Farm Bureau and the Coalition of Arizona and New Mexico Communities for Stable Economic Growth;

- Complaint in Intervention and Motion to Dismiss.

Pursuant to local rule 7.1, counsel for the Parties in Intervention have contacted Plaintiffs and Defendant to determine whether they oppose this Motion. Plaintiffs have indicated that they will advise the Court by separate filing. Defendant takes no position on the Motion.

WHEREFORE, for the foregoing reasons, the Parties in Intervention respectfully request that this Court grant their Motion to Intervene and dismiss the pending action.

Respectfully submitted this 29th day of January, 2015.

/s/ Dori E. Richards, Esq.
Dori E. Richards, Esq.
dorierichards@gmail.com
(505)463-6601

/s/ A. Blair Dunn, Esq.
A. Blair Dunn, Esq.
abdunn@ablairdunn-esq.com
(505)681-7801

Attorneys for Parties in Intervention
Western Agriculture, Resource and Business Law Advocates
1801 Rio Grande Blvd.,
Unit 2-C
Albuquerque, NM 87104

FWS has noted, without a valid recovery plan "to organize, coordinate and prioritize the many possible recovery actions, [a recovery] effort may be inefficient or even ineffective." Interim Endangered and Threatened Species Recovery Planning Guidance, Version 1.3 1.1-1 (June 2010) [hereinafter "Recovery Planning Guidance"]. The Mexican gray wolf reintroduction effort has been "inefficient or even ineffective," because the Service's 1982 "Recovery Plan" document lacks the fundamental scientific basis necessary to "organize, coordinate and prioritize" Mexican gray wolf recovery actions, as well as fundamental requirements such as established criteria that would signify full recovery and support eventual delisting.

38. The 1982 document was drafted without ESA-required recovery and delisting criteria because, at the time of the document's drafting, "the status of the Mexican wolf was so dire that the recovery team could not foresee full recovery and eventual delisting." 78 Fed. Reg. 35,719, 35,726 (June 13, 2013). As a result, the document's authors sought only "to ensure the immediate survival of the Mexican wolf." 2010 Conservation Assessment, at 22. They thus grounded the document in the maintenance of a captive breeding program and a stopgap measure of re-establishing in the wild "a viable, self-sustaining population of at least 100 Mexican wolves." Mexican Wolf Recovery Team, Mexican Wolf Recovery Plan 23 (Sept. 1982) [hereinafter 1982 "Recovery Plan" document].

39. Despite its stopgap nature, that 100-wolf measure has continued to serve as FWS's sole guidepost for the Mexican gray wolf reintroduction effort. As FWS has

stated, aside from the 100-wolf objective, "the gray wolf recovery effort in the Southwest operates without any guidance in terms of the number and distribution of wolves considered adequate for recovery and delisting." 2010 Conservation Assessment, at 7.

40. Yet the 100-wolf objective is admittedly an inadequate guidepost. In this regard, the Service "recognize[s] that the reestablishment of a single experimental population of Mexican wolves is inadequate for recovery and … [is] fully cognizant that a small isolated wolf population such as the experimental population now occupying the [Blue Range Wolf Recovery Area ("BRWRA"), which lies within the MWEPA] can neither be considered 'viable' nor 'self-sustaining'—regardless of whether it grows to a number of 'at least 100.'" U.S. Fish & Wildlife Serv., Final Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*) (November 2014) Ch. 1, at 17 [hereinafter FEIS]. FWS has further "acknowledge[d] that this [100-wolf] population target is … insufficient for recovery and delisting of C. l. baileyi, as the subspecies would still be in danger of extinction with a single population of this size." 78 Fed. Reg. 35,664, 35,695 (June 13, 2013) (emphasis added).

41. Since 1982, FWS has convened three recovery teams in an effort to develop a legitimate recovery plan. Three times, FWS has charged those teams with the task of drafting a recovery plan that reflects the best available scientific information. Three times, FWS has failed to issue such a plan.

42. In the first attempt, FWS in 1995 produced a draft recovery plan to supersede the 1982 "Recovery Plan" document. It was never finalized. The FWS Southwest Region convened another recovery team in 2003, but indefinitely suspended that recovery planning process in 2005.

43. FWS initiated the most recent recovery planning effort in 2010 when the Southwest Regional Director charged a Science and Planning Subgroup of the agency's Mexican Wolf Recovery Team with developing a recovery plan consistent with the best available scientific information. That subgroup included an interdisciplinary team of prominent scientists, including some of the world's foremost wolf biologists.

44. The Science and Planning Subgroup drafted a plan that proposed, based on the best available science, a minimum of three interconnected subpopulations, each of at least 200 animals, as part of a metapopulation of at least 750 Mexican gray wolves. A metapopulation consists of a group of distinct, spatially separated populations of the same species that are connected by dispersal. However, within two weeks of the release of a May 7, 2012, draft recovery plan containing this recommendation, FWS's Southwest Regional Director cancelled an upcoming recovery team meeting and effectively suspended the recovery planning process despite disagreement from members of the team who disputed the need to suspend the meetings.

THE MEXICAN GRAY WOLF REINTRODUCTION PROGRAM UNDER ESA SECTION 10(j)

45. The Mexican gray wolf is one of the most genetically, morphologically, and ecologically distinct lineages of wolves in the Western Hemisphere. It is believed to

be "the only surviving descendant[] of the first wave of gray wolves to colonize North America during the Pleistocene Epoch." Letter from Michael A. Mares, Ph.D., President, Am. Soc'y of Mammalogists, et al., to the Honorable Dan Ashe, Director, U.S. Fish & Wildlife Serv., Re: Recovery Planning for the Mexican Wolf (June 20, 2012). Mexican gray wolves historically inhabited Mexico and the southwestern United States, including portions of Arizona, New Mexico, and Texas. It appears that the subspecies also may have ranged into southern Utah and southern Colorado.

46. Largely at the behest of the livestock industry, the U.S. Biological Survey effectively exterminated the subspecies from the southwestern United States by the mid-1900s. In 1950, FWS (the institutional successor to the Biological Survey) launched a similar campaign in Mexico. According to FWS, the last known wild Mexican gray wolf in the United States was killed in 1970. It is believed that the subspecies was completely extinct in the wild by the mid-1980s.

47. Between 1977 and 1980, five Mexican gray wolves—four males and one female—were captured in Mexico. These wolves were placed in a captive breeding program and became known as the "McBride" lineage. Two other already-existing captive lineages, the "Aragón" and "Ghost Ranch" lineages, were also certified as genetically pure Mexican gray wolves in 1995. All individuals alive today come from a founding stock of seven of these captive Mexican gray wolves: three McBride wolves, two Aragón wolves, and two Ghost Ranch wolves.

48. In 1998, after a near thirty-year absence of Mexican gray wolves from the landscape, FWS released eleven captive-reared Mexican gray wolves under ESA section 10(j) as a nonessential experimental population into the BRWRA in east-central Arizona and west-central New Mexico. See 16 U.S.C. § 1539(j) (the "10(j)" provision for "experimental" populations); 63 Fed. Reg. 1752 (Jan. 12, 1998) (rule for the establishment of a 10(j) population of Mexican gray wolves in Arizona and New Mexico); see also 50 C.F.R. § 17.84(k)(9).

49. As described by FWS in the 1982 "Recovery Plan" document, the original, stopgap objective of the reintroduction effort was to achieve "a viable, self-sustaining population of at least 100 Mexican wolves" in the wild. 1982 "Recovery Plan" document, at 23. As of the Service's most recent population report in December 2013, the reintroduction program has fallen well short of that target, with only 83 individuals in the wild. At the end of 2013, the wild Mexican gray wolf population was neither viable nor self-sustaining. At its current size and level of genetic variation, the Mexican gray wolf population is "considered small, genetically impoverished, and significantly below estimates of viability appearing in the scientific literature." FEIS, Ch. 1, at 22. FWS has admitted that "[t]his would be true even at the 1982 Recovery Plan objective of 'at least 100 wolves.'" Id.

50. Several factors have contributed to the limited success of the reintroduction effort. Many are attributable to the actions—and failures to act—of FWS itself. Specifically, FWS has failed to respond to mounting genetic issues, inappropriately

limited the geography in which Mexican gray wolves can be released and can reside, excessively removed wolves from the wild, and failed to effectively respond to an extremely high level of illegal wolf mortality. These problems will persist—and may even be exacerbated—under the revised 10(j) rule.

Genetic Problems

51. The genetic challenges to Mexican gray wolf recovery largely stem from the small number of individuals that remained in existence when conservation efforts for this subspecies began. The extremely small number of founders in the captive breeding population (i.e., the Mexican gray wolves from which all individuals living today descend) has raised significant concerns about the long-term genetic health of the Mexican gray wolf subspecies. As FWS explains, "[t]he small number of founders upon which the existing Mexican wolf population was established has resulted in pronounced genetic challenges, including inbreeding (mating of related individuals), loss of heterozygosity (a decrease in the proportion of individuals in a population that have two different [variants of] a specific gene), and loss of adaptive potential (the ability of populations to maintain their viability when confronted with environmental variations)." FEIS, Ch. 1, at 4.

52. Inbreeding was a concern with the McBride lineage, which was founded by only three individuals. Indeed, by the mid-1990s, McBride pups had inbreeding levels "similar to … offspring from … full sibling or parent-offspring pairs." 78 Fed. Reg. at 35,704. In 1995, the captive breeding program integrated the Aragón and Ghost Ranch

lineages—both of which were also highly inbred—into the McBride lineage in an attempt to increase the overall genetic diversity of the founder population. After this integration of the three lineages, specific breeding protocols and genetic goals were established to inform Mexican gray wolf pairings.

53. Unfortunately, while the captive breeding facilities have more recently managed the Mexican gray wolf breeding program to preserve as much genetic diversity as possible, much of the genetic potential of the founding stock has been lost. The loss of genetic potential is the result of the small number of founder wolves, the fact that "[t]he Mexican wolf captive breeding effort … was not managed to retain genetic variation until several years into the effort," and the failure of the reintroduction program to facilitate the rapid expansion of a genetically diverse wild Mexican gray wolf population. FEIS, Ch. 1, at 20. Today, "[t]he captive population is estimated to retain only 3.01 founder genome equivalents, suggesting that more than half of the alleles (gene variants) from the seven founders have been lost from the population." 78 Fed. Reg. at 35,705. In other words, despite the fact that the founding stock for the current population consisted of seven individual wolves, the captive Mexican gray wolf population today retains the genetic material of only approximately three individual founders.

54. The wild population is in even worse genetic shape than the captive population. According to FWS, the wild population "has poor representation of the genetic variation remaining in the captive population. The wolves in the experimental population have Founder Genome Equivalents (FGE) that are 33 percent lower than

found in the captive population and the estimated relatedness … of these animals suggest that on average they are as related to one another as … full siblings are related to each other." FEIS, Ch. 1, at 20-21. FWS has acknowledged that "[w]ithout substantial management action to improve the genetic composition of the [wild] population, inbreeding will accumulate and … [genetic material] will be lost much faster than in the captive population." 78 Fed. Reg. at 35,706.

55. As would be expected in the present circumstances, there is already "evidence of strong inbreeding depression in the reintroduced [Mexican gray wolf] population," including reduced litter size and reduced pack size. 78 Fed. Reg. at 35,706. In other words, inbreeding has reduced the reintroduced Mexican gray wolves' ability to survive and reproduce. FWS has emphasized that "[h]igher levels of genetic variation within the experimental population are critically important to minimize the risk of inbreeding and support individual fitness and ecological and evolutionary processes." FEIS, Ch. 1, at 20. Unless rectified, the current "level of inbreeding depression may substantially reduce the viability of the population" and "limit the ability of future Mexican wolf populations to adapt to environmental challenges." 78 Fed. Reg. at 35,706. That is, inbreeding may result in a Mexican gray wolf population that suffers from both a genetically based reduction in survival and reproduction potential, and—again because of its genetic limitations—a reduced ability to respond to environmental changes.

56. To maximize genetic potential and prospects for recovery, FWS must commit to an active program of releasing genetically diverse wolves into the wild,

capitalizing on the genetic potential now available in the captive population before it is further depleted. Such releases, if managed properly, would promote "[r]apid expansion of the population …[,] further promot[ing] maintenance of genetic diversity." 2010 Conservation Assessment, at 60. Rapid expansion is critical because it will allow the released wolves to reproduce and express the full spectrum of remaining genetic potential—something they are unable to do in captivity due to constraints on the number of breeding facilities and holding space. In addition to minimizing the loss of genetic potential, it is critical to release more wolves into the wild in a timely fashion because "[i]f captive Mexican wolves are not reintroduced to the wild within a reasonable period of time, … physical … or behavioral changes resulting from prolonged captivity could diminish their prospects for recovery." 63 Fed. Reg. at 1755. As FWS itself said in 2010, "[t]he longer … threats [to the Mexican gray wolf] persist, the greater the challenges for recovery, particularly as related to genetic fitness and long-term adaptive potential of the population." 2010 Conservation Assessment, at 78.

57. Under the FWS's revised section 10(j) rule, the agency would maintain a single experimental Mexican gray wolf population of 300-325 individuals in the MWEPA and successfully integrate a small number of captive wolves into the population per generation. FEIS, Exec. Summary, at ES-8; id., Ch. 1, at 22. However, the FEIS for the revised rule ignores the substantial risk that a single, isolated population of wolves with a low level of genetic diversity, supplemented by an extremely low level of releases

of captive wolves, is insufficient to support the survival or recovery of the species in the wild.

Excessive Removals, Insufficient Releases & Illegal Mortality

58. The genetic impediments to recovery described above are exacerbated by extremely high levels of Mexican gray wolf take and removal from the wild. One of the reasons FWS reintroduced Mexican gray wolves as an ESA section 10(j) nonessential, experimental population was to "enable[] the Service to develop measures for management of the population that are less restrictive than the mandatory prohibitions that protect species with 'endangered' status. This includes allowing limited 'take' … of individual wolves …." 63 Fed. Reg. at 1754. FWS deemed such "[m]anagement flexibility" necessary "to make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting" and "to obtain[] needed State, Tribal, local, and private cooperation." Id. FWS believed such "flexibility [would] improve the likelihood of success" of the reintroduction program and, ultimately, Mexican gray wolf recovery. Id. Unfortunately, as the past sixteen years have demonstrated, this management flexibility has not resulted in a successful reintroduction program. Instead, the reintroduction effort currently teeters on the brink of failure and the subspecies' recovery prospects remain in jeopardy.

59. Since reintroduction began, removal of Mexican gray wolves from the wild, whether by agency-authorized action or illegal killing by members of the public, has exacted a heavy toll on the Blue Range population. FWS itself removed 160 Mexican

gray wolves from the reintroduced population since 1998. Of these, FWS has killed or ordered the killing of twelve wolves and consigned twenty-four once-wild wolves to permanent captivity. The remaining 124 instances of removal were temporary removals, meaning those wolves remained theoretically eligible for translocation. However, some temporarily removed wolves, "while eligible for translocation, have been removed from consideration for future release." U.S. Fish & Wildlife Serv., Outcomes of Mexican Wolf Management Removals from the Blue Range Population, Arizona and New Mexico, 1998-2013 (Dec. 31, 2013). Such removal of Mexican gray wolves from the wild "[has] the same practical effect on the wolf population as mortality if the wolf is permanently removed." 2010 Conservation Assessment, at 61. Indeed, FWS has identified "[t]he high number of wolf removals … as a contributing factor hindering the population's growth." Id. at 55.

60. Wolves that are killed or permanently removed from the wild are no longer able to genetically enrich the reintroduced population. Nevertheless, to date, FWS has shown little regard for the genetic contribution or importance of individual wolves in authorizing take or removal. For example, in November 2007, FWS permanently removed the alpha male from the Aspen pack—then the most genetically valuable pack in the reintroduced population. In December of that year, it permanently removed the Aspen pack's alpha female and a yearling female, and temporarily removed several pups.

61. As FWS has recognized, "[t]he ability of management to address inbreeding depression in the Blue Range population is constrained by regulatory and

discretionary management mechanisms that do not incorporate consideration of genetic issues yet result in limitation or alteration of the genetic diversity of the population. … The … Mexican Wolf [Species Survival Plan program, a bi-national cooperative conservation program overseen by the Association of Zoos and Aquariums that manages the species' breeding so as to maintain a healthy, genetically diverse, and demographically stable population,] has recommended that until the representation of the Ghost Range and Aragon lineages has increased and demographic stability is achieved in the wild population, careful consideration of genetic diversity should be prioritized during decisions to permanently remove wolves." 2010 Conservation Assessment, at 60. Nevertheless, "[t]he Service has not developed any specific protocols to promote genetic fitness in the population in response to recent research and professional recommendations." Id. The absence of such protocols is particularly problematic because high levels of illegal killing of Mexican gray wolves coupled with the Service's lenient take provision and its inadequate record of releasing new wolves into the wild (only four new wolves have been released since 2008) mean that the genetic issues only stand to worsen and become harder to remedy.

Wolves' Inability to Roam

62. Even for Mexican gray wolves that are released or born into the wild and that persist, the road to recovery is daunting. To date, FWS has confined the wolves to an ecologically arbitrary geography that impedes the subspecies' recovery.

63. FWS's 1998 10(j) rule did not permit wolves to establish territories wholly outside the BRWRA boundary. When wolves attempted to establish territories outside this ecologically arbitrary boundary, FWS captured and relocated them. This boundary restriction "does not allow for natural dispersal movements from the BRWRA or occupation of the [larger MWEPA]." 78 Fed. Reg. at 35,727. This limitation hindered Mexican gray wolf recovery by preventing natural wolf behavior, i.e., wide-ranging dispersal to find unoccupied territories with sufficient prey, denning sites, and other basic life necessities.

64. If wolves are not allowed to disperse more widely, it is highly unlikely that a viable, self-sustaining population will ever be established. Experts have long counseled and FWS has acknowledged that the long-term conservation of the Mexican gray wolf will likely "'depend on establishment of a metapopulation or several semi-disjunct but viable populations spanning a significant portion of [the species'] historic range.'" FEIS, App. G, at 28 (citation omitted). Independent scientists have recently echoed this advice in a peer-reviewed scientific journal publication that FWS itself has cited as an authoritative source of the best available scientific information. The independent scientists stated that "viability of the existing wild population is uncertain unless additional populations can be created and linked by dispersal." Carlos Carroll et al., Developing Metapopulation Connectivity Criteria from Genetic and Habitat Data to Recover the Endangered Mexican Wolf, 28 Conservation Biology 76, 84 (2014) ("Carroll et al. (2014)"). As FWS has explained, "[f]or a species that has been extirpated from so

much of its historic range, explicit effort must be made to recreate redundancy" (where "[r]edundancy refers to the existence of redundant, or multiple, populations spread throughout a species' range"). 2010 Conservation Assessment, at 68, 72 (emphasis omitted).

65. Generally speaking, well-connected metapopulations are better able to withstand less favorable demographic rates (e.g., birth rate, fertility rate, life expectancy) and catastrophic environmental events (e.g., wildfire, disease outbreak) than are isolated populations. This is because (1) connectivity facilitates gene flow as individuals move among populations, which reduces the severity and effects of inbreeding, and (2) the existence of multiple populations helps to ensure that the species is not wiped out if a catastrophic event decimates one of the populations. A well-connected metapopulation is especially important for the recovery of the Mexican gray wolf, which right now exists in the wild as one extremely small, isolated, and genetically-threatened population.

66. FWS recognized the need for a metapopulation early on in its management of Mexican gray wolves. Even the inadequate 1982 "Recovery Plan" document provided that an appropriate interim objective for Mexican gray wolf conservation would be to establish at least a second population. FWS reiterated this objective in the 1996 FEIS for Mexican gray wolf reintroduction into the Blue Range, where the Service stated that "[f]ull recovery of the Mexican wolf subspecies likely will require additional reintroduction projects elsewhere." U.S. Fish & Wildlife Serv., Reintroduction of the Mexican Wolf within its Historic Range in the Southwestern United States: Final

Environmental Impact Statement 1-1 (Nov. 1996) [hereinafter 1996 FEIS]. The agency has admitted that meeting the 1982 document's 100-wolf objective "alone would not allow de-listing; other populations would need to be reestablished elsewhere in accordance with criteria … developed in the revision of the Mexican Wolf Recovery Plan." Id. at 5-42.

67. The Service acknowledged this need again in the Biological Opinion accompanying the 2014 FEIS for the proposed revision to the nonessential experimental population of the Mexican gray wolf, where the agency stated, that "[t]he recovery and long-term conservation of the Mexican wolf in the southwestern U.S. and northern Mexico is likely to 'depend on establishment of a metapopulation of several semi-disjunct but viable populations spanning a significant portion of [the subspecies'] historic range in the region.'" FEIS, App. G, at 28 (citation omitted). Nevertheless, FWS's management rules have not permitted, much less facilitated, such metapopulation establishment.

THE REVISED SECTION 10(j) RULE

68. The Service's 1998 10(j) Rule for the Mexican gray wolf provided that "[t]he Service will evaluate Mexican wolf reintroduction progress and prepare ... full evaluations after 3 and 5 years that recommend continuation, modification, or termination of the reintroduction effort." 50 C.F.R. § 17.84(k)(13).

69. Accordingly, in 2001 FWS conducted a Three-Year Review of the reintroduction program with a team of scientific experts. That review resulted in a

number of recommendations, including that FWS "immediately modify" the 10(j) rule to allow for more widespread releases of Mexican gray wolves and afford wolves more latitude to establish territories outside the BRWRA. The Three-Year Review warned that "[s]urvival and recruitment rates [for Mexican wolves] are far too low to ensure population growth or persistence" and "[w]ithout dramatic improvement in these vital rates, the wolf population will fall short of predictions for upcoming years." Paul C. Paquet et al., Mexican Wolf Recovery: Three-Year Program Review and Assessment 27 (2001). These recommendations for facilitating the presence of more wolves in expanded territory were supported by an independent analysis by the Arizona Game and Fish Department ("AZGFD") and the New Mexico Department of Game and Fish.

70. A subsequent Five-Year Review offered further support for these recommendations. The Five-Year Review was completed in 2005 by the Mexican Wolf Adaptive Management Oversight Committee ("AMOC") under the 10(j) rule. AMOC consisted of representatives from FWS, AZGFD, New Mexico Department of Game and Fish, U.S. Forest Service, Wildlife Services (a program within the U.S. Department of Agriculture), and the White Mountain Apache Tribe.

71. Like the Three-Year Review, the Five-Year Review recommended continuation of the reintroduction program subject to modifications that would allow wolves to expand their territory outside of the BRWRA and allow the release of wolves in New Mexico. FWS did not adopt any of these recommendations.

72. Finally, in 2012 – spurred on by citizen advocacy, including a petition and two lawsuits filed by Plaintiff Center for Biological Diversity – the Service commenced formal rulemaking to revise the Mexican gray wolf 10(j) rule. On June 13, 2013, the Service published a proposed rule to revise the existing nonessential experimental population designation of the Mexican gray wolf and several provisions of the associated 10(j) rule. 78 Fed. Reg. 35,719.

73. On July 25, 2014, FWS released for public review and comment a Draft Environmental Impact Statement ("DEIS") for the proposed rule. 79 Fed. Reg. 43,358 (July 25, 2014). In the DEIS, the Service analyzed three, nearly-identical action alternatives (one of which was the preferred alternative) and one "no action" alternative. None of the alternatives included a population cap or a phased process for wolf reintroduction and dispersal; each of those provisions appears for the first time in the final rule.

74. Indeed, in connection with the DEIS, FWS expressly rejected for further consideration an alternative that would establish a cap on the population of Mexican wolves. FWS explained that setting a cap would be "premature" without the guidance of a new recovery plan, and would "not contribute to the achievement of our objective to further the conservation of the Mexican wolf." U.S. Fish & Wildlife Serv., Draft Environmental Impact Statement for the Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*) Ch. 2, at 10 (July 16, 2014) [hereinafter DEIS]. Accordingly, Plaintiffs did not comment on those issues.

75. After release of the DEIS, however, the Service entered into detailed discussions with AZGFD concerning the terms of the revised 10(j) rule. Available correspondence indicates that AZGFD demanded that the Service establish a population cap for the Mexican gray wolf population, allow for removal of wolves that negatively impact ungulate populations based on AZGFD's determination, and limit the westward dispersal of Mexican gray wolves to shield elk herds from natural predation.

76. On August 26, 2014, FWS memorialized discussions about a population cap with representatives from AZGFD in an email to an AZGFD official. FWS acknowledged that "[l]ack of a cap is a deal breaker for [AZGFD]." Email from John Oakleaf to Jim deVos (Aug. 26, 2014). Nevertheless, FWS stated that AZGFD's demand for a population cap was "difficult for the Service" and that "discussions will have to occur at a director level for a cap per se to be implemented." Id. In the end, however, FWS incorporated language nearly identical to AZGFD's demand for a population cap into the FEIS and final rule, along with additional new provisions responding to AZGFD's demands to protect ungulate populations from natural wolf predation and to limit westward dispersal of wolves.

77. FWS published the FEIS for the revised 10(j) rule on November 25, 2014. It provides that the purpose for the revision "is to further the conservation of the Mexican wolf by improving the effectiveness of the Reintroduction Program in managing the experimental population." FEIS, Exec. Summary, at ES-3.

78. However, FWS ultimately undermined that purpose by imposing measures

that threaten to prevent the recovery of the Mexican gray wolf, consigning the species to a perpetual fight for survival. Specifically, FWS included a number of elements in the revised rule that are not supported by the best available science, conflict with expert recommendations, and which are deleterious to the recovery of the Mexican gray wolf. Among other things, the rule provides that:

a. FWS will manage a single experimental population of Mexican gray wolves capped at 300 to 325 individuals. FEIS, Exec. Summary, at ES-8.

b. FWS will seek to integrate only one to two effective migrants per generation from the captive population to the reintroduced population. Id., Ch. 1, at 22.

c. FWS will revise and reissue the Mexican Wolf Recovery Program's section 10(a)(1)(A) research and recovery permit so as to authorize removal of Mexican gray wolves that can be identified as coming from the experimental population that disperse to establish territories in areas outside the MWEPA, including from areas north of I-40 where needed recovery habitat exists. Id., Exec. Summary, at ES-8.

d. FWS will authorize more permits for the otherwise prohibited "taking"—e.g., capturing or killing—of Mexican gray wolves. 16 U.S.C. § 1539(a)(1)(A); FEIS, Exec. Summary, at ES-8.

e. FWS will authorize the take of Mexican gray wolves if it concurs with an AZGFD determination that they are having an "unacceptable impact" on wild, native ungulate (i.e., hoofed mammals, particularly deer and elk) herds. Id.

f. FWS will implement a phased approach for the release of Mexican gray

wolves with limitations on the western boundary of their range and which delays the initial release and dispersal of wolves into suitable habitat within the MWEPA. Id. at ES-7. FWS adopted this phased management approach based on AZGFD's concerns that elk herds in western Arizona may be negatively impacted by the dispersal of Mexican gray wolves into those areas.

79. FWS published its revised section 10(j) rule incorporating these terms in the Federal Register on January 16, 2015.

ANALYTICAL DEFECTS IN THE FEIS AND 10(j) RULE

80. On certain critical issues, FWS's revised 10(j) rule reflects undue deference to the demands imposed by AZGFD during the agency rulemaking process rather than a legitimate response to the best available scientific information concerning the survival and recovery needs of the Mexican gray wolf. Although the ESA encourages FWS to cooperate with states in implementing the ESA, it does not permit FWS to take such cooperation so far as to adopt measures that frustrate the statute's fundamental mandates for species survival and recovery. FWS did so here, and in doing so it made a series of analytical errors that undermined its ultimate conclusions concerning the environmental impacts of the revised 10(j) rule and thereby corrupted the agency's NEPA process.

81. Wolf experts have sounded a continuing refrain emphasizing the importance of increasing the absolute number and distribution of Mexican gray wolves in the wild. Rather than allowing for sufficient growth of the Mexican gray wolf population, FWS instead imposed a population cap of 300-325 individuals in the Blue

Range population. The Service relies on a peer-reviewed scientific journal publication, Carroll et al. (2014), to justify this cap, asserting that the authors' analysis demonstrates that extinction risk for the Mexican gray wolf is satisfactorily low for a single isolated population of 300-325 individuals. See FEIS, Ch. 1, at 20. In fact, Carroll et al. (2014) assessed extinction risk not for a single, isolated population, but for a population when it is present within a metapopulation of three connected populations. Carroll and other scientists did perform simulations to assess the long-term viability of an isolated population and found that, even at 300-325 individuals, "an isolated population originating from wolves with the genetic composition of the current Blue Range population showed relatively high extinction rate, long term decline in population size in those populations that did not go extinct, as well as" significant challenges related to genetic health. Letter from Carlos Carroll, Ph.D., et al., to Division of Policy and Directives Management, U.S. Fish & Wildlife Serv. Headquarters 4-5 (Dec. 19, 2014) [hereinafter Carroll et al. Letter]. FWS's placement of a cap on the Blue Range population thus places the sole wild Mexican gray wolf population in the United States at a high risk for extinction, something that by its very nature is inconsistent with long-term recovery of the species, let alone its basic survival.

82. In addition to artificially constraining the Mexican gray wolf population size, FWS failed to provide for the release of enough captive wolves to ensure the Blue Range population's genetic health. This failure also resulted from a misinterpretation of Carroll et al. (2014).

83. Specifically, FWS attempted to interpret the findings of Carroll et al. (2014) with respect to the number of effective migrants per generation necessary to sustain the Blue Range population. Effective migrants, i.e., individuals from outside the population that successfully breed and pass along their genes within the population, are critical for the long-term viability of the genetically impoverished Blue Range population. While "[i]n the context of a metapopulation, effective migration is achieved through dispersal from one population to another[, i]n the context of [the] current single experimental population [FWS] intend[s] to … us[e] initial releases from the captive population as a source of effective migrants." FEIS, Ch. 1, at 22. FWS would choose wolves with "appropriate genetic background" for release to bolster the Blue Range population gene pool. Id.

84. The Service concludes that it "need[s] to integrate two effective migrants into the population each generation while the population is around 100-250 animals. This number could decrease to one effective migrant per generation at population sizes greater than 250." Id. However, FWS again misinterpreted Carroll et al. (2014) in reaching this conclusion—this time with the result that the Service set the effective migration level too low to provide for genetic integrity of the reintroduced population.

85. Carroll et al. (2014) "estimated a rate of effective migration that would ensure acceptably low long-term erosion of genetic health in a recovered metapopulation of three populations." Carroll et al. Letter at 4. This is not analogous to the "optimal rate in the short-term for releases from the captive population" needed to improve the genetic

health of the current genetically impoverished Blue Range population. Id. As Carroll et al. explained in a letter to FWS:

> Our simulations suggest that ~2 effective migrants per generation may be enough to maintain the existing level of heterozygosity in the Blue Range population if adult mortality is low (~22-23%). However, given the current depauperate genetic composition and the high relatedness of the Blue Range population, in order for this population to contribute to recovery it is necessary to not only forestall further genetic degradation but also reduce the high relatedness of the Blue Range population and increase its levels of genetic variation. … Releases from the captive population at a rate equivalent to 2 effective migrants per generation would … be inadequate to address current genetic threats to the Blue Range population.

Id. (emphasis added). Accordingly, the effective migration rates established by FWS in the new rule are insufficient to address genetic threats to the Blue Range population. FWS's vague and unenforceable suggestion that it "may conduct additional releases in excess of 1-2 migrants per generation" and its reliance on the recovery planning process and adaptive management to "refine" its release rate do not remedy this shortcoming. Final Rule, at 20. Coupled with the population cap and in the absence of a metapopulation, these rates not only fail to respond to existing threats but go further to actually threaten the long-term recovery of the Mexican gray wolf.

86. FWS also ignored the harmful impact of prohibiting natural wolf dispersal outside the MWEPA -- in particular to needed recovery habitat north of Interstate 40. The best available science makes clear that the establishment of several populations connected via effective migration is imperative for the genetic health and successful recovery of the Mexican gray wolf, and the Service itself has repeatedly admitted that "[t]he recovery and long-term conservation of the Mexican wolf in the southwestern U.S.

and northern Mexico is likely to 'depend on establishment of a metapopulation or several semi-disjunct but viable populations spanning a significant portion of [the species'] historic range in the region.'" FEIS, App. G, at 28 (citation omitted).

87. Wolf experts have identified suitable habitat outside the MWEPA boundaries—including habitat north of I-40—where these additional populations could be established. Specifically, Carroll et al. (2014) stated that "the southwestern United States has 3 core areas with long-term capacity to support populations of several hundred wolves each. These 3 areas . . . [include the] Blue Range . . ., northern Arizona and southern Utah (Grand Canyon), and northern New Mexico and southern Colorado (Southern Rockies)." The draft recovery plan prepared by the Service's Science and Planning Subgroup reached a parallel finding.

88. The Service ignored this best available science in its decision to confine Mexican gray wolves only to areas south of I-40. FWS claimed that it lacked a sound scientific basis for identifying important recovery habitat outside the MWEPA, overlooking the fact that Carroll et al. (2014)—the same study FWS cited in its misguided attempt to justify a population cap—and the studies it cites, including Carlos Carroll et al., Defining Recovery Goals and Strategies for Endangered Species: the Wolf as a Case Study, 56 BioScience 25 (2006), provide the scientific basis for identifying such habitat.

89. Further, while FWS recognizes that wolf dispersal beyond the MWEPA "may be important to the recovery of the Mexican wolf," it did not analyze in detail an

alternative to the revised 10(j) rule that included dispersal beyond MWEPA boundaries, including to areas north of I-40, despite credible studies showing that expansion of the wolf's range in that area would help conserve the species. FEIS, Ch. 1, at 32.

90. The revised 10(j) rule also liberalizes already too-lenient regulatory provisions authorizing take of reintroduced Mexican gray wolves. Even the current level of take has contributed to the ongoing "risk of failure" of the reintroduction program. Further, such take is often conducted without due regard for the genetic significance of the individuals taken—something the reintroduced population can ill afford. The FEIS did not adequately analyze the impacts of increased wolf removal on Mexican gray wolf recovery, particularly given the species' genetic predicament.

91. To justify liberalizing the take authorization, the revised rule relies on faulty and factually unsupported reasoning—namely, that the agency "expect[s] that modifying the provisions governing the take of Mexican wolves will reduce the likelihood of indiscriminate, illegal killing of wolves and will substantially lessen the overall risk of human caused wolf mortality." Mexican Wolf Recovery Program, Southwestern Reg'l Office, U.S. Fish & Wildlife Serv., Environmental Impact Statement for the Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*) and the Implementation of a Management Plan, Preliminary Draft, Ch. 1 and 2 35 (Aug. 2, 2013) [hereinafter Preliminary DEIS]; see also FEIS, Ch. 1, at 31-32 (hypothesizing that the take provisions "build[] trust and cooperation" and "social tolerance for wolves"). However, as the past sixteen years of the Mexican gray

wolf reintroduction program have demonstrated, liberal take rules have not prevented excessive illegal mortality or enhanced Mexican gray wolf recovery in the wild. To the contrary, illegal killing has been the single largest source of mortality for the reintroduced Mexican gray wolf population, in some years resulting in population declines of 10% or more. Further, recent research suggests that FWS has its logic backward, and that broad public authorization for lethal control of predators, including wolves, is linked to reduced public tolerance for those predators on the landscape.

FIRST CAUSE OF ACTION
(Violation of the National Environmental Policy Act)
Failure to Prepare a Supplemental Draft EIS

92. All preceding paragraphs are hereby incorporated as if fully set forth herein.

93. NEPA's implementing regulations provide that agencies shall prepare supplements to draft environmental impact statements if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(i). Accordingly, if an agency departs substantially from the alternatives described in the draft EIS, a supplemental draft EIS is required. Russell Country Sportsmen, 668 F.3d at 1045. Failure to prepare such a supplemental draft EIS subverts the NEPA process, in part because the NEPA process contemplates that federal agencies shall respond to comments received on a draft EIS by taking various actions in the final EIS, including modifying the alternative actions under consideration, developing new alternatives, improving its environmental analysis, and/or making factual corrections.

See 40 C.F.R. § 1503.4. Absent a draft EIS that legitimately discloses and describes the agency's proposed action and attempts to analyze its environmental impacts, this iterative process, and the purpose it serves in promoting protection of the environment, is thwarted.

94. Here, FWS's final EIS for the revised 10(j) rule made substantial changes from the proposed action that were not disclosed to the public in the agency's draft EIS. The proposed action in FWS's final EIS adopted a population cap for the reintroduced Mexican gray wolf population that the agency explicitly rejected in the draft EIS and limited wolf dispersal west of Highway 87 in a staged manner that was not disclosed or even forecasted in the draft EIS. Nevertheless, FWS failed to prepare a supplemental draft EIS to provide relevant agencies, tribes and the public with an adequate opportunity to review and comment on these innovations, and to enable the agency itself to appropriately analyze and respond to such comments. This shortcuts the analytical and public comment process that NEPA requires.

95. FWS violated NEPA by failing to prepare a supplemental draft EIS to address substantial changes that the agency made in the proposed action that are relevant to environmental concerns.

SECOND CAUSE OF ACTION
(Violation of National Environmental Policy Act)
Failure to Take Hard Look and Insure Scientific Integrity of EIS

96. All preceding paragraphs are hereby incorporated as if fully set forth herein.

97. NEPA requires federal agencies, including the FWS, to take a "hard look" at the direct, indirect, and cumulative impacts of proposed major federal actions. 42 U.S.C. § 4332(2)(C)(i)-(ii); 40 C.F.R. § 1502.16, 1508.25(c). To take the required "hard look" at the impacts of a proposed project "an agency may not rely on incorrect assumptions or data in an EIS." Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 964 (9th Cir. 2005). Further, agencies must ensure "the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24.

98. Here, in the environmental review of its proposed action set forth in the final EIS for the revised 10(j) rule, FWS failed to take a "hard look" and ensure the scientific integrity of its discussions and analyses. As one particularly significant example, FWS purported to rely on a 2014 peer-reviewed scientific journal publication by Carlos Carroll and other eminent scientists—Carroll et al. (2014)—to justify the imposition of a population cap on the reintroduced Mexican gray wolf population. However, FWS's EIS analysis misused and misrepresented the Carroll et al. (2014) publication. Specifically, Carroll et al. (2014) considered the extinction risk for Mexican gray wolf populations of various sizes within a complex of several populations connected by varying degrees of wolf dispersal and migration. Carroll et al. (2014) did not address the extinction risk for a much more precarious single, isolated population of 300 to 325 wolves and the analysis in Carroll et al. (2014) did not support the imposition of the population cap imposed in the proposed action set forth in FWS's final EIS.

99. FWS similarly misused and misinterpreted Carroll et al. (2014) in determining the number of releases of captive wolves necessary to address the wild Mexican gray wolf population's compromised genetic integrity. FWS concluded that releases sufficient to yield only two effective migrants were needed per wolf generation to sustain the wolf population while the population was between 100 and 250 animals, with even fewer releases needed at higher population levels. However, in a letter describing the findings of their 2014 study, Carroll et al. (2014) explained that the level of releases proposed by the government would be inadequate to address current genetic threats to the Blue Range population. See Carroll et al. Letter at 4 (emphasis added). FWS had misconstrued Carroll et al. (2014) by applying the authors' findings—which looked at levels of effective migration necessary to retain genetic integrity within a more genetically diverse metapopulation—to the single, genetically impoverished Blue Range population. Carroll et al. (2014) does not support FWS's finding as to necessary levels of effective migration, and FWS failed to take a hard look at the actual genetic consequences of the insufficient levels of effective migration that the agency prescribed.

100. The proposed action set forth in FWS's final EIS also imposed a restriction on dispersal of wolves from the reintroduced Mexican gray wolf population to areas north of Interstate 40 in Arizona and New Mexico. Further reflecting FWS's failure to take a "hard look" and ensure the scientific integrity of its discussions and analyses, FWS sought to justify this restriction on the asserted ground that there does not exist any sound, peer-reviewed scientific basis to provide guidance on where Mexican gray wolf

populations must be established to reach full recovery. However, Carroll et al. (2014)—the same publication upon which FWS attempted to rely in imposing the population cap—discussed this issue. Carroll et al. (2014) stated that "the southwestern United States has 3 core areas with long-term capacity to support populations of several hundred wolves each. These 3 areas … [include the] Blue Range …, northern Arizona and southern Utah (Grand Canyon), and northern New Mexico and southern Colorado (Southern Rockies)." Carroll et al. (2014), at 78, referencing Carlos Carroll et al., Defining Recovery Goals and Strategies for Endangered Species: the Wolf as a Case Study, 56 BioScience 25 (2006). Two of the referenced core areas—those in the Grand Canyon and Southern Rockies regions—are located north of Interstate 40 where wolf dispersal is prohibited pursuant to the proposed action in FWS's final EIS. FWS failed to consider Carroll et al. (2014) in examining the impacts of restricting wolf dispersal north of Interstate 40.

101. As yet another example of FWS's failure to take a "hard look" and ensure the scientific integrity of its discussions and analyses, FWS proposed to authorize removal of Mexican gray wolves if AZGFD determines they are having an "unacceptable impact" on wild, native ungulate herds. Under the FWS's proposed approach, this determination would be based on either the state agency's own "ungulate management goals" or a documented "15 percent decline in an ungulate herd." FEIS, Exec. Summary, at ES-8. Yet, the best available science shows that not only do ungulate population sizes vary widely based on a number of factors having little to do with predation pressure, but

even obtaining an accurate count of ungulate population size "is a difficult task, almost always with confidence intervals so wide that it is hard to tell when a herd size has changed." Letter from L. David Mech, Senior Research Scientist, U.S. Geological Survey and Adjunct Professor, Univ. of Minn., to Sherry Barrett (Aug. 11, 2014). FWS thus failed to take a hard look at the actual impact of such a vague and ill-defined take authorization on wolf recovery.

102. FWS violated NEPA by misusing, ignoring, and making incorrect assumptions regarding the Carroll et al. (2014) study and other scientific information in a manner that subverted the agency's analysis of environmental impacts associated with the proposed action set forth in the final EIS.

THIRD CAUSE OF ACTION
(Violation of National Environmental Policy Act)
Failure to Consider a Reasonable Range of Alternatives

103. All preceding paragraphs are hereby incorporated as if fully set forth herein.

104. NEPA requires that agencies proposing major Federal actions significantly affecting the quality of the human environment must consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). NEPA's implementing regulations augment this duty, providing that agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The discussion of alternatives "is the heart of the environmental impact statement," id. § 1502.14, because it constitutes the means by which the agency may assess whether its proposed action may

be undertaken with fewer environmental impacts. The discussion of alternatives must "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public." Id. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 813 (9th Cir. 2005) (quotations omitted).

105. Here, FWS's final EIS set forth the agency's purpose "to further the conservation of the Mexican wolf by improving the effectiveness of the Reintroduction Project in managing the experimental population," FEIS, Executive Summary, at 3 – in effect, to further the recovery of the Mexican gray wolf by improving management of the Mexican gray wolf population as required by the Endangered Species Act. Nevertheless, in exploring options for such management improvements, FWS gave detailed consideration to three action alternatives, none of which included needed conservation measures for the Mexican gray wolf that would have satisfied the agency's purpose in revising the 10(j) rule.

106. Important conservation measures omitted from the alternatives studied by FWS in detail included, without limitation, measures permitting Mexican gray wolves to disperse into needed recovery habitat north of Interstate 40 and imposing safeguards to ensure against the removal of genetically significant Mexican gray wolves through the revised 10(j) rule's expanded provisions for "taking" wolves through capture or killing. Plaintiffs each proposed a conservation alternative including several such measures in their respective comments on the Preliminary DEIS, but the FWS failed to adequately

address these proposals in either the DEIS or FEIS. See Letter from Michael J. Robinson, Conservation Advocate, Center for Biological Diversity 30 (Sept. 19, 2013) and Letter from Jamie Rappaport Clark, President and CEO, Defenders of Wildlife 9 (Sept. 19. 2013).

107. FWS violated NEPA by failing to consider a reasonable range of alternatives.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that FWS acted arbitrarily and capriciously and violated NEPA in revising the ESA section 10(j) rule for the Mexican gray wolf population and issuing an associated ESA section 10(a)(1)(A) permit;

2. Set aside and remand the challenged portions of the FWS's revised 10(j) rule, 10(a)(1)(A) permit, and final EIS for the Mexican gray wolf population;

3. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation; and

4. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

DATED this 16th day of January, 2015,

s/ Timothy J. Preso

Timothy J. Preso (Montana Bar No. 5255)
Earthjustice
313 East Main Street
Bozeman, MT 59715
tpreso@earthjustice.org
Fax: (406) 586-9695
Phone: (406) 586-9699

Heidi McIntosh (Utah Bar No. 6277)
Jessica Townsend (Colorado Bar No. 46895)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
hmcintosh@earthjustice.org
jtownsend@earthjustice.org
Fax: (303) 623-8083
Phone: (303) 623-9466

Attorneys for Plaintiffs Center for Biological Diversity and Defenders of Wildlife

Andrea Santarsiere (Idaho Bar No. 8818)
Center for Biological Diversity
P.O. Box 469
Victor, ID 83455
asantarsiere@biologicaldiversity.org
Phone: (303) 854-7748

Attorney for Plaintiff Center for Biological Diversity

Regarding: Cochise Co. Coalition of Counties - JPA) Board Mtg 10/17/94

IS RECEIVED-

6 SEP 94 11: 10

APACHE COUNTY ATTORNEY

STEPHEN G. UDALL
COUNTY ATTORNEY

P.O. Box 637, St. Johns, AZ 85936
(602) 337-4364
FAX (602) 337-2427

RUSSELL H. BURDICK, JR.
Chief Deputy
MICHAEL G. GOIMARAC
Deputy
MICHAEL P. ROCA
Deputy
BRITT W. HANSON
Deputy
JAMES D. DE VANEY
Deputy
LOUIS T. GIAQUINTO
Deputy

September 12, 1994

ENCLOSURE FORM

DATE: September 12, 1994

TO:

ATT: MARIA MARSH
Cochise County Board of Supervisors
1415 W. Melody Lane
Bisbee, Arizona 85903

RE: Joint Powers Agreement

Pursuant to your conversation with Steve Udall today, he asked that I send a copy of the Joint Powers Agreement to you. A copy is enclosed. If you have any questions, please do not hesitate to contact our office.

Cookie Overson
Legal Secretary

Agreement No. _____

JOINT POWERS AGREEMENT

THIS AGREEMENT is made and entered into this ____ day of _____, 1993, pursuant to the Joint Powers Agreement Act, Sections 11-1-1, et seq., NMSA 1978, and the Arizona Intergovernmental Agreement Statute, A.R.S. §11-951 et seq. among the following parties:

1) Catron County, New Mexico,
2) Hidalgo County, New Mexico,
3) Lincoln County, New Mexico,
4) Luna County, New Mexico,
5) Sierra County, New Mexico,
6) Socorro County, New Mexico,
7) Torrance County, New Mexico,
8) Apache County, Arizona,
9) Cochise County, Arizona
10) Gila County, Arizona
11) Graham County, Arizona
12) Greenlee County, Arizona,
13) Navajo County, Arizona

WITNESSETH:

WHEREAS, all of the parties are public agencies as this term is defined in Section 11-1-2, NMSA 1978 and A.R.S. §11-951; and

WHEREAS, all of the parties desire to enter into a joint powers agreement in order to coordinate mutual efforts to

preserve the viability of local economies and to take legal or other steps necessary to protect local economies.

NOW, THEREFORE, the parties agree as follows:

1. Purpose. The parties enter into this Joint Powers Agreement in order to provide for mutual and common efforts regarding the preparation, funding and direction of litigation and related activities pertaining to land use and resource management actions by federal agencies which affect the parties and the economies of their areas. Each of the counties shall have exclusive control over the expenditure of its money. In other words, each county board will divert the expenditure of its funds towards passage of specific legislation or handling specific litigation and the joint powers group will not expend those monies for any other purpose or purposes.

2. Scope. The parties shall form a committee made up of one representative from each party, or may act through the existing coalition of Counties if all parties are members of the Coalition. The committee shall direct the administering agency and authorize is to act on behalf of the parties. The combined efforts of the parties shall be referred to as the "Joint Powers Group". The committee shall by majority vote of the members determine all matters relating to management, coordination, expenditure, purposes, administration and disbursement of all funds available and shall specify all contract terms of any contracts entered into by the Joint powers Group which shall not be inconsistent with other provisions of the laws of the States

of Arizona and New Mexico. No contract entered into by the Joint Powers Group shall be effective until approved by the governing body of each party.

3. Administering Agency. The Joint Powers Group may designate any one of the above member counties to become the administering agency to carry out the directives of the Joint Powers Group and to receive, administer and account for all funds received and expended by the Joint Powers Group.

4. Funding. The administering agency may accept contributions from the parties and from other sources for the purposes set forth herein.

5. Disbursement of Funds. The administering agency will administer disbursements of funds pursuant to the direction of the Committee. The administering agency shall administer funds in compliance with applicable state laws and regulations, and otherwise by direction of the Committee. It is recognized that all contracting and expending of appropriated funds may be subject to the provisions of the New Mexico Procurement Code and any other applicable laws of the States of New Mexico and Arizona. The administering agency shall be strictly accountable to the Joint Powers Group for all receipts and disbursements of funds. All contracts entered into by the administering agency on behalf of the Joint Powers Group shall contain a clause requiring strict accountability by contractors for receipt and disbursement of all funds.

6. Term. This Agreement shall not become effective until approved by the governing bodies of all parties and the Secretary of the New Mexico Department of Finance and Administration and also as to the Arizona parties when filed with the Arizona Secretary of State after approval by each county's legal counsel. This agreement shall continue indefinitely, until terminated by the parties.

7. Participation. Other parties than those designated herein shall be allowed to participate in this Agreement by majority vote of the Committee. Any party may, however, withdraw from participation under this Agreement by providing advance written notice.

8. Records. The administering agency shall maintain any and all records required by the Committee for contracts authorized by the Committee. For such contracts, the other parties agree to maintain any records required by the administering agency and to provide such records at its request. The administering agency will require all contractors to maintain detailed records of all matters relating to contracts.

9. Confidentiality. The parties recognize that actions of the Joint Powers Group may involve pending litigation and attorney-client matters and that all meetings and records involving privileged attorney-client communications are protected from public disclosure by the laws of the States of New Mexico and Arizona. All parties will endeavor to protect all privileged communications, information, documents and records involving the

functions of the Joint Powers Group. It is also recognized by the parties that such privileged communications, information, documents and records may be protected as attorney's work product for litigation purposes.

10. Open Meeting Law. This Agreement and all proceedings pursuant to or in furtherance of the Agreement are subject to and shall be conducted in accordance with the Arizona Open Meeting Law (A.R.S. Section 38-431, et seq.).

11. Product of Contracts. The product, written or otherwise, of all contracts funded by the Joint Powers Group shall be made available on an equal basis to each of the parties. Any efforts funded solely by a party or parties are not subject to this provision.

12. Amendment. This Agreement shall not be altered, changed or amended except by instrument in writing executed by all parties hereto, except that a party may unilaterally withdraw from participation in this Agreement after written notice. In the event of withdrawal of a party from the contract, any contribution not yet expended of that party in excess of dues shall be forthwith returned to the withdrawing party.

13. Disposition of Property. Any property acquired as a result of this Agreement shall, consistent with the provisions of paragraph 9 herein, be made available to all parties on an equal basis, at all times during the course of this Agreement and upon its termination. Upon the termination of this Agreement, any funds provided by the parties will be returned to each party in

the proportion or in the amount in which they were originally made, to the relative contribution of that party.

14. Applicable Law. This Agreement and all contracts resulting therefrom shall be governed by the laws of the States of New Mexico and Arizona.

15. Execution. This Agreement may be executed in counterparts and considered as executed as one document.

16. Notice. Notices of meetings and activities of the Joint Powers Group shall be given to each member as follows:

Catron County Commission
P.O. Box 507
Reserve, NM 87830

Hidalgo County Commission
300 S. Shakespeare
Lordsburg, NM 88045

Lincoln County Commission
P.O. Box 711
Carrizozo, NM 88301

Luna County Commission
Luna County Courthouse
Deming, NM 88030

Sierra County Commission
311 Date Street
Truth or Consequences, NM 87901

Socorro County Commission
P.O. Box 1
Socorro, NM 87801

Torrance County Commission
P.O. Box 48
Estancia, NM 87016

Apache County Board of Supervisors
P.O. Box 428
St. Johns, AZ 85936

Cochise County Board of Supervisors
P.O. Box 225
Bisbee, AZ 85603

Gila County Board of Supervisors
1400 E. Ash Street
Globe, Arizona 85501

Graham County Board of Supervisors
800 Main Street
Safford, AZ 85546

Greenlee County Board of Supervisors
P.O. Box 908
Clifton, AZ 85533

17. As to the Arizona parties, notice is hereby given that this agreement may be terminated pursuant to A.R.S. §38-511 for violating the Arizona conflice of interest statute.

18. Severability. If any part or application of this Agreement is held to be invalid, the remainder, or its application to other situations or persons, shall not be affected.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

CATRON COUNTY, NEW MEXICO

BY:_____
TITLE: Chairman, Board of County Commissioners

DATE:_____

ATTEST:_____
County Clerk

TORRANCE COUNTY, NEW MEXICO

BY:_____
TITLE: Chairman, Board of County Commissioners

DATE:_____

ATTEST:_____
County Clerk

HIDALGO COUNTY, NEW MEXICO

BY:_____
TITLE: Chairman, Board of County Commissioners

COCHISE COUNTY, ARIZONA

BY:_____
TITLE: Chairman, Board of County Supervisors

DATE: _____

ATTEST: _____
County Clerk

LINCOLN COUNTY, NEW MEXICO

BY: _____
TITLE: Chairman, Board
of County Commissioners

DATE: _____

ATTEST: _____
County Clerk

LUNA COUNTY, NEW MEXICO

BY: _____
TITLE: Chairman, Board
of County Commissioners

DATE: _____

ATTEST: _____
County Clerk

SIERRA COUNTY, NEW MEXICO

BY: _____
TITLE: Chairman, Board
of County Commissioners

DATE: _____

ATTEST: _____
County Clerk

SOCORRO COUNTY, NEW MEXICO

BY: _____
TITLE: Chairman, Board
of County Commissioners

DATE: _____

ATTEST: _____
County Clerk

DATE: _____

ATTEST: _____
County Clerk

APACHE COUNTY, ARIZONA

BY: _____
TITLE: Chairman, Board of
County Supervisors

DATE: _____

ATTEST: _____
County Clerk

GRAHAM COUNTY, ARIZONA

BY: _____
TITLE: Chairman, Board of
County Supervisors

DATE: _____

ATTEST: _____
County Clerk

GREENLEE COUNTY, ARIZONA

BY: _____
TITLE: Chairman, Board of
County Supervisors

DATE: _____

ATTEST: _____
County Clerk

NAVAJO COUNTY, ARIZONA

BY: _____
TITLE: Chairman, Board
of Supervisors

DATE: _____

ATTEST: _____
County Clerk

GILA COUNTY, ARIZONA

BY:_____
TITLE: Chairman, Board
of Superviosrs

DATE:_____

ATTEST:_____
County Clerk

STATE OF NEW MEXICO
DEPARTMENT OF FINANCE
AND ADMINISTRATION

BY:_____

TITLE:_____

DATE:_____

Approved as to form and within the power and authority of their clients by:

_____
APACHE COUNTY ATTORNEY
DATE:_____

Alan K. Polley
_____
COCHISE COUNTY ATTORNEY
DATE: 20 SEPT. 1994

_____
GILA COUNTY ATTORNEY
DATE:_____

_____
GRAHAM COUNTY ATTORNEY
DATE:_____

_____
GREENLEE COUNTY ATTORNEY
DATE:_____

_____
NAVAJO COUNTY ATTORNEY
DATE:_____

Timothy J. Preso
Earthjustice
313 East Main Street
Bozeman, MT 59715
Montana Bar No. 5255
Fax: (406) 586-9695
tpreso@earthjustice.org
Phone: (406) 586-9699

Heidi McIntosh
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
Utah Bar No. 6277
Fax: (303) 623-8083
hmcintosh@earthjustice.org
Phone: (303) 623-9466

Attorneys for Plaintiffs Defenders of Wildlife; Center for Biological Diversity; Endangered Wolf Center; David R. Parsons; and Wolf Conservation Center

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Defenders of Wildlife; Center for Biological Diversity; Endangered Wolf Center; David R. Parsons; and Wolf Conservation Center, Plaintiffs, v. Sally Jewell, Secretary of the Interior; and United States Fish and Wildlife Service, Defendants.	No. _____ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the failure of the United States Fish and Wildlife Service ("FWS" or "Service") to prepare a long overdue, legally required recovery plan for one of the most endangered mammals in North America—the Mexican gray wolf (Canis lupus baileyi)—as required by the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1533(f).

2. The Mexican gray wolf—the "lobo" of Southwestern lore—is the most genetically distinct subspecies of wolf in the Western Hemisphere, uniquely adapted to environments in Mexico and the American Southwest. Like wolves elsewhere across the United States, this smaller wolf subspecies was driven to near extinction as a result of human persecution and government predator-control efforts in the early to mid-20th century. Once reduced to only seven individuals in a captive breeding program, the Mexican gray wolf was reintroduced into the wild by FWS in 1998 pursuant to the ESA.

3. Unfortunately, the reintroduced population has not flourished. This is in significant part because FWS has imposed numerous restrictions on the Mexican gray wolf reintroduction program that continue to impede efforts to bring this rare species back from the brink of extinction. Under FWS's management, introduction of captive Mexican gray wolves into the wild remains infrequent, allowing genetic problems for the species to mount even as more genetically diverse wolves languish in captive breeding facilities. When FWS has authorized releases of captive animals, it has limited such releases to an inadequate "primary recovery zone" in eastern Arizona—a limitation that prevents new releases of needed animals in high-quality, unoccupied habitat. Further,

FWS does not permit Mexican gray wolves to colonize lands beyond recovery-area boundaries; any wolves that establish territories outside the small core recovery area are captured and removed from the wild or relocated. FWS also has liberally authorized the killing and removal of Mexican gray wolves that come into conflict with domestic livestock, regardless of those wolves' genetic significance to the population. As a result, the reintroduced Mexican gray wolf population consisted of only 83 individuals at the end of 2013. By FWS's own estimation, the reintroduced population "is not thriving" and remains "at risk of failure." Southwest Region (Region 2), U.S. Fish & Wildlife Serv., Mexican Wolf Conservation Assessment 11, 14, 62, 78 (2010) [hereinafter 2010 Conservation Assessment].

4. At the root of these problems is 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 FWS itself admitted that the 1982 document was "far from complete" and did not fulfill the ESA's requirement for recovery planning and was intended only as a temporary, stopgap measure. Mexican Wolf Recovery Team, Mexican Wolf Recovery Plan 1 (1982) [hereinafter 1982 "Recovery Plan" document]. Indeed, the 1982 document does not address many of the critical issues that continue to imperil the Mexican gray wolf, and does not even lay out a comprehensive recovery program. Accordingly, while styled as a recovery plan, the 1982 document is so deficient that, for all intents and purposes, there is

no recovery plan for the Mexican gray wolf as that term is defined by the ESA. Thus 32 years after issuing the deficient 1982 document and 38 years after the subspecies' initial listing under the ESA, FWS still has not completed a legally compliant recovery plan for this critically imperiled subspecies.

5. The agency's failure in this regard is particularly notable because FWS has three times since 1982 initiated recovery planning processes for the Mexican gray wolf but each time halted these processes before completion. Most recently, FWS in 2010 pulled together a recovery team including many of the world's top wolf scientists to develop a recovery plan consistent with the best available scientific information. However, when that team produced a draft recovery plan in 2012 that called for establishing additional Mexican gray wolf populations in the wild, FWS abruptly canceled the next scheduled recovery team meeting and effectively suspended the recovery planning process.

6. Since then, the need for a scientifically grounded, legally valid recovery plan for the Mexican gray wolf has only grown more urgent. The window of opportunity to salvage the Mexican gray wolf's genetic integrity is closing as more genetically diverse captive animals die or age beyond their breeding years, and as the captive population becomes inexorably adapted to captivity rather than the wild. Further, despite the absence of a recovery blueprint to guide wolf management, FWS is proceeding to revise the rules that govern management of the reintroduced Mexican gray wolf population. The proposed revisions not only fail to take essential steps needed to facilitate Mexican gray wolf recovery, they continue to institutionalize management

shortcomings that have hindered Mexican gray wolf recovery to date. In short, the guidance of a scientifically grounded, legally valid recovery plan for the Mexican gray wolf is needed to organize, coordinate, and prioritize FWS's management actions for this subspecies, and time is of the essence.

7. FWS's repeated refusals to complete a recovery plan for the Mexican gray wolf, despite receiving expert guidance from top minds in the field, demonstrates the need for judicial intervention to enforce compliance with federal law. 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). Accordingly, this Court should order FWS to complete a scientifically grounded, legally valid recovery plan for the Mexican gray wolf. The Plaintiffs hereby request that this Court require FWS to complete a draft plan within six months of the Court's judgment, and a final recovery plan within six months thereafter.

JURISDICTION AND VENUE

8. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540(c), (g) (ESA), and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02, 16 U.S.C. § 1540 (ESA), and 5 U.S.C. § 706 (APA). Plaintiffs bring this action pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), which waives Defendants' sovereign immunity. Alternatively, Defendants' sovereign immunity is waived pursuant to the APA, 5 U.S.C. § 702.

9. Plaintiffs provided Defendants with notice of Plaintiffs' intent to sue on September 10, 2014, as required by 16 U.S.C. § 1540(g)(2). Defendants have not responded to Plaintiffs' notice letter.

10. Venue is proper in this District pursuant to 16 U.S.C. § 1540(g)(3)(A) and 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 based in Tucson, Arizona, and Plaintiff Defenders of Wildlife has an office in Tucson in which it conducts much of its work on the Mexican gray wolf.

11. This case should be assigned to the Tucson Division of this Court because the Mexican gray wolf occurs within the counties of this Division and Plaintiffs Defenders of Wildlife and Center for Biological Diversity maintain their main Arizona offices in Tucson. L.R. Civ. 77.1(a), (c).

PARTIES

12. Plaintiff Defenders of Wildlife ("Defenders") is a national non-profit conservation organization headquartered in Washington, D.C., with offices throughout the country, including a Southwest office in Tucson, Arizona. Defenders has more than 392,000 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.

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. The Center has advocated for recovery of the Mexican gray wolf since the organization's inception, and maintains an active program to protect the subspecies 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. Founded in 1971, Plaintiff Endangered Wolf Center is a non-profit organization dedicated to preserving and protecting Mexican gray wolves and other endangered canids through carefully managed breeding, reintroduction, and educational programs. The Endangered Wolf Center, located near St. Louis, Missouri, has been a cornerstone of FWS's Mexican gray wolf recovery program since its inception. The Endangered Wolf Center became home to the last Mexican gray wolf female captured in the wild, and she bore several litters at the facility. In all, more than 170 Mexican gray wolves have been born at the Endangered Wolf Center, and a number of those wolves have been released into the wild through FWS's reintroduction program. All Mexican

gray wolves alive today can trace their roots back to the Endangered Wolf Center. The Endangered Wolf Center also conducts ground-breaking research to help with the management of this critically imperiled species both within captive breeding facilities and in the wild.

15. Plaintiff David R. Parsons is a professional wildlife biologist. He holds a Bachelor of Science degree in Fisheries and Wildlife Biology from Iowa State University and a Master of Science degree in Wildlife Ecology from Oregon State University. A career wildlife biologist with FWS, Mr. Parsons served as the Service's first Mexican Wolf Recovery Coordinator from 1990-1999. In that capacity, he led the agency's efforts to reintroduce the Mexican gray wolf to the American Southwest. Now retired from FWS, he continues to further large carnivore conservation through his roles as Carnivore Conservation Biologist at The Rewilding Institute; an advisor to various conservation organizations on carnivore conservation science and policy; and a member of the Stakeholder Subgroup of the most recently assembled Mexican Wolf Recovery Team.

16. Founded in the 1990s, Plaintiff Wolf Conservation Center is a non-profit environmental education organization committed to conserving wolf populations in North America through science-based education programming and participation in federal Species Survival Plan programs for critically endangered wolf species. As a participant in the Mexican Wolf Species Survival Plan program, the Wolf Conservation Center strives to maintain the genetic diversity remaining in the captive Mexican gray wolf population and serves as one of the few breeding facilities for Mexican gray wolves eligible for release into the wild. Several Mexican gray wolves have been released to

their ancestral homeland from the Wolf Conservation Center facility in South Salem, New York.

17. All Plaintiffs have a long-standing interest in the preservation and recovery of the Mexican gray wolf in the American Southwest because individual and organizational Plaintiffs and their members place a high value on Mexican gray wolves as a subspecies and because the presence of these wolves promotes the healthy functioning of ecosystems. Plaintiffs actively seek to protect and recover the Mexican gray wolf through a wide array of actions including public education, scientific analysis, and advocacy. Plaintiffs Endangered Wolf Center and Wolf Conservation Center both serve as members of the Mexican Wolf Species Survival Plan ("SSP") Program. The Mexican gray wolf SSP is a bi-national cooperative conservation program, overseen by the Association of Zoos and Aquariums, that manages the species' breeding so as to maintain a healthy, genetically diverse, and demographically stable population. The primary purpose of the SSP is to re-establish a wild, self-sustaining Mexican gray wolf population through the captive breeding of wolves for reintroduction, research, and public outreach.

18. Plaintiffs and/or Plaintiffs' members use public land in the American Southwest, including lands in the Blue Range Wolf Recovery Area, the Gila, Cibola, and Apache-Sitgreaves national forests, and other nearby public lands, for recreational pursuits, including hiking, fishing, camping, backpacking, hunting, horseback riding, wildlife viewing (including wolf watching), and aesthetic enjoyment. Some of Plaintiffs' members work in industries, such as tourism, that depend on the opportunity to view

Mexican gray wolves. Plaintiffs and/or members of Plaintiffs have viewed and have planned concrete efforts to view Mexican gray wolves and signs of wolf presence in the wild in Arizona and New Mexico, and without a scientifically sound, legally compliant recovery plan to guide wolf conservation efforts, their opportunity to do so will remain in jeopardy. The absence of a scientifically grounded, legally valid recovery plan has resulted in a Mexican gray wolf population that, sixteen years after reintroduction, "is not thriving" and remains "at risk of failure." 2010 Conservation Assessment, at 11, 14, 62, 78. That risk, and the related ongoing problems with the Mexican gray wolf recovery program described in this complaint, represent a direct threat to the interests of all Plaintiffs. In particular, the absence of a legally-compliant recovery plan is a direct threat to the success of the missions of Plaintiffs Endangered Wolf Center and Wolf Conservation Center because recovery cannot take place in captivity alone; the Mexican gray wolf captive breeding program is not infinitely sustainable, and is already being threatened by ongoing loss of founder genome equivalents, an aging population, lack of space, and the inevitable selection for traits more suited to captivity than the wild. Accordingly, the legal violations alleged in this complaint cause direct injury to the aesthetic, conservation, economic, recreational, scientific, educational, and wildlife preservation interests of the Plaintiffs and/or Plaintiffs' members.

19. Plaintiffs' aesthetic, conservation, economic, 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,

traceable to Defendants' conduct that would be redressed by the requested relief. Plaintiffs have no adequate remedy at law.

20. 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.

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

THE ENDANGERED SPECIES ACT

22. The ESA, 16 U.S.C. § 1531 et seq., 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). "Conservation," under the ESA, means to recover such species from their imperiled status. See id. § 1532(3).

23. To receive the full protections of the Act, 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).

24. The ESA establishes a congressional policy that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." Id. § 1531(c). The statute requires all federal agencies to "carry … out programs for the conservation of endangered species and threatened species." Id. § 1536(a)(1).

25. To effectuate this policy, once a species is listed as "endangered" or "threatened," the ESA requires that "[t]he Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of [such listed] species …, unless he finds that such a plan will not promote the conservation of the species." Id. § 1533(f).

26. Each recovery plan must include, to the maximum amount practicable, "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." Id. § 1533(f)(1)(B)(i)-(iii).

27. FWS's internal recovery planning guidelines provide that final recovery

plans "should be completed within 2.5 years of listing." Nat'l Marine Fisheries Serv. & U.S. Fish & Wildlife Serv., Interim Endangered and Threatened Species Recovery Planning Guidance, Version 1.3 1.5-2 (June 2010) [hereinafter "Recovery Planning Guidance"]. See also 59 Fed. Reg. 34,272 (July 1, 1994) (setting forth interagency policy of developing draft recovery plans within 18 months of listing, and a final recovery plan within 12 months of the draft plan's completion).

MEXICAN GRAY WOLVES IN THE AMERICAN SOUTHWEST

28. Mexican gray wolves are believed to be "the only surviving descendants of the first wave of gray wolves to colonize North America during the Pleistocene Epoch." Letter from Michael A. Mares, Ph.D., President, Am. Soc'y of Mammalogists, et al., to the Honorable Dan Ashe, Director, U.S. Fish & Wildlife Serv., Re: Recovery Planning for the Mexican Wolf (June 20, 2012). Mexican gray wolves historically inhabited Mexico and the southwestern United States, including portions of Arizona, New Mexico, and Texas. It appears that the subspecies also ranged into southern Utah and southern Colorado. The subspecies is one of the most genetically, morphologically, and ecologically distinct lineages of wolves in the Western Hemisphere. The Mexican gray wolf is also one of the most endangered mammals in North America.

29. The recent history of the Mexican gray wolf has been likened to "a melodrama of persecuted fugitives to rival Les Misérables." Caroline Fraser, For Wolves on the Brink, a Hobbled Recovery Plan, Yale e360 (Oct. 25, 2012), http://e360.yale.edu/feature/for_wolves_on_the_brink_a_hobbled_recovery_plan/2585/. Largely at the behest of the livestock industry, the U.S. Biological Survey effectively

exterminated the subspecies from the southwestern United States by the mid-1900s. In 1950, FWS (the institutional successor to the Biological Survey) launched a similar campaign in Mexico. According to FWS, the last known wild Mexican gray wolf in the United States was killed in 1970. It is believed that the subspecies was completely extinct in the wild by the mid-1980s.

30. Between 1977 and 1980, five Mexican gray wolves—four males and one female—were captured in Mexico. These wolves were placed in a captive breeding program and became known as the "McBride" lineage. Two other already-existing captive lineages, the "Aragón" and "Ghost Ranch" lineages, were also certified as genetically pure Mexican gray wolves in 1995. All individuals alive today come from a founding stock of seven of these captive Mexican gray wolves: three McBride wolves, two Aragón wolves, and two Ghost Ranch wolves.

THE MEXICAN GRAY WOLF REINTRODUCTION PROGRAM

31. In 1998, after a near thirty-year absence of Mexican gray wolves from the landscape, FWS released eleven captive-reared Mexican gray wolves under ESA section 10(j) as a "nonessential experimental" population into the Blue Range Wolf Recovery Area ("BRWRA") in east-central Arizona and west-central New Mexico. See 16 U.S.C. § 1539(j) (the "10(j)" provision for "experimental" populations); 63 Fed. Reg. 1752 (Jan. 12, 1998) (rule for the establishment of a 10(j) population of Mexican gray wolves in Arizona and New Mexico). As described by FWS in the 1982 "Recovery Plan" document, the original, stopgap objective of the reintroduction effort was to achieve "a viable, self-sustaining population of at least 100 Mexican wolves" in the wild. 1982

"Recovery Plan" document, at 23. To date, the reintroduction program has fallen well short of that target. At the end of 2013, the wild Mexican gray wolf population was neither viable nor self-sustaining and numbered only 83 individuals. At its current size and level of genetic variation, the Mexican gray wolf population is "considered small, genetically impoverished, and significantly below estimates of viability appearing in the scientific literature." U.S. Fish & Wildlife Serv., Draft Environmental Impact Statement for the Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*) Ch. 1, at 20-21 (July 16, 2014) [hereinafter DEIS].

32. Several factors contribute to the limited success of the reintroduction effort. Many are attributable to the actions—and failures to act—of FWS itself. Specifically, lacking a completed recovery plan to guide Mexican gray wolf conservation, FWS has failed to respond to mounting genetic issues, inappropriately limited the geography in which Mexican gray wolves can be released and can reside, excessively removed wolves from the wild, and failed to effectively respond to an extremely high level of illegal wolf mortality. It has also proposed to modify the existing nonessential experimental population designation for the wolf, again without a completed recovery plan to guide that action. FWS's steadfast refusal to complete a legitimate, legally compliant recovery plan for the Mexican gray wolf that would provide a blueprint for the actions that are needed, and the actions that must be prohibited, to successfully bring this species back from the brink of extinction violates the Endangered Species Act.

Genetic Problems

33. The genetic challenges to Mexican gray wolf recovery largely stem from

the small number of individuals that remained in existence when conservation efforts for this subspecies began, but FWS has compounded the resulting genetic problems by failing to take actions that are necessary to capitalize on the subspecies' remaining genetic diversity.

34. The extremely small number of founders (i.e., the Mexican gray wolves from which all individuals living today descend) in the captive breeding population has raised significant concerns about the long-term genetic health of the Mexican gray wolf subspecies. As FWS explains, "[t]he small number of founders upon which the existing Mexican wolf population was established has resulted in pronounced genetic challenges, including inbreeding (mating of related individuals), loss of heterozygosity (a decrease in the proportion of individuals in a population that have two different alleles for a specific gene), and loss of adaptive potential (the ability of populations to maintain their viability when confronted with environmental variations)." DEIS, Ch. 1, at 4.

35. When two individuals mate, their offspring receive two "alleles" (or forms of a gene) for a given trait, one from each parent. While all populations carry some harmful alleles, they are usually rare and not detrimental to an individual if he or she carries only one such allele. However, in a small, closely-related population, more individuals may carry the same harmful alleles. Thus, when related individuals mate, they have a higher chance of passing on two harmful alleles (one from each parent) to their offspring. If an offspring receives two harmful alleles, that individual may exhibit reduced survival, reproduction, body size, and/or disease resistance. With enough inbreeding, harmful alleles may become fixed in the population—that is, the non-harmful

forms of certain alleles may disappear from the population, leaving the overall population with a reduced level of fitness that ultimately affects population viability.

36. Inbreeding was a concern with the McBride lineage, which was founded by only three individuals. Indeed, by the mid-1990s, McBride pups had inbreeding levels "similar to … offspring from … full sibling or parent-offspring pairs." 78 Fed. Reg. 35,664, 35,704 (June 13, 2013). In 1995, the captive breeding program integrated the Aragón and Ghost Ranch lineages—both of which were also highly inbred—into the McBride lineage in an attempt to increase the overall genetic diversity of the founder population. After this integration of the three lineages, specific breeding protocols and genetic goals were established to inform Mexican gray wolf pairings.

37. Unfortunately, while the captive breeding facilities have more recently managed the Mexican gray wolf breeding program to preserve as much genetic diversity as possible, much of the genetic potential of the founding stock has been lost. The loss of genetic potential is the result of the small number of founder wolves, the fact that "[t]he Mexican wolf captive breeding effort … was not managed to retain genetic variation until several years into the effort," and the failure of the reintroduction program to facilitate the rapid expansion of a genetically diverse wild Mexican gray wolf population. DEIS, Ch. 1, at 19. Today, "[t]he captive breeding population is estimated to retain only 3.01 founder genome equivalents, suggesting that more than half of the alleles (gene variants) from the seven founders have been lost from the population." 78 Fed. Reg. at 35,705. In other words, despite the fact that the founding stock for the current population consisted of seven individual wolves, the captive Mexican gray wolf population today retains the

genetic material of only approximately three individual founders. Unless and until FWS makes changes to its reintroduction program—changes that could be developed and institutionalized through a legally compliant recovery plan—such genetic challenges will continue to mount.

38. The wild population is in even worse genetic shape than the captive population. According to FWS, the wild population "has poor representation of the genetic variation remaining in the captive population. The wolves in the experimental population have Founder Genome Equivalents (FGE) that are 33 percent lower than found in the captive population and the estimated relatedness … of these animals suggest that on average they are as related to one another as … full siblings are related to each other." DEIS, Ch. 1, at 19. FWS has acknowledged that "[w]ithout substantial management action to improve the genetic composition of the [wild] population, inbreeding will accumulate and … alleles will be lost much faster than in the captive population." 78 Fed. Reg. at 35,706.

39. The social structure of wolf packs makes genetic problems flowing from inbreeding all the more likely in the reintroduced Mexican gray wolf population. Generally speaking, each wolf pack has only one breeding pair that reproduces annually. Thus, the effective gene pool is even smaller than the overall population size would suggest because not all reproductively mature, wild individuals are breeding. At the end of 2013, FWS counted only five breeding pairs of Mexican gray wolves in Arizona and New Mexico. This contrasts starkly with expectations: FWS's 1996 Final Environmental Impact Statement ("FEIS") on reintroduction projected 18 breeding pairs by 2006.

40. As would be expected in the present circumstances, there is already "evidence of strong inbreeding depression in the reintroduced [Mexican gray wolf] population," including reduced litter size and reduced pack size. 78 Fed. Reg. at 35,706. In other words, inbreeding has reduced the reintroduced Mexican gray wolves' ability to survive and reproduce. FWS has emphasized that "[h]igher levels of genetic variation within the experimental population are critically important to minimize the risk of inbreeding and support individual fitness and ecological and evolutionary processes." DEIS, Ch. 1, at 19. Unless rectified, the current "level of inbreeding depression may substantially reduce the viability of the population" and "limit the ability of future Mexican wolf populations to adapt to environmental challenges." 78 Fed. Reg. at 35,706. That is, inbreeding may result in a Mexican gray wolf population that suffers from both a genetically based reduction in survival and reproduction potential, and—again because of its genetic limitations—a reduced ability to respond to environmental changes.

41. To maximize genetic potential and prospects for recovery, FWS must commit to an active program of releasing genetically diverse wolves into the wild, capitalizing on the genetic potential now available in the captive population before it is further depleted. Such releases, if managed properly, would promote "[r]apid expansion of the population …[,] further promot[ing] maintenance of genetic diversity." 2010 Conservation Assessment, at 60. Rapid expansion is critical because it will allow the released wolves to reproduce and express the full spectrum of remaining genetic potential—something they are unable to do in captivity due to constraints on the number of breeding facilities and holding space. In addition to minimizing the loss of genetic

potential, it is critical to release more wolves into the wild in a timely fashion because "[i]f captive Mexican wolves are not reintroduced to the wild within a reasonable period of time, … physical … or behavioral changes resulting from prolonged captivity could diminish their prospects for recovery." 63 Fed. Reg. at 1755. As FWS itself said in 2010, "[t]he longer … threats [to the Mexican gray wolf] persist, the greater the challenges for recovery, particularly as related to genetic fitness and long-term adaptive potential of the population." 2010 Conservation Assessment, at 78.

42. Nevertheless, the agency has failed to take appropriate action given the urgent nature of the genetic challenges facing the reintroduced Mexican gray wolf population. FWS has acknowledged that, "[o]ver the entire 16 year course of the Reintroduction Project we have not been able to conduct the number of initial releases [of captive wolves into the wild] … sufficient to establish or maintain adequate genetic variation in the experimental population." DEIS, Ch. 1, at 20. The consequences of such a failure to act are likely to be dire. As FWS has explained, "[w]ithout an increase in the number of initial releases and without a better release success rate, the number of effective migrants [(i.e., migrants that actually breed and pass along their genes)] per generation needed to improve the genetic fitness of the Mexican wolf experimental population will not be achieved and the negative effects of inbreeding depression will continue—potentially … result[ing] in additional reduction in genetic variation, leading to decreased fitness and lower survival rates and ultimately causing an extinction vortex for the experimental population of Mexican wolves." Id. Ch. 1, at 23-24.

43. In short, time is of the essence for the survival, conservation, and recovery

of the Mexican gray wolf based on genetic issues alone, and FWS's management actions to date have not provided a response commensurate with the urgent nature of this problem. FWS's inadequate response reflects the absence of a recovery plan to organize and prioritize the agency's action.

Excessive Removals, Insufficient Releases & Illegal Mortality

44. The genetic impediments to recovery described above are being exacerbated by extremely high levels of Mexican gray wolf take and removal from the wild. Under the ESA, to "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). One of the reasons FWS reintroduced Mexican gray wolves as an ESA section 10(j) nonessential, experimental population was to "enable … the Service to develop measures for management of the population that are less restrictive than the mandatory prohibitions that protect species with 'endangered' status. This includes allowing limited 'take' … of individual wolves …." 63 Fed. Reg. at 1754. FWS deemed such "[m]anagement flexibility" necessary "to make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting" and "to obtain … needed State, Tribal, local, and private cooperation." Id. FWS believed such "flexibility [would] improve the likelihood of success" of the reintroduction program and, ultimately, Mexican gray wolf recovery. Id.

45. Unfortunately, as the past sixteen years have demonstrated, this management flexibility has not resulted in a successful reintroduction program. Instead, the reintroduction effort currently teeters on the brink of failure and the subspecies'

recovery prospects remain in jeopardy. Since reintroduction began, agency removal of Mexican gray wolves from the wild has exacted a heavy toll on the Blue Range population. Overall, FWS has engaged in 160 removals of Mexican gray wolves from the reintroduced population since 1998. Of these, FWS has killed or ordered the killing of twelve wolves and consigned twenty-four once-wild wolves to permanent captivity. The remaining 124 instances of removal were temporary removals, meaning those wolves remained theoretically eligible for translocation. However, some temporarily removed wolves, "while eligible for translocation, have been removed from consideration for future release." U.S. Fish & Wildlife Serv., Outcomes of Mexican Wolf Management Removals from the Blue Range Population, Arizona and New Mexico, 1998-2013 (Dec. 31, 2013). Such removal of Mexican gray wolves from the wild "[has] the same practical effect on the wolf population as mortality if the wolf is permanently removed." 2010 Conservation Assessment, at 61. Indeed, FWS has identified "[t]he high number of wolf removals … as a contributing factor hindering the population's growth." Id. at 55.

46. Wolves that are killed or permanently removed from the wild are no longer able to genetically enrich the reintroduced population. Nevertheless, to date, FWS has shown little regard for the genetic import of individual wolves in authorizing take or removal. For example, in November 2007, FWS permanently removed the alpha male from the Aspen pack—then the most genetically valuable pack in the reintroduced population. In December of that year, it permanently removed the Aspen pack's alpha female and a yearling female, and temporarily removed several pups. As FWS has recognized, "[t]he ability of management to address inbreeding depression in the Blue

Range population is constrained by regulatory and discretionary management mechanisms that do not incorporate consideration of genetic issues yet result in limitation or alteration of the genetic diversity of the population. … The … Mexican Wolf SSP has recommended that until the representation of the Ghost Range and Aragon lineages has increased and demographic stability is achieved in the wild population, careful consideration of genetic diversity should be prioritized during decisions to permanently remove wolves." 2010 Conservation Assessment, at 60. Nevertheless, "[t]he Service has not developed any specific protocols to promote genetic fitness in the population in response to recent research and professional recommendations." Id.

47. In addition to killing and removing Mexican gray wolves, including genetically valuable animals, FWS has drastically reduced releases of captive wolves and translocations of captured-but-release-eligible wolves since 2006. Only four new wolves from the captive breeding pool have been released into the wild since 2008. According to FWS's own 2010 progress report, "lack of appropriate initial releases and successful translocations from captivity" contributed to "[f]ewer known adult wolves available for pair formation." U.S. Fish & Wildlife Serv., Mexican Wolf Recovery Program: Progress Report #13, Reporting Period: January 1-December 31, 2010 29. As a result, new genetic material is not being infused into the reintroduced population, further imperiling Mexican gray wolf recovery.

48. Compounding the problems of excessive take and removal and insufficient releases of Mexican gray wolves by FWS is an extremely high level of illegal wolf killing by members of the public. This high level of illegal mortality calls into question

FWS's assertion that, without the management flexibility afforded to the agency through "[d]esignation of the released wolves as [a] nonessential experimental [population] …, intentional illegal killing of wolves likely would harm the prospects for success." 63 Fed. Reg. at 1755. In fact, even with the agency's desired management flexibility, intentional, illegal wolf killing has undermined the reintroduction program. From 1998-2013, there were 55 documented illegal killings of Mexican gray wolves, and such killings make up the majority of wolf mortalities since the reintroduction program began.

49. Further, available information indicates that at least 50 additional wolves—including, in some instances, pairs of wolves repeatedly located together—have simply "disappeared," likely illegally killed. Such illegal mortalities, in conjunction with agency removals of wolves, have proven demographically destabilizing and genetically deleterious and hinder the reintroduced Mexican gray wolf population's prospects for success.

50. Given the high level of illegal killing, the excessive level of authorized take and insufficient level of releases of captive animals are yet more examples of impediments to Mexican gray wolf recovery that could be addressed through a scientifically grounded, legally compliant recovery plan.

Wolves' Inability to Roam

51. Even for Mexican gray wolves that are released or born into the wild and that persist, the road to recovery is daunting. To date, FWS has confined the wolves to an ecologically arbitrary geography, which prevents the Service from most effectively staging releases and growing the population.

52. For example, FWS has imposed a requirement that captive Mexican gray wolves that are released into the wild for the first time may be released only into a small "primary recovery zone" within the BRWRA (specifically within the Greenlee County, Arizona portion of the BRWRA). This primary recovery zone constitutes only 16 percent of the BRWRA as a whole. This restriction has impeded FWS's ability to release wolves, including genetically valuable wolves, "where they are most needed, that is, in high-quality habitat lacking wolves or for replacement of lost mates and genetic enhancement." Anthony Povilitis et al., The Bureaucratically Imperiled Mexican Wolf, 20 Conservation Biology 942, 942 (2006). FWS has "observed … negative population effects of the regulations that restrict initial release" and has acknowledged that "[r]evisions to the 1998 Final Rule … are needed because … under the current regulations we will not be able to achieve the necessary population growth, distribution and recruitment that would contribute to the persistence of, and improve the genetic variation within, the experimental population." DEIS, App. F, at 1; id. Ch. 1, at 16.

53. In addition to release restrictions, FWS does not permit wolves to establish territories wholly outside the BRWRA boundary. When wolves attempt to establish territories outside this ecologically arbitrary boundary, FWS seeks to capture and relocate them. This boundary restriction "does not allow for natural dispersal movements from the BRWRA or occupation of the [larger Mexican Wolf Experimental Population Area ("MWEPA")]." 78 Fed. Reg. 35,719, 35,727 (June 13, 2013). This limitation hinders Mexican gray wolf recovery by preventing natural wolf behavior, i.e., wide-ranging dispersal to find unoccupied territories with sufficient prey, denning sites, and other basic

life necessities. If wolves are not allowed to disperse more widely, it is highly unlikely that a viable, self-sustaining population will ever be established. In fact, recent research suggests that "viability of the existing wild population is uncertain unless additional populations can be created and linked by dispersal." Carlos Carroll et al., Developing Metapopulation Connectivity Criteria from Genetic and Habitat Data to Recover the Endangered Mexican Wolf, 28 Conservation Biology 76, 84 (2014) (emphasis added). Such distinct, spatially separated populations of the same species that are connected by dispersal are referred to as "metapopulations."

54. Experts have long counseled and FWS has acknowledged that the long-term conservation of the Mexican gray wolf will likely "'depend on establishment of a metapopulation or several semi-disjunct but viable populations spanning a significant portion of [the species'] historic range.'" DEIS, Ch. 2, at 6 (citation omitted). As FWS explains, "[f]or a species that has been extirpated from so much of its historic range, explicit effort must be made to recreate redundancy" (where "redundancy refers to the existence of redundant, or multiple, populations spread throughout a species' range"). 2010 Conservation Assessment, at 68, 72 (emphasis omitted).

55. Generally speaking, well-connected metapopulations are better able to withstand less favorable demographic rates (e.g., birth rate, fertility rate, life expectancy) and catastrophic environmental events (e.g., wildfire, disease outbreak) than are isolated populations. This is because (1) connectivity facilitates gene flow as individuals move among populations, which reduces the severity and effects of inbreeding, and (2) the existence of multiple populations helps to ensure that the species is not wiped out if a

catastrophic event decimates one of the populations. A well-connected metapopulation is especially important for the recovery of the Mexican gray wolf, which right now exists in the United States as one extremely small, isolated, and genetically-threatened population.

56. FWS recognized the need for a metapopulation early on in its management of Mexican gray wolves. Even the inadequate 1982 "Recovery Plan" document provided that an appropriate interim objective for Mexican gray wolf conservation would be to establish at least a second population. FWS reiterated this objective in the 1996 FEIS for Mexican gray wolf reintroduction into the Blue Range, where the Service stated that "[f]ull recovery of the Mexican wolf subspecies likely will require additional reintroduction projects elsewhere," U.S. Fish & Wildlife Serv., Reintroduction of the Mexican Wolf within its Historic Range in the Southwestern United States: Final Environmental Impact Statement 1-1 (Nov. 1996) [hereinafter 1996 FEIS] (proposing reintroduction of a nonessential experimental population). The Service acknowledged this objective again in the 2014 DEIS for the proposed revision to the nonessential experimental population of the Mexican gray wolf, where it stated that "[t]he dispersal of Mexican wolves between subpopulations may be an important part of recovery," DEIS, Ch. 1, at 31. FWS has admitted that meeting the 1982 document's 100-wolf objective "alone would not allow de-listing; other populations would need to be reestablished elsewhere in accordance with criteria … developed in the revision of the Mexican Wolf Recovery Plan." 1996 FEIS at 5-42.

57. FWS's current management of the reintroduced Mexican gray wolf population not only fails to prescribe a metapopulation approach to recovery, it

effectively precludes the establishment of a metapopulation. Specifically, the agency's extant policy of removing wolves that attempt to establish territories outside the BRWRA boundary impedes the natural establishment of any other population in the region. The policy further obstructs the Blue Range population's ability to connect with other reintroduced populations, including a fledgling population recently reintroduced in Mexico. FWS's refusal to permit wolves to range freely and establish territories outside the BRWRA, in conjunction with the agency's refusal to establish a metapopulation, are actively hindering—if not outright precluding—the recovery of a viable, self-sustaining, wild Mexican gray wolf population. Again, the development of a legally compliant recovery plan reflecting the best available science would allow FWS to implement release, range, and metapopulation measures that would promote Mexican gray wolf recovery.

THE LACK OF A LEGITIMATE RECOVERY PLAN

58. The absence of a legitimate agency blueprint for Mexican gray wolf recovery underlies the ongoing challenges facing the subspecies' recovery program. Accordingly, those challenges could be resolved through the production and implementation of a scientifically based and legally valid recovery plan to guide and drive Mexican gray wolf management decisions, such as scheduled releases to promote genetic diversity, necessary limitations on wolf removals by FWS and the public, and delineation of appropriate geographic areas to facilitate wolf recovery. In many respects, the primary underlying impediment to Mexican gray wolf recovery has been, and continues to be, the lack of such a plan—a fact FWS has repeatedly acknowledged. The

stopgap approach to Mexican gray wolf conservation outlined by FWS in the 1982 "Recovery Plan" document was "far from complete," and was intended to provide guidance only through September 30, 1984. 1982 "Recovery Plan" document, at 1, 20. Yet more than 30 years after this expiration date, and despite FWS's continued recognition of the need for a valid and effective recovery plan, the Service still has developed nothing beyond its original stopgap approach to guide its Mexican gray wolf conservation efforts.

59. As FWS has noted, without a valid recovery plan "to organize, coordinate and prioritize the many possible recovery actions, [a recovery] effort may be inefficient or even ineffective." Recovery Planning Guidance, at 1.1-1. The Mexican gray wolf reintroduction effort has been "inefficient or even ineffective," because the Service's 1982 "Recovery Plan" document lacks the fundamental scientific basis necessary to "organize, coordinate and prioritize" Mexican gray wolf recovery actions, as well as fundamental requirements such as established criteria that would signify full recovery and support eventual delisting.

60. The 1982 document was drafted without ESA-required recovery and delisting criteria because, at the time of the document's drafting, "the status of the Mexican wolf was so dire that the recovery team could not foresee full recovery and eventual delisting." 78 Fed. Reg. at 35,726. As a result, the document's authors sought only "to ensure the immediate survival of the Mexican wolf." 2010 Conservation Assessment, at 22. They thus grounded the document in the maintenance of a captive breeding program and a stopgap measure of re-establishing in the wild "a viable, self-

sustaining population of at least 100 Mexican wolves." 1982 "Recovery Plan" document, at 23.

61. Despite its stopgap nature, that 100-wolf measure has continued to serve as FWS's sole guidepost for the Mexican gray wolf reintroduction effort. As FWS has stated, aside from the 100-wolf objective, "the gray wolf recovery effort in the Southwest operates without any guidance in terms of the number and distribution of wolves considered adequate for recovery and delisting." 2010 Conservation Assessment, at 7.

62. Yet the 100-wolf objective is admittedly an inadequate guidepost. In this regard, the Service "recognize[s] that the reestablishment of a single experimental population of Mexican wolves is inadequate for recovery and … [is] fully cognizant that a small isolated wolf population such as the experimental population now occupying the BRWRA can neither be considered 'viable' nor 'self-sustaining'—regardless of whether it grows to a number of 'at least 100.'" DEIS, Ch. 1, at 17. FWS has further "acknowledge[d] that this [100-wolf] population target is … insufficient for recovery and delisting of C. l. baileyi, as the subspecies would still be in danger of extinction with a single population of this size." 78 Fed. Reg. at 35,695(emphasis added).

63. Moving beyond the stopgap 100-wolf objective is crucial for Mexican gray wolf recovery. The Service recognized this as recently as July of this year, when it again forecasted the need for both a metapopulation and a legitimate recovery plan for this subspecies. FWS's July 2014 DEIS provides that "[e]stablishment of a numerical objective for the size of the experimental population of Mexican wolves may be an important part of recovery planning in which the experimental population would function

as a subpopulation to a viable and self-sustaining metapopulation of Mexican wolves." DEIS, Ch. 2, at 10. "However," the DEIS continues, "full recovery is beyond the scope of this EIS and setting this population objective now would be premature." Id.

64. This recent statement by FWS is just the latest chapter in a long saga of agency delay and obstruction in addressing the need for a Mexican gray wolf recovery plan. Since 1982, FWS has convened three recovery teams in an effort to develop a legitimate recovery plan. Three times, FWS has charged those teams with the task of drafting a recovery plan that reflects the best available scientific information. Three times, FWS has failed to issue such a plan.

65. In the first attempt, FWS in 1995 produced a draft recovery plan to supersede the 1982 "Recovery Plan" document. It was never finalized.

66. The FWS Southwest Region convened another recovery team in 2003, but indefinitely suspended that recovery planning process in 2005.

67. FWS initiated the most recent recovery planning effort in 2010 at the direction of the current director of the Service's Southwest Region. The Southwest Regional Director charged a Science and Planning Subgroup of the agency's Mexican Wolf Recovery Team with developing a recovery plan consistent with the best available scientific information. That subgroup included an interdisciplinary team of prominent scientists, including Recovery Team leader and wolf biologist Peter Siminski; wolf biologists Dr. Douglas Smith, Michael K. Phillips, and Dr. Jorge Servin; population biologist Dr. John Vucetich; conservation biologist Dr. Carlos Carroll; human dimensions expert Dr. Kirsten Leong; geneticist Dr. Richard J. Fredrickson; and carnivore biologist

Carlos Lopez.

68. The Science and Planning Subgroup drafted a plan that proposed, based on the best available science, a minimum of three interconnected subpopulations, each of at least 200 animals, as part of a metapopulation of at least 750 Mexican gray wolves. However, within two weeks of the release of a May 7, 2012, draft recovery plan containing this recommendation, FWS's Southwest Regional Director cancelled an upcoming recovery team meeting and effectively suspended the recovery planning process.

69. FWS's attempts to explain the suspended status of Mexican gray wolf recovery planning have met with a skeptical response from the recovery team itself. Just over a year after FWS's May 2012 suspension of the recovery planning process, several members of the Stakeholder Subgroup of the Mexican Wolf Recovery Team wrote a letter to the FWS Southwest Regional Director regarding the ongoing delay in recovery planning. They stated their "understanding that the science subteam has continued to meet, has completed an exhaustive amount of modeling, and has now prepared a third draft of the recovery plan." Letter from Eva Lee Sargent, Ph.D., Dir., Southwest Program, Defenders of Wildlife, et al., to Benjamin Tuggle, Ph.D., Regional Dir., Southwest Region, U.S. Fish & Wildlife Serv. (July 23, 2013). The members requested that a meeting be scheduled where the Science and Planning Subgroup could provide "a full and complete briefing … on their work." Id.

70. FWS responded with a letter in September 2013 stating that, in effect, another meeting was not possible in the near-term because the science subgroup was

"currently finalizing Vortex [modeling] simulations to support recovery criteria and the modeling appendix to the draft recovery plan." Letter from Joy E. Nicholopoulos, Acting Regional Dir., U.S. Fish & Wildlife Serv., to Eva Lee Sargent, Ph.D., Dir., Southwest Program, Defenders of Wildlife (Sept. 11, 2013). Upon seeing this letter, however, one of the Science and Planning Subgroup members expressed "surprise … [at] the Service's recent response … to Dr. Sargent's query about the status of Mexican wolf recovery planning." Email from Mike Phillips, to Sherry Barrett et al. (Sept. 15, 2013). According to Science and Planning Subgroup member Michael Phillips, a prominent wolf biologist, the Science and Planning Subgroup had "been ready since immediately following the Director's briefing in March [2013] to complete work to finalize our recommendations to the Service concerning recovery criteria and recovery region." Id. Nevertheless, FWS has not scheduled the meeting requested by the stakeholder subgroup members or otherwise moved forward with completion of the suspended recovery planning process. In short, recovery planning for the Mexican gray wolf appears to be indefinitely suspended.

2013 PROPOSED RULES

71. Although FWS has not acted on the Science and Planning Subgroup's apparent willingness and readiness to finalize its recommendations for Mexican gray wolf recovery planning, the agency recently has advanced other administrative actions concerning Mexican gray wolf management. However, such actions have lacked the guidance that would be provided by a scientifically grounded, legally compliant recovery plan. Accordingly, while offering some prospect of improvement over the status quo,

FWS's proposed actions still fail to take the essential steps needed to facilitate Mexican gray wolf recovery and in some respects would continue to institutionalize or even exacerbate management shortcomings that have hindered Mexican gray wolf recovery to date. Again, the lack of a valid recovery plan is at the root of these problems.

72. Specifically, FWS recently moved forward with a proposed rulemaking to revise the existing nonessential experimental population designation of the Mexican gray wolf and several provisions of the associated 10(j) rule. See generally 78 Fed. Reg. 35,719 (June 13, 2013); 79 Fed. Reg. 43,358 (July 25, 2014). On June 13, 2013, FWS issued two proposed rules relating to gray wolves' status under the ESA. In the first rule, FWS proposed to "remove the gray wolf from the List of Endangered and Threatened Wildlife but to maintain endangered status for the Mexican wolf by listing it as a subspecies." 78 Fed. Reg. at 35,664. In coordination with this proposed rule, FWS issued a second proposed rule that would "revise the existing nonessential experimental population designation of the Mexican gray wolf (Canis lupus baileyi) under section 10(j) of the Endangered Species Act of 1973" and revise, in several respects, the section 10(j) rule itself. 78 Fed. Reg. at 35,719. In response to public comments received on the draft rule and a Preliminary Draft EIS, FWS released a revised proposed rule on July 25, 2014. See generally 79 Fed. Reg. 43,358. In these rulemaking proposals, FWS concluded that it had to modify the 10(j) rule to "help [the agency] enhance the growth, stability, and success of the nonessential experimental population." Id. at 43,359.

73. However, despite the recommendations to the contrary by FWS's own hand-picked Science and Planning Subgroup, FWS in these rules again proposed

restrictions that would prohibit Mexican gray wolves from establishing a metapopulation—an essential element of Mexican gray wolf recovery. Specifically, FWS proposed to remove any Mexican gray wolf "that can be identified as coming from the experimental population that disperse[s] to establish territories in the areas outside the MWEPA"—including, significantly, any wolves that may attempt to disperse north of Interstate 40. DEIS, Ch. 1, at 31. Such wolves would be maintained in captivity, translocated to suitable habitat within the MWEPA, or transferred to Mexico. This restriction threatens to preclude wolves in the Blue Range population from ever naturally establishing other populations, or connecting with other Mexican gray wolf populations should they be established.

74. The Science and Planning Subgroup specifically identified two regions—the Grand Canyon ecoregion and northern New Mexico/southern Colorado—as having sufficient habitat to host the necessary two additional core populations that would be required to recover the Mexican gray wolf. FWS's proposed restriction on wolf dispersal north of I-40 would both prevent natural recolonization of and dispersal among populations in these areas. By including this provision, the new rule would preclude the establishment of a metapopulation and actively prevent Mexican gray wolves from recovering.

75. Furthermore, the proposed rule would remove protections from wolves traveling north from Mexico, which currently are protected as fully endangered and not experimental. That provision in the proposed rule, and the absence of mandatory proactive measures to prevent depredations in the region, will likely result in

management actions blocking connectivity between the BRWRA experimental wolf population and the nascent and vulnerable Mexican gray wolf population in Mexico.

76. While FWS has acknowledged that a metapopulation is critical for recovery and stated that consideration of a metapopulation will be part of the recovery planning process, that process has been indefinitely suspended for three years with no signs of resumption; in the meantime, the Service proposes to continue active obstruction of metapopulation establishment.

77. FWS also proposes in the new rule to liberalize the agency's already-too-lenient regulatory provisions authorizing take of reintroduced Mexican gray wolves. As explained above, even the current level of take has contributed to the ongoing "risk of failure" of the reintroduction program. Further, such take is often conducted without due regard for the genetic significance of the individuals taken—something the reintroduced population can ill afford.

78. To justify liberalizing the take authorization, FWS's proposed rule relied on the same faulty reasoning the agency relied upon in designating the population as nonessential experimental in the first instance—namely, that the agency "expect[s] that modifying the provisions governing the take of Mexican wolves will reduce the likelihood of indiscriminate, illegal killing of wolves and will substantially lessen the overall risk of human caused wolf mortality." Mexican Wolf Recovery Program, Southwestern Reg'l Office, U.S. Fish & Wildlife Serv., Environmental Impact Statement for the Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*) and the Implementation of a Management Plan, Preliminary

Draft, Chapter 1 and 2 35 (Aug. 2, 2013). However, as the past sixteen years of the Mexican gray wolf reintroduction program have demonstrated, liberal take rules have not prevented excessive illegal mortality or enhanced Mexican gray wolf recovery in the wild. To the contrary, illegal killing has been the single largest source of mortality for the reintroduced Mexican gray wolf population, in some years resulting in population declines of 10% or more. Further, recent research suggests that FWS has its logic backward, and that broad public authorizations for lethal control of predators, including wolves, is linked to reduced public tolerance for those predators on the landscape.

79. In sum, FWS is proceeding with the pending ESA section 10(j) rulemaking—a rulemaking whose effects will likely persist for years, if not decades—without any of the guidance that a scientifically accurate and legally valid recovery plan would provide. FWS is doing so despite its own acknowledgement that a legally valid recovery plan should "provide the foundation for a revision to the 10(j) rule, both in terms of boundaries and management." Letter from Benjamin Tuggle, Regional Dir., Southwest Region, U.S. Fish & Wildlife Serv., to Robert R. Woodhouse, Chairman, Ariz. Game & Fish Comm'n (Dec. 9, 2011). Further, FWS has had numerous opportunities to complete a valid recovery plan in advance of the ongoing 10(j) rulemaking, including most recently when FWS indefinitely suspended recovery planning in 2012. Lacking such a foundation, FWS proposes to continue erecting barriers (e.g., precluding the establishment of a metapopulation and allowing excessive take) that will impede the full recovery of the reintroduced Mexican gray wolf population that the Endangered Species Act requires. By crafting rules that will direct Mexican gray wolf management for the

foreseeable future before completing a valid recovery plan that would provide the necessary scientific blueprint for any such measures, FWS has put the cart before the horse and fundamentally frustrated the statutory scheme for species recovery established by Congress in the ESA.

FIRST CAUSE OF ACTION
(Violation of Endangered Species Act § 4(f), 16 U.S.C. § 1533(f))

80. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 79.

81. The ESA mandates that "[t]he Secretary shall develop and implement [recovery] plans … for the conservation and survival of endangered and threatened species … unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1).

82. Each recovery plan must include, to the maximum amount practicable, "objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list." Id. § 1533(f)(1)(B)(ii).

83. FWS prepared a document styled as a "Recovery Plan" for the Mexican gray wolf in 1982. However, this interim document—which "did not contain objective and measurable recovery criteria for delisting as required by section 4(f)(1) of the Act"—was intended to provide guidance only through September 30, 1984. 78 Fed. Reg. at 35,726. The only substantive guidance provided by this document was to establish a captive breeding program and "a viable, self-sustaining population of at least 100 Mexican wolves." 1982 "Recovery Plan" document, at 23.

84. Despite the incomplete and invalid nature of the 1982 document, FWS

continues to rely on it to guide the agency's Mexican gray wolf reintroduction and recovery efforts. FWS does so despite the agency's admission that "a single experimental population of Mexican wolves is inadequate for recovery" and that even a population of 100 wolves—the stopgap objective established in the 1982 document—would leave the subspecies "in danger of extinction." DEIS, Ch. 1, at 17; 78 Fed. Reg. at 35,695.

85. FWS has not made an ESA section 4(f) finding that a legally compliant recovery plan would not promote the conservation of the Mexican gray wolf. To the contrary, FWS "continues to acknowledge the need to develop objective and measurable recovery criteria in a revised recovery plan" for the subspecies. 2010 Conservation Assessment, at 109. See also id. at 10 ("failure to develop an up-to-date recovery plan results in inadequate guidance for the reintroduction and recovery effort."); id. at 31 ("Objective and measurable recovery criteria are still needed to provide context for the subspecific Mexican wolf reintroduction and recovery effort within remaining gray wolf listed range"). The agency has also found that "[t]hreats hindering the biological progress of the [reintroduced Mexican gray wolf] population and success of the recovery program include … lack of an up-to-date recovery plan." Id. at 78. The longer that this threat persists, "the greater the challenges for recovery, particularly as related to genetic fitness and long-term adaptive potential of the [Mexican gray wolf] population." Id.

86. FWS has declared that "it is time to shift the focus of the [Mexican gray wolf] recovery program … toward pursuit of full recovery." Id. at 79. Yet the agency has failed to take the first step required to live up to this hortatory pronouncement—

preparation of a scientific blueprint for full recovery. The preparation and implementation of a scientifically sound, legally valid recovery plan would promote the conservation and full recovery of the Mexican gray wolf. Conversely, FWS's continued failure to develop a scientifically sound, legally compliant recovery plan threatens to affirmatively impede the conservation and full recovery of the Mexican gray wolf by failing to correct ongoing inadequate management practices and by facilitating FWS's efforts to alter Mexican gray wolf management in a manner that would continue to preclude essential recovery measures that have been identified by FWS's own scientific recovery teams. FWS's action in three times initiating a recovery planning process but each time terminating that process before completing a statutorily required plan demonstrates that judicial action is needed to effectuate compliance with the congressional mandate set forth in the ESA.

87. FWS's refusal to develop and implement a scientifically grounded and legally valid recovery plan for the Mexican gray wolf violates the plain requirements of Section 4(f) of the ESA, 16 U.S.C. § 1533(f).

SECOND CAUSE OF ACTION
(Agency Action Unlawfully Delayed or Unreasonably Withheld Under Administrative Procedure Act, 5 U.S.C. § 706(1))

88. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 87.

89. Under the APA, a reviewing court has the authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

90. Completion of a recovery plan for the Mexican gray wolf under the ESA constitutes a discrete action that FWS is required to take pursuant to 16 U.S.C. § 1533(f).

91. Agency policy provides that FWS should complete a final recovery plan within two and half years of a species' listing under the ESA.

92. Thirty-eight years after the Mexican gray wolf's listing under the ESA and 32 years after a temporary, incomplete "Recovery Plan" document was drafted, FWS has failed to produce a legally compliant recovery plan for the Mexican gray wolf, which is one of the most endangered mammals in North America.

93. Despite the production of several nearly complete draft recovery plans by three separate recovery teams, FWS has failed to finalize and issue a legitimate recovery plan for the subspecies.

94. This delay is unlawful and unreasonable because FWS is not operating under a legally valid recovery plan and has not determined that such a plan would not promote the conservation of the Mexican gray wolf. To the contrary, FWS has repeatedly acknowledged that a scientifically grounded, legally valid recovery plan would promote the conservation of the Mexican gray wolf subspecies, and that the lack of such a plan threatens recovery.

95. This delay is further unlawful and unreasonable given the dire genetic circumstances facing the Mexican gray wolf, the closing window of opportunity to address those genetic circumstances through necessary recovery actions, and the ready availability of scientific information that would, were it implemented via a valid recovery plan, foster Mexican gray wolf recovery.

96. This delay is also unlawful and unreasonable given FWS's continued reliance on the incomplete and expired 1982 "Recovery Plan" document in its recently

proposed revision to the 10(j) rule for the Mexican gray wolf. Without the guidance that a scientifically grounded and legally valid recovery plan would provide, FWS's proposed rulemaking includes measures that would impede full recovery of the Mexican gray wolf subspecies.

97. Finally, this delay is unlawful and unreasonable because FWS's own conduct demonstrates that the agency has had sufficient time and resources available to conduct recovery planning for the Mexican gray wolf and that recovery planning could be expeditiously completed. FWS has three times initiated such recovery planning but has never yet completed a scientifically grounded and legally compliant recovery plan, despite having received a draft recovery plan in 2012 from the Science and Planning Subgroup of the agency's own Mexican Wolf Recovery Team. FWS has not offered a rational reason for its failure to complete the recovery planning process.

98. FWS's continued failure to prepare a legally sufficient recovery plan constitutes "agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully requests that this Court:

1. Declare FWS in violation of ESA § 4(f), 16 U.S.C. § 1533(f), and the APA, 5 U.S.C. § 706(1);

2. Order FWS to prepare and implement a scientifically based, legally valid recovery plan for the Mexican gray wolf, with a draft plan required within six months of the Court's judgment, and a final recovery plan required within six months thereafter;

3. Retain continuing jurisdiction over this matter until FWS fully remedies the violations of law identified herein;

4. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation, pursuant to 16 U.S.C. § 1540(g) and/or 28 U.S.C. § 2412(d); and

5. Grant Plaintiffs such additional relief as the Court may deem just and proper.

DATED this 11th day of November, 2014,

Timothy J. Preso
Earthjustice
313 East Main Street
Bozeman, MT 59715
Fax: (406) 586-9695
tpreso@earthjustice.org
Phone: (406) 586-9699

Heidi McIntosh
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
Fax: (303) 623-8083
hmcintosh@earthjustice.org
Phone: (303) 623-9466

Attorneys for Plaintiffs Defenders of Wildlife; Center for Biological Diversity; Endangered Wolf Center; David R. Parsons; and Wolf Conservation Center

Andrea R. Buzzard (NM Bar # 392)
Karen Budd-Falen (Pro Hac Vice pending)
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003
(307)632-5105 Telephone
(307)637-3891 Telefax

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

ARIZONA and NEW MEXICO COALITION of COUNTIES for ECONOMIC GROWTH; NEW MEXICO CATTLE GROWERS ASSOCIATION; GILA LIVESTOCK GROWERS; NEW MEXICO FEDERAL LANDS COUNCIL; NEW MEXICO WOOL GROWERS, INC.; SOUTHERN ARIZONA CATTLEMEN'S PROTECTIVE ASSOCIATION; CENTRAL VALLEY SOIL and WATER CONSERVATION DISTRICT; DOÑA ANA SOIL and WATER CONSERVATION DISTRICT; GRANT SOIL and WATER CONSERVATION DISTRICT; HAGERMAN-DEXTER SOIL and WATER CONSERVATION DISTRICT; SIERRA SOIL and WATER CONSERVATION DISTRICT; HIDALGO SOIL and WATER CONSERVATION DISTRICT; McKinley SOIL and WATER CONSERVATION DISTRICT; SOUTHWEST QUAY SOIL and WATER CONSERVATION DISTRICT; JIM CHILTON; WHITE WATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT; WILCOX-SAN SIMON NATURAL RESOURCE CONSERVATION DISTRICT; PIMA NATURAL RESOURCE CONSERVATION DISTRICT **Petitioners,** **v.** **UNITED STATES FISH and WILDLIFE SERVICE,** an agency of the United States Department of the Interior; **DANIEL M. ASHE,** Director, United States Fish and Wildlife Service; **THE UNITED STATES DEPARTMENT OF THE INTERIOR, SALLY JEWELL,** Interior Secretary; **and BENJAMIN N. TOGGLE,** Regional Director, Region 2 of the United States Fish and Wildlife Service **Respondents.**	Civil Action No.

PETITION FOR REVIEW

1. Petitioners, by and through counsel, Karen Budd-Falen *(pro hac vice pending)* and Andrea R. Buzzard, Budd-Falen Law Offices, LLC, seek judicial review pursuant to 5 U.S.C. §§ 702, 704 and 706 of the "final agency action" of Respondents United States Department of the Interior and United States Fish and Wildlife Service, an agency of the Department of the Interior (collectively "USFWS") adopting, on or about January 16, 2015, its final rule under section 10(j) of the Endangered Species Act entitled: "Endangered and Threatened Wildlife and Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf." 80 Fed. Reg. 2512 – 2567 (Jan. 16, 2015) ("2015 10(j) Rule"). Endangered Species Act section 10(j) is codified at 16 U.S.C. § 1539(j).

2. The 2015 10(j) Rule changes the 1998 10(j) Rule (63 Fed. Reg. 1752 (January 12, 1998)) in several material respects:

A. Much larger land areas of New Mexico and Arizona are impacted by the 2015 10(j) Rule, in contrast to the areas of land impacted by the 1998 10(j) Rule. The 2015 10(j) Rule provides for a fourfold increase in the land area where Mexican wolves primarily are expected to occur and provides for a tenfold increase in the land area where Mexican wolves can initially be released from captivity. Specifically, the 2015 10(j) Rule extends the Mexican Wolf Experimental Population Area's ("MWEPA") southern boundary from I-10 to the border with Mexico, the northern boundary to I-40 and dramatically expands the MWEPA to comprise 153,853 square miles 98,465,920 acres). Most of the geographical areas of the States of New Mexico and Arizona are now

included in the expanded MWEPA, essentially all of those two States below Interstate 40.

B. The 2015 10(j) Rule enlarges the wolf population objective from 100 under the 1998 10(j) Rule, to 300-325 under the 2015 10(j) Rule. Importantly however, the 300-325 population objective is not a fixed cap, because the Record of Decision ("ROD") issued by the USFWS on January 6, 2015 states that number may change to accommodate a new recovery plan.

C. The 2015 10(j) Rule MWEPA is divided into three zones. Wolves would be released from captivity and translocated into two of those zones, comprising 91,263 square miles (58,408,320 acres). Under the 1998 10(j) Rule, wolves were only released from captivity into Arizona in an area comprising 737,857 acres. Under the 2015 10(j) Rule, wolves would be allowed to occupy the whole of 153,853 square miles (98,465,920 acres).

D. The 2015 10(j) Rule includes the provisions establishing conditions under which a permit could be issued to livestock owners allowing “take” of any Mexican wolf present on private and tribal lands. Under the 1998 10(j) Rule, a "take" permit could be issued if there were six wolf breeding pairs and wolves were wounding or biting livestock on public lands. In contrast, the 2015 10(j) Rule allows a livestock owner to acquire a "take permit" only after the Respondents or other designated federal agency have engaged in a removal action.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 *et seq.* (Administrative Procedure Act).

4. Petitioners have suffered a legal wrong and are adversely affected or aggrieved by the challenged USFWS's final agency actions and are entitled to seek review pursuant to 5 U.S.C. §§ 702 and 704.

5. The challenged USFWS's final agency actions are reviewable in accordance with the scope of review provided by 5 U.S.C. § 706.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(2), providing that when a defendant is an agency of the United States government, venue is proper in the judicial district where a substantial part of the events or omissions giving rise to the lawsuit occurred, or a substantial part of the subject property is situated. A substantial amount of the land area where the USFWS proposes to release Mexican wolves and where Mexican wolves will be "managed" is within the State of New Mexico.

7. With the issuance of the Final Environmental Impact Statement ("FEIS") on November 25, 2014 (79 Fed. Reg. 70154 (Nov. 25, 2014)), the Record of Decision on January 6, 2015 and the publication of the final rule in the Federal Register on January 16, 2015 (80 Fed. Reg. 2512 (Jan. 16, 2015)), this case is ripe for judicial review.

PARTIES

8. Petitioners can be divided into three general Groups:

9. Group 1 – Membership Organizations: Membership organization Petitioners include the Arizona and New Mexico Coalition of Counties for Stable

Economic Growth ("ANMC"), New Mexico Cattle Growers Association ("NMCGA"), Gila Livestock Growers ("GLG"), New Mexico Federal Lands Council ("NMFLC"), New Mexico Wool Growers Inc. ("NMWGI") and the Southern Arizona Cattlemen's Protective Association ("SACPA"). These Petitioners are membership organizations that represent the interests of farmers, ranchers and landowners and include, as members, ranchers, farmers and landowners who live, work and graze livestock within the expanded MWEPA. Some of the members of these organizations have suffered injury from the 1998 10(j) Rule and many more of their members will suffer actual or imminent injury from the 2015 10(j) Rule as both the number of wolves, and the areas where wolves can be released and will be managed, drastically expands. That injury stems from the deaths of their members' livestock that the released wolves and their offspring are certain to cause. That injury also stems from the fear for their members' personal safety that the released wolves and their offspring will engender, because it is reasonably foreseeable that death or injury to humans will result from the USFWS's conduct in releasing wolves from captivity in their midst pursuant to the 2015 10(j) Rule.

10. Additionally, members of these organizations engage in the hunting and outfitting business. These members will also suffer actual and imminent injury from the 2015 10(j) Rule with the reduction in elk and other wildlife populations upon which these hunters and outfitters depend.

11. Members of the ANMC, NMCGA, GLG, NMFLC, NMGWI, and SACPA also recreate in all zones within the expanded MWEPA. The 2015 10(j) Rule jeopardizes

their customary uses of the land and environment and inalterably changes the area's total environment, which causes them actual and imminent injury, including actual injury to their ability to aesthetically, recreationally and spiritually enjoy the private land that they own or the public and federal land in which they recreate.

12. Group 2 – Local Governments: Local government Petitioners are the second group challenging the 2015 10(j) Rule. First, sixteen counties comprise the local government membership in the ANMC. Those local governments include the New Mexico Counties of Catron, Chaves, Eddy, Harding, Hidalgo, Lincoln, McKinley, Rio Arriba, Roosevelt and Sierra, and the Arizona counties of Apache, Cochise, Gila, Graham, and Navajo. These county government members of the ANMC have a combined population of over 700,000. Many of these local governments have local land use plans or policies specifically discussing the reintroduction of the Mexican wolf or the Mexican wolf 2015 10(j) Rule that is the subject of this complaint.

13. As local governments, some of the members of the ANMC were designated as "cooperating agencies" in the National Environmental Policy Act ("NEPA") analysis for the FEIS for the 2015 10(j) Rule. Additionally, all local government members of the ANMC attended some or all of the Defendants' Identification Team meetings for the FEIS for the 2015 10(j) Rule.

14. Local governments Petitioners also include various soil and water or natural resources conservation districts. These local governments in New Mexico include the Central Valley Soil and Water Conservation District ("Central Valley"), Dona Ana Soil and Water Conservation District ("Dona Ana"), Grant Soil and Water

Conservation District ("Grant"), Hagerman-Dexter Soil and Water Conservation District ("Hagerman-Dexter"), Sierra Soil and Water Conservation District ("Sierra"), Hidalgo Soil and Water Conservation District ("Hidalgo"), McKinley Soil and Water Conservation District ("McKinley"), and Southwest Quay Soil and Water Conservation District ("Southwest Quay"). These Petitioners are elected governmental entities, whose constituents also reside within the original and expanded MWEPA.

15. New Mexico soil and water conservation districts are organized pursuant to the Soil and Water Conservation District Act, N.M. Stat. Ann. § 73-20-25 *et seq*. These local governments are a division of the State of New Mexico. N.M. Stat. Ann. § 73-20-44. These districts are authorized by statute to sue and be sued in their respective names. N.M. Stat. Ann. § 73-20-45.

16. New Mexico local government Petitioners Central Valley, Dona Ana, Grant, Hagerman-Dexter, Grant, Sierra, Hidalgo, McKinley, and Southwest Quay have adopted local land use policies or plans directly related to the Mexican wolf 2015 10(j) Rule. These local land use plans or policies were forwarded to the Respondents pursuant to the NEPA.

17. Petitioners Central Valley, Dona Ana, Grant, Hagerman-Dexter, Grant, Sierra, Hidalgo, McKinley, and Southwest Quay requested "cooperating agency status" related to the development of the environmental impact statement for the Mexican wolf 2015 10(j) Rule. That request was rejected by the USFWS.

18. Arizona local government Petitioners White Water Draw Natural Resource Conservation District ("White Water Draw"), Pima Natural Resources Conservation

District ("Pima") and Wilcox-San Simon Natural Resource Conservation District ("Wilcox-San Simon Draw") are elected governmental entities whose constituents reside and work within the expanded MWEPA.

19. Pursuant to ARS 37-1054, natural resource conservation districts can sue and be sued. The Arizona legislature has declared that natural resource conservation districts are to provide for the restoration and conservation of lands and soil resources of the state, the preservation of water rights and the control and prevention of soil erosion, thereby conserving natural resources and wildlife, protecting the tax base and public lands and protecting and restoring Arizona's rivers and streams and associated riparian habitats, including fish and wildlife resources that are dependent on those habitats, "in such manner to protect and promote the public health, safety and general welfare of the people." ARS 37-1001.

20. Management and release of Mexican wolves within these boundaries of these Arizona and New Mexico local governments will unquestionably alter the physical landscape these local governments are charged with protecting. Additionally, the ability of these local governments to govern and establish land use plans for the benefit of their constituents and the natural resources will be compromised and harmed.

21. Group 3 – Private Individuals: The third category of Petitioners is private individuals. Petitioner Jim Chilton is the owner of the cattle ranch, located near Arivaca, Arizona. Petitioner Chilton's ranching operation is located in zone 3 of the MWEPA. Petitioner Chilton will suffer actual or imminent injury from the 2015 10(j) Rule. That injury stems from the deaths of his livestock that the released wolves and

their offspring are certain to cause. That injury also stems from the fear for his children and grandchildren's personal safety that the released wolves and their offspring will engender, because it is reasonably foreseeable that death or injury to human beings will result from the USFWS's conduct in releasing wolves from captivity in their midst pursuant to the USFWS's 2015 10(j) Rule.

22. The Petitioners filed substantive comments related to the Mexican wolf Final 10(j) Rule as part of the National Environmental Policy Act process. Each of the Petitioners is located within one of the zones created to the 2015 10(j) Rule.

23. Respondent Department of the Interior is a Department of the United States Government and is charged with the oversight of the U.S. Fish and Wildlife Service. Respondent Department of the Interior is bound by the requirements of the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), the Council of Environmental Quality ("CEQ") regulations, the Regulatory Flexibility Act ("RFA") and Executive Order 12898 entitled "Environmental Justice" ("E.O. 12898").

24. Respondent United States Fish and Wildlife Service is a division of the United States Department of the Interior, and is charged with the conservation, protection, and enhancement of the nation's fish, wildlife, and plants, and associated habitats. Respondent USFWS is also bound by the requirements of the NEPA, the ESA, the CEQ regulations, the RFA and E.O. 12898.

25. Respondent Region 2, New Mexico Ecological Services Field Office ("Region 2") is a region of the U.S. Fish and Wildlife Service charged with management

of the Mexican wolf population. Respondent Region 2 is bound by the requirements of the NEPA, the ESA, the CEQ regulations, the RFA and E.O. 12898.

STATEMENT OF FACTS

History of Grey Wolf Listing and Management

26. The Mexican wolf was originally listed as an endangered species distributed in New Mexico, Arizona and Texas pursuant to the ESA on April 28, 1976. 41 Fed. Reg. 17736 – 17740 (April 28, 1976).

27. Region 2 of the USFWS was responsible for implementing the Mexican Gray Wolf Recovery Program based upon that listing.

28. In 1978, the USFWS listed the entire gray wolf species as endangered under the species name *Canis lupus*. That endangered species listing completely subsumed the 1976 Mexican wolf listing into the larger listing. 43 Fed. Reg. 9607 (March 9, 1978). As stated by the USFWS in that species listing, "the grey wolf (*Canis lupus*) group in Mexico and the coterminous States of the United States other than Minnesota, is being considered as one 'species,' and the gray wolf group in Minnesota is being considered as another group." *Id*. at 9610.

29. The USFWS approved a Recovery Program for the species *Canis lupus* in 1982, which included a captive breeding component for the wolves in Arizona and New Mexico. 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.'"

30. The first release of those captive-bred wolves into the wild occurred in 1998 as an experimental non-essential ("ENE") population pursuant to the ESA § 10(j). 63 Fed. Reg. 1752 (Jan. 12, 1998).

31. The ENE designation for the Mexican wolf contained a component allowing release of captive born Mexican wolves into an area known as the Blue Range Wolf Recovery Area ("BRWRA"). The original BRWRA contained a "primary" and "secondary" recovery zone. 63 Fed. Reg. 1752 (January 12, 1998). Under the original program, Mexican wolves were only released into the primary recovery zone of the BRWRA in Arizona, an area of 737,857 acres. No Mexican wolves were released in New Mexico.

32. Additionally, under the original program, Mexican wolves were only allowed to disperse into the BRWRA. If wolves traveled outside the BRWRA, they were trapped or captured and returned to the BRWRA. 63 Fed. Reg. 1752, 1754, 1758 (January 12, 1998).

33. In 2012, the USFWS issued an ESA "12-month finding" stating that listing the Mexican wolf as a subspecies or a distinct population segment ("DPS") was not warranted because the species was already being protected as endangered. 77 Fed. Reg. 61375 – 61381 (October 9, 2012).

34. On June 13, 2013, the USFWS published a notice in the Federal Register announcing its intent to amend the 1998 ENE 10(j) rules for the Mexican wolf; the amendment would be accompanied by an analysis pursuant to the NEPA. 78 Fed. Reg. 35719 (June 13, 2013).

35. In anticipation of this notice, in the Summer of 2013, some Group 2 Petitioners, as local governments, requested that they be allowed to participate with the USFWS as "cooperating agencies" pursuant to NEPA as allowed by 40 C.F.R. § 1508.5.

36. Via e-mail dated August 26, 2013, the USFWS declined to recognize some of the Group 2 Local Government Petitioners as cooperating agencies, determining that "extending an invitation to your District to act as a cooperating agency in the development of this [environmental impact statement] EIS would not provide additional benefit beyond that achievable through the District's normal consultations with local government." Those specific Group 2 Petitioners include Central Valley, Dona Ana, Grant, Hagerman-Dexter, Sierra, Hidalgo, McKinley, and Southwest Quay.

37. Additionally, in order to effectuate their responsibilities as local governments, the Group 2 Local Government Petitioners individually adopted certain policy resolutions related to the Mexican wolf 10(j) rule.

38. Each and every policy Resolution or local land use plan adopted by the Group 2 local government Petitioners was sent to the USFWS to be incorporated into the USFWS NEPA analysis based upon NEPA's "consistency review" requirements.

39. On January 16, 2015, the USFWS issued a final rule changing the species classification for the grey wolf and separately listing the Mexican wolf as a subspecies, except in the areas where the ENE population is located. 80 Fed. Reg. 2488 – 2512 (January 16, 2015).

40. Additionally, on January 16, 2015, the USFWS issued the final Mexican wolf 10(j) Rule challenged in this case. 80 Fed. Reg. 2512 – 2567 (Jan. 16, 2015).

LEGAL BACKGROUND

A. National Environmental Policy Act

41. As stated above, the USFWS has prepared a FEIS in connection with the proposed revision to the Mexican wolf 10(j) Rule. 79 Fed. Reg. 43358.

42. NEPA, 42 U.S.C. § 4332, requires that major Federal actions significantly affecting the quality of the human environment must include a detailed statement about the environmental impact of the proposed action, the adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity and an irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

43. NEPA also requires the following:

A. "[P]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, . . . shall accompany the proposal through the existing agency review processes." 42 U.S.C. § 4332(c).

B. The federal agency must study, develop and describe appropriate alternatives to the recommended course of action, which involves unresolved conflicts concerning alternative uses of available resources. 42 U.S.C. § 4332(C)(iii).

C. The federal agency must develop procedures, in consultation with CEQ, to ensure that unquantified environmental amenities and values are given appropriate consideration along with economic and technical considerations. 42 U.S.C. § 4332(B).

44. The CEQ regulations implementing NEPA bind all federal agencies, including Respondents in this case. Among other things, those regulations require:

A. Agencies shall use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of the actions upon the quality of the human environment. 40 C.F.R. § 1500.2.

B. The alternatives should present the environmental impacts and the alternatives in comparative form to sharply define the issues and to provide a clear basis for choice among options. Agencies must rigorously explore and objectively evaluate all reasonable alternatives and discuss the reasons for elimination of those alternatives that were eliminated. Agencies must devote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits. Agencies must include the alternative of "no action." Agencies must include appropriate mitigation measures not included in the proposed action or alternatives. 40 C.F.R. § 1502.14.

C. Federal agencies must discuss the environmental impacts of the alternatives, including the proposed action, any adverse environmental effect which cannot be avoided if the proposal is implemented. The relationship between the short-term uses of man's environment and the maintenance and enhancement of long-term

productivity and any irreversible or irretrievable commitments of resources if the proposal is implemented. It must include (1) discussion of the direct and indirect effects and their significance; (2) conflicts between the proposed action and objectives of State and local land use plans and policies and controls for the area concerned; (3) environmental effects of alternatives, including the proposed action; (4) conservation potential of the various alternatives and mitigation measures; (5) natural or depletable resource requirements; (6) urban quality, historic and cultural resources; and (7) means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16.

D. When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS and there is incomplete or unavailable information, the agency shall make clear that such information is lacking. If the incomplete information, relevant to reasonably foreseeable significant adverse impacts, is essential to a reasoned choice among alternatives, and the costs of obtaining are not exorbitant, the agency must include it in the EIS. The analysis about reasonably foreseeable adverse impacts must not be based on pure conjecture but must be supported by credible scientific evidence and within the rule of reason. 40 C.F.R. § 1502.22.

E. The federal agency shall identify and discuss all factors, including economic, technical and national policy, which were balanced by the agency in making its decision and state how those considerations entered into its decision. An agency must state whether all practicable means to avoid or minimize environmental harm has

been adopted and if not, why not. A monitoring and enforcement program shall be adopted for any mitigation. 40 C.F.R. § 1505.2.

F. Federal agencies must cooperate with State and local agencies to the fullest extent possible, including joint planning research and environmental assessments. Specifically, NEPA regulations require that federal agencies cooperate with state and local governments. In furtherance of this goal, NEPA regulations require "[t]o better integrate environmental impact statements into State or local planning processes, [environmental impact] statements shall discuss any inconsistency of a proposed action, with any approved State or local plan and law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 C.F.R. § 1506.2(d).

G. The "human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. Economic or social effects are not intended by themselves to require preparation of an EIS. When an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, then the EIS will discuss all of these effects on the human environment. 40 C.F.R. § 1508.14.

H. Actions which may be connected should be discussed in the same impact statement. Actions are connected if they automatically trigger other actions which may require an EIS or are interdependent parts of a larger action and depend on the larger for justification. Cumulative actions, which when viewed with other proposed

actions, have cumulatively significant impacts should be discussed in the same impact statement. 40 C.F.R. § 1508.25.

I. "Significantly" must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Both short and long-term effects are relevant. In evaluating severity of impact, an agency must consider the degree to which the action affects public health or safety, the unique characteristics of the geographic area; the degree to which the effects on the human environment are likely to be highly controversial, highly uncertain or involve unique or unknown risks; and the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration. Significance exists if it is reasonable to anticipate a cumulatively significant impact. Agency must consider if the action adversely affects an endangered or threatened species or its critical habitat. An agency must consider whether the action threatens a violation of State or local law or requirements imposed for protection of the environment. 40 C.F.R. § 1508.27.

J. A supplemental environmental impact statement is required when (a) the agency makes substantial new circumstances or information relevant to environmental concerns or (b) there are significant new circumstances or new information relevant to the environmental concerns and bearing on the proposed impacts of the decision. 40 C.F.R. § 1502.9(c).

B. Endangered Species Act

45. Authority for a 10(j) regulation is found at 16 U.S.C. § 1539(j) "experimental populations."

46. According to those regulations, the USFWS may authorize for release "any population" but only when, and at such times as, the population is "wholly separate geographically" from "nonexperimental populations of the same species." *Id*. at 1539(j)(1).

47. The population released, which can include individuals, must be of an endangered or threatened species, the release must be outside the "current range of the species" and the Secretary [of the Department of the Interior] must "determine[] that such release will further the conservation of such species." *Id*. at 1539(j)(2)(A).

48. Before authorizing the release of any population, the Secretary must, by regulation "identify the population" and must "determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species." *Id*. at 1539(j)(2)(B).

49. Each member of an experimental population must be treated as a threatened species except that if nonessential to the continued existence, the species is treated as a species proposed to be listed and critical habitat shall not be designated. *Id*. at 1539(j)(2)(C).

50. The USFWS regulations at 50 C.F.R. § 17.80 define "experimental population" as an introduced or designated population that has been designated in accordance with procedures but only when, and at such times as the population is

wholly separate geographically from non-experimental populations of the same species. Where there is overlap with natural populations at times but wholly separate at other times, the experimental population will not be recognized outside the areas of overlap. The population will be treated as experimental only when the times of geographic separation are reasonably predictable; e.g., fixed migration patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

51. Under 50 C.F.R. § 17.81, providing for the designation of an experimental population, the population must be "released into suitable natural habitat" that is "outside the current natural range (but within its probable historic range" (absent a finding, in the extreme case, that the primary habitat has been unsuitably and irreversibly altered or destroyed).

52. The Secretary "must find by regulation that such release will further the conservation of the species." In making the finding, the Secretary "shall utilize the best scientific and commercial data available to consider" the following:

--any possible adverse effects on the existing populations of a species as a result of removal of individuals for introduction elsewhere;

--the likelihood that such experimental population will become established and survive in the foreseeable future;

--the relative effects that the experimental population will have on the recovery of the species; and

--the extent to which the introduced population may be affected by existing or anticipated Federal, State actions or private activities within or adjacent to the experimental population area.

50 C.F.R. § 17.81(b).

53. The Secretary may issue a permit to allow acts necessary to establish and maintain an experimental population. Any regulation must provide: (1) appropriate means to identify the experimental population, including actual or proposed location, actual or anticipated migration, number of specimens released or to be released and other criteria appropriate to identify; (2) a finding, based solely on the best scientific and commercial data available, and supporting factual basis, whether the experimental population is or is not essential to continued existence of the species in the wild; (3) management restrictions, protective measures or other special management concerns of that population, including measures to isolate or contain the population designated from natural populations; and a process for periodic review and evaluation of the success or failure of the release and the effect of release on conservation and recovery of the species. 50 C.F.R. § 17.81(c).

54. USFWS regulations at 50 C.F.R. § 17.81(d) require USFWS to consult with, among others, "local governmental entities" in developing experimental population rules, including the 2015 10(j) Rule at issue in this case. This regulation requires that:

> Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

50 C.F.R. § 18.81(d).

C. Special Expertise and the Consistency Review Requirements for the Arizona and New Mexico Soil and Water Conservation Districts

55. Group 2 Petitioners are local governments. New Mexico statutes specify that a "'soil and water conservation district', organized under or perpetuated by the

provisions of the Soil and Water Conservation District Act, is a governmental subdivision of the state, a public body politic and corporate." N.M. Stat. Ann. § 73-20-44.

56. According to New Mexico statutes, Soil and Water Conservation Districts may:

> A. conduct research, investigations and surveys treating soil erosion and floodwater and sediment damage, concerning the conservation, development, utilization and disposal of all waters and relating to control programs and public works necessary to facilitate conservation and development.
>
> B. publish and disseminate research findings and preventive and control measures relating to resource conservation and development;
>
> C. with the consent and cooperation of the landowner or the state or federal agency administering the land, conduct projects upon land within the district to demonstrate by example the methods by which soil and other natural resources may be conserved, . . .
>
> G. foster, publish and promote district natural resource development plans and their adoption and development by landowners within the district;
>
> H. acquire or administer the project of any other governmental agency undertaken to provide for the conservation, development and utilization of natural resources within the district.

N.M. Stat. Ann. § 73-20-44.

57. Based upon the New Mexico statutes, Petitioners' activities include the development of expertise related to soil, water, wildlife, agricultural, and economic protection.

58. The Petitioners in Group 2 have developed resource management and conservation programs and plans and have adopted Resolutions related to the management of the Mexican wolf and the 2015 10(j) Rule.

59. The New Mexico Soil and Water Conservation District Resolutions adopted by the local governments do not argue for any violation of federal law, including the ESA.

60. Rather the Resolutions include the following policies:

A. A requirement that local prey and habitat studies be done before any action introducing the predators [Mexican wolves] takes place;

B. A requirement that the quantitative conclusions of such studies equate to conditions conducive to natural species survival opportunities rather than induced or artificial;

C. A requirement that no individual predator be released or slated to be released until the ESA [10(j) final decision] is concluded;

D. A requirement that any individual [Mexican wolf] that enters the boundaries of the District be captured and removed immediately;

E. A requirement that the management plan emanating from any [Mexican wolf] introduction shall give citizens and livestock operators the right to protect their livestock, pets, and personal safety;

F. A requirement that such authority be extended to but not limited to action to discourage such predators near personal and or contracted property;

G. A requirement that such authority be further extended to acts of shaping prey to be killed, wounding, or killing such pet and livestock prey;

H. A requirement that ESA "take" permits must be offered without regard to predator numbers;

I. A requirement that allows and favors all lawful trapping;

J. A request that the District be informed of any private land discussions or contracts for release within or adjacent to lands of the District, and

61. The Resolutions were forwarded to the Respondents to meet the consistency review requirements outlined in the NEPA and CEQ regulations.

D. Regulatory Flexibility Act

62. The RFA requires all agencies, as part of the rulemaking process, to conduct a "regulatory flexibility analysis" for their proposed rules. 5 U.S.C. §§ 603-604. In the analysis, the agency must evaluate how the proposed rule will affect small entities, consider alternatives that would "minimize the significant economic impact on small entities," and explain "why each one of the other alternatives" was rejected. *See* 5 U.S.C. § 604(a)(6).

63. In the context of ranching and the raising of livestock, a "small entity" means an agricultural enterprise (including its affiliates) that has annual receipts not exceeding $750,000. *See* 5 U.S.C. § 601 (3) and (6); 5 U.S.C. § 632 (a)(1).

64. The agency does not have to prepare a flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605 (b). Such certification must be published with the rulemaking notice "along with a statement providing the factual basis for such certification." *Id.*

E. Executive Order 12898 – "Environmental Justice"

65. Section 1-101 of E.O. 12898 states that federal agencies, to the greatest extent practicable and permitted by law, shall make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse

human health or environmental effects of its programs and activities on minority and low-income population.

66. E.O. 12898 also states, in § 6-609, "This order is intended only to improve the internal management of the executive branch. This order does not create any right or benefit enforceable at law or in equity by a party against the United States or its agencies or officers. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance."

67. However, in this case, the Defendants chose to complete an E.O. 12898 analysis as part of the Mexican wolf 2015 10(j) Rule FEIS. Therefore, this analysis is reviewable by this court.

CLAIMS FOR RELIEF

First Claim
Violations of the National Environmental Policy Act

68. Petitioners restate the foregoing paragraphs as if fully stated herein.

69. The Administrative Procedure Act, codified at 5 U.S.C. § 551 *et seq.* ("APA") provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "[F]inal agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704.

A. *Violation of NEPA's Consultation and Consistency Review Requirements*

70. Group 2 Petitioners are local governments that have special expertise that is highly relevant to the EIS process associated with USFWS's proposed revision to the

2015 10(j) Rule. This expertise has developed as a result of Plaintiffs' activities that include (1) the creation and implementation of resource management plans and (2) the representation of conservation and agricultural interests in the development of state and national policies.

71. Group 2 Petitioners' officially adopted Resolutions expressing the policies and positions of the Group 2 Petitioners with regard to the management of the Mexican wolf and the proposed 2015 10(j) Rule.

72. Even though they were timely filed with the Respondents, copies of the Local Governments' Resolutions were not discussed or appended to the 2014 Proposed Rule or Draft Environmental Impact Statement in violation of the requirement that the comments and views of Local Governments "shall accompany the proposal through the existing agency review process." 42 U.S.C. § 4332(c).

73. Additionally, CEQ regulation 40 C.F.R. § 1506.2 (d) provides: "To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." *See also* 40 C.F.R. § 1502.16 (c) (environmental impact statement should discuss possible conflicts of its proposed action with local land use plans).

74. The USFWS's FEIS, ch. 4 at 96-98, states that the USFWS evaluated the consistency of its 2015 10(j) Rule and the alternatives with the Petitioners' (governmental entities') local land use plans Resolutions or policies.

75. However, the USFWS does not discuss any inconsistencies with Petitioners' local land use plans or state how it would reconcile its action with any inconsistencies of those land use plans.

76. Instead, the USFWS asserts that under the Supremacy Clause the federal government's authority displaces that of the local governments.

77. The USFWS does not make federal law.

78. Federal law requires that the USFWS review and describe any inconsistencies of its proposed action with Petitioners' local land use plans and state how it would reconcile its proposed action, here the 2015 10(j) Rule, with the Petitioners' local land use plans.

79. The USFWS has failed to comply with 40 C.F.R. § 1506.2(d), 40 C.F.R. § 1502.16(c) and 42 U.S.C. § 4332(c).

80. The 2015 10(j) Rule, the ROD, and the FEIS are not in accordance with law, are arbitrary or capricious and have not been made with observance of procedures required by law.

B. *The USFWS Piecemeal Approach is Erroneous under NEPA and CEQ Regulations*

81. Plaintiffs restate the foregoing paragraphs as if fully stated herein.

82. CEQ regulation 40 C.F.R. § 1508.25 provides that the scope of an environmental impact statement must include connected actions, interdependent parts

of a larger action, and cumulative actions, which have cumulatively significant impacts. The same environmental impact statement must discuss and thus disclose to the public the total impact of a program.

83. The USFWS is not permitted to segment its wolf conservation or reintroduction project, only partially analyzing it in an environmental impact statement and thus not revealing the true, total impacts of its project.

84. The USFWS is not permitted under NEPA and CEQ regulation 40 C.F.R. § 1508.25 to "piecemeal" its environmental impact statements for its project, the conservation of the Mexican wolf.

85. Here, the USFWS has taken one admittedly inadequate "first step" and now under the 2015 10(j) Rule has taken a second "first step," all the while not knowing whether it is achieving conservation, not knowing whether its objective of 300-325 wolves is realistic and having no concrete means to verify population counts or know, definitively, what to do if there are more than 300-325 wolves.

86. The currently existing recovery plan developed by Region 2 of the USFWS states a recovery goal of 100 wolves.

87. The USFWS has not updated this plan, thus, there is no legal basis for a goal of 300 – 325 wolves. According to the 2015 10(j) Rule and FEIS, recovery is beyond the scope of its FEIS and ROD.

88. Thus, the USFWS' 2015 10(j) Rule is premature until a final decision is issued regarding the ESA final listing of the Mexican wolf and, depending upon that status, an updated recovery plan (if required by law) is issued.

89. The USFWS has argued in *Defenders of Wildlife et al v. Jewell*, 14-cv-2472-TUC-FRZ that Plaintiffs complain seeking the USFWS to develop a recovery plan for the Mexican wolf is moot because of the existence of the 1982 Mexican wolf recovery plan. *See Id*. at Defendants' Motion to Dismiss, filed January 30, 2015, at Docket 18 (stating, "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.'")

90. The USFWS now is attempting to increase that "self-sustaining population" threefold, without revising the agency's existing Recovery Plan and completing that proper analysis.

91. The USFWS' 2015 10(j) Rule, its FEIS, and its ROD are not in accordance with law, are arbitrary or capricious and have not made with observance of procedures required by law until the new listing decision is made and until the USFWS revises or issues a new recovery plan.

C. *Absence of Critical Information and Narrow Range of Alternatives*

92. Petitioners restate the foregoing paragraphs as if fully stated herein.

93. Title 42 U.S.C. § 4332 requires the USFWS to prepare a detailed environmental impact statement that describes the environmental impact of its

proposed action, the adverse environmental effects, if implemented, and alternatives to its proposed action.

94. CEQ regulation 40 C.F.R. § 1500.2(f) requires that USFWS "[u]se all practicable means ... to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."

95. CEQ regulation 40 C.F.R. § 1502.14 requires that USFWS present alternatives to its proposed action in comparative form, thus sharply defining the issues and providing a clear basis of choice among options by the decision maker and the public. USFWS must rigorously explore and objectively evaluate all reasonable alternatives and devote substantial treatment to each alternative considered in detail so that reviewers may evaluate their comparative merits.

96. CEQ regulation 40 C.F.R. § 1502.22 requires the USFWS to evaluate the significant adverse effects on the human environment. Incomplete information that is relevant to significant adverse impacts and is essential to a reasoned choice and if the costs of obtaining it are not exorbitant, the agency must obtain and include the information that it lacks.

97. In issuing its 2015 10(j) Rule, the USFWS deliberately chose to exclude highly relevant information pertaining to its future plan of recovery. Given the settlement deadline, it states that it did not have time to prepare and thus include this information.

98. The missing information is relevant and critical, because without it there is no way to assess the merits or purported necessity of the USFWS' chosen course of action.

99. This missing information is critical, because the USFWS' action has significant adverse effects on the human environment, namely, on people and their domestic animals, pets and valuable livestock, which are placed in harm's way by the deliberate release and management of captive wolves in the areas and communities where Petitioners live and work.

100. The FEIS reflects that the alternatives 2 and 3 to the proposed (and adopted) alternative 1 did not vary appreciably in terms of the USFWS' depicted summary of environmental impacts. *See* November 2014 FEIS, ES-18-20. The enlarged area for the new MWEPA remains the same under all three alternatives.

101. That summary of environmental impacts under "human health/safety" states that for alternatives 1 through 3, that there is no significant adverse impact. It states essentially the same for "economic activity (ranching/livestock production)." Yet, in zone 3, there is only 1% suitable habitat and the wolves "would be more actively managed ... to reduce human conflict." *See* FEIS, ES-6. The USFWS' conclusions are not logical.

102. The USFWS did not consider an adequate range of alternatives to provide a clear basis of choice.

103. The USFWS' 2015 10(j) Rule, its FEIS, and its ROD are not in accordance with law, are arbitrary or capricious and have not made with observance of procedures required by law.

D. *Failure to Analyze Any Irreversible or Irretrievable Commitments of Resources*

104. Petitioners restate the foregoing paragraphs as if fully stated herein.

105. CEQ regulation 40 C.F.R. § 1502.16 provides that an environmental impact statement should discuss "any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented." *See also* 42 U.S.C. § 4332.

106. In this case, there have not been any studies to show the adequacy of the wildlife prey base necessary for the additional number of wolves to be released.

107. The USFWS analyzes this requirement in its FEIS, ch. 4 at 101-102, but erroneously does so from the apparent perspective that it has purported authority to commit resources, namely, cattle, that it does not own.

108. The USFWS states that while it realizes that cattle will be killed by the Mexican wolves, cattle are an abundant and renewable resource, and, therefore, it does not consider depredation on cattle to be either irretrievable or irreversible.

109. The USFWS should ask that small rancher who owns a valuable cow, perhaps one that he/she was breeding for its valuable genetics, just how "renewable" his/her killed animal, worth perhaps $1,000, is.

110. The regulation is intended to focus on the federal government's commitment of federal resources, not property that is privately owned.

111. The 2015 10(j) Rule, the ROD, and the FEIS are not in accordance with law, are arbitrary or capricious and are not made with observance of procedures required by law.

E. *Failure to Consider Adverse Effects on Human Environment*

112. Petitioners restate the foregoing paragraphs as if fully stated herein.

113. The USFWS must use all practicable means to avoid or minimize any possible adverse effects of their actions on the "human environment," a broad term embracing social and economic effects. *See* 40 C.F.R. §§ 1500.2 (f) and 1508.14.

114. The FEIS and ROD do not address or consider the severe toll that its Mexican wolf reintroduction program is having and will have on the lives of impacted inhabitants and impacted ranchers and farmers who live, work and raise their families in the expanded MWEPA.

115. The USFWS' analysis evidences bias in favor of its wolf program and against those who suffer because of it.

116. The USFWS' conclusions regarding lack of significant effect to the rancher who runs cattle are arbitrary and lack sufficient evidence, because the USFWS fails to properly quantify the number of expected cattle depredations. For example, 59 observed wolves in 2006 committed 27 "confirmed" cattle kills, leading to a projected 45 killed head per 100 wolves. *See* FEIS, ch. 4 at 30.

117. Yet, the FEIS recognizes that it is difficult, for a number of reasons, to determine a precise number of depredations. According to one study, only one out of

eight cattle that were killed by wolves was discovered and "confirmed." *See* FEIS, ch. 4 at 31.

118. Even though the USFWS did not and has not attained its 1998 wolf population count of 100, the USFWS now has decided to more than triple that number and possibly enlarge it later, without having the scientific knowledge necessary to quantify depredations, other than possibly multiplying 45 by three or four and again by eight, a calculation it does not make.

119. The USFWS has not factored into its analyses the fact that 68% of the cattle killed by wolves are calves and 27% were cows, animals which might otherwise have yielded offspring. *See* FEIS, ch. 4 at 34.

120. The USFWS has not factored into its analyses the fact that it intends to release an unknown (or unrevealed to the public) number of wolves the agency thinks it needs to achieve a 300-325 wolf population count, which could increase based upon a recovery plan.

121. The USFWS has not factored in the other burdens of its program, the physiological impacts to the rancher's cattle, such as stress and weight loss due to the presence of wolves, changes in forage use, the need for additional labor and supplies and the disproportionate impact on ranchers.

122. The USFWS' Mexican wolf reintroduction program is at-odds with and is incompatible with the human environment, and the mitigation measures offered by the USFWS that a private rancher might employ (hazing, separately pasturing, buying hay,

and the like) are unreasonably burdensome, inadequate and in derogation of one's right to peaceable enjoyment of one's property and ability to pursue a chosen livelihood.

123. The federal government is the largest landowner in many New Mexico and Arizona counties. *See* FEIS, ch. 3 at 7.

124. Of the federally managed suitable wolf habitat, 63% occurs on Forest Service land. *See* FEIS, ch. 3 at 11.

125. Many cow-calf operations in Arizona and New Mexico depend heavily on federal lands for forage. Most ranches would no longer be economically viable or sustainable without access to public land resources. *See* FEIS, ch. 3 at 71.

126. The nine national forests in the project area are managed for multiple uses. Traditional land uses include grazing. Livestock grazing are active programs throughout the national forests, under which permittees are allowed to graze their cattle on the federal land. Many communities and private land adjoin or are in close proximity to the forests. *See* FEIS, ch. 3 at 13-29.

127. In 1990, the Forest Service permitted 2.5 million animal unit months throughout the national forests in New Mexico and Arizona, declining to 2.1 million in 2012. *See* FEIS, ch. 3 at 72.

128. The ROD states that the majority of suitable wolf habitat is on Forest Service land. "This is where cumulative effects are most likely to occur.... Protection of wildlife habitat may ... require reduction of permitted livestock or exclusion of livestock from sensitive areas." *See* ROD at 19.

129. The USFWS disregards human health and public safety concerns attendant its 2015 Rule 10(j).

130. It concludes, for its proposed action and all alternatives, that there is no significant direct or indirect adverse impact on human health/public safety. *See* FEIS, ch. 2 at 34.

131. The USFWS' FEIS, ch. 4 at 60-69, shows that there is an adverse impact to human health/public safety. Aggression by wolves toward people was evident in 51 of 80 cases of wolf-human encounters. Twelve of those cases involved wolves with known or suspected rabies. Nineteen cases were considered by one authority to be unprovoked. Habituation contributed to unprovoked wolf aggression toward people in 11 cases, resulting in bites. In 21 out of 28 incidents, habituation was a contributing factor. In many cases, the habituation was the result of food conditioning. *Id.*at 62. "While habituation may occur without the involvement of food, food conditioned wild animals are almost always habituated (Carnes 2004). A food conditioned wolf may seek out humans or human use areas and may demonstrate an agonistic lunge, charge or bite if the food reward that they seek is withheld (McNay 2002a)." *Id.* at 62-63. "Attacks on dogs are among the most commonly reported conflicts between wolves and humans (McNay 2002b). " "Wolves treat dogs as trespassers in their territory and will kill dogs whenever the two canids occur (Fritts et al. 2003). They will also prey on domestic dogs... and dogs may be an important food source for wolves in some areas (Carnes 2004, Fritts et al. 2003)." *Id.* at 63.

132. "Approximately 39% of the documented human-wolf interactions in the BRWRA [Blue Range recovery area] have involved wolves recently released from captivity, suggesting that wolves released from captivity may be more prone to initial fearless behavior toward humans...." *Id.* at 67.

133. The USUSFWS dismisses the evidence presented by Gila Livestock Growers Association and of Catron County that proves the damage, both psychological and physical, caused by the wolves on the residents, children and pets. The USUSFWS dismisses Catron County's report entitled *Problem Wolves in Catron County, New Mexico: A County in Crisis*, stating that no peer-reviewed studies have been conducted, and the county provides anecdotal accounts.

134. The USFWS ignores the fact that it is releasing upon the residents of New Mexico and of Arizona "problem wolves," wolves that are habituated to humans by virtue of food conditioning, since they are captive and depend on humans for food, and by virtue of the veterinarian care they receive. *See* FEIS, ch. 3 at 96.

135. The USFWS evidences its bias in favor of its wolf project, by dismissing reliable, first-hand evidence that shows the damage its experimental population of wolves is inflicting on human beings, which will only become worse by virtue of the expansion of its program.

136. When the USFWS concludes that the risk to humans is extremely small, *see* FEIS, ch. 4 at 66, it demonstrates bias and is ignoring and disregarding evidence to the contrary that indicates a reasonable probability that it will be proved wrong.

137. The 2015 10(j) Rule, the ROD, and the FEIS are not in accordance with law, are arbitrary or capricious, have not been made with observance of procedures required by law and are not supported by substantial evidence.

F. *Failure to Provide and Consider Adequate Mitigation*

138. Petitioners restate the foregoing paragraphs as if fully stated herein.

139. CEQ regulations define mitigation as including "compensating for the impact by replacing or providing substitute resources or environments." 40 C.F.R. § 1508.20.

1. The Compensation Program Does Not Provide Adequate Mitigation

140. With regard to the FEIS' proposed mitigation for the loss of livestock, the FEIS, ch. 4 at 101, states that **if** the Mexican Wolf/Livestock Trust Fund continues to be funded, the USFWS would expect the Mexican Wolf/Livestock Coexistence Council (Coexistence Council) to compensate 100% of the market value of confirmed depredated cattle and 50% of the market value for probable kills.

141. The USFWS states that another possible source of mitigation funding is the USDA Livestock Indemnity Program, part of the 2014 Farm Bill, which provides (among other things) benefits to livestock producers for livestock lost due to attacks by animals introduced into the wild by the federal government or protected by federal law, including wolves.

142. The USFWS does not represent with certainty the availability of these compensation sources.

143. A "confirmed kill" represents only a small number of the actual killings of cattle by wolves.

144. There is no compensation to individuals for their pain and suffering and physical and emotional damage and injury caused by the USFWS' reintroduction program.

145. The 2015 10(j) Rule, the ROD, and the FEIS do not provide adequate assurance of mitigation required by NEPA, thus is in violation of the APA.

2. The Regulatory "Take" Provisions are Unduly Restrictive Thus Are Not Adequate Mitigation

146. The 2015 10(j) Rule at section (k)(7) provides that an allowable "take" includes, on private land, the killing or injuring of a Mexican wolf that is "in the act of biting, killing or wounding a domestic animal." The USFWS must be provided evidence that the wolf was, in fact, in the "act of biting, killing or wounding" at the time of the "take." The killing or injuring must be reported to the Respondents within 24 hours.

147. The USFWS may, in its discretion, issue permits to allow a taking, specifying the number of days that the permit is valid and the number of wolves that may be taken.

148. On federal land, for example, in the situation where a livestock owner is grazing cattle on federal land, the Service may, in its discretion and in conjunction with a removal action, issue permits to allow livestock owners to take or intentionally harass any Mexican wolf that is "in the act of biting, killing or wounding livestock on Federal land where specified in the permit." Reporting within 24 hours is required. Evidence to

support the fact that the wolf was in the act of killing, biting or wounding must be provided, such as freshly wounded or killed livestock.

149. If the USFWS intends to reduce permitted livestock to accommodate the Mexican wolf, it is proceeding in direct antithesis to mitigation, to NEPA and to multiple use requirements for federal land. Moreover, the "take" provision for permittees grazing cattle on federal land is dependent on a standardless, discretionary permit and a governmental removal action, which could render the "take" provision of little value to the rancher who needs to protect his/her cattle from the wolves that the USUSFWS has introduced into the forest.

150. These "take" provisions are onerous, because they allow the wolf a "free" kill of a cow, bull, steer or calf. Only after the damage is done, since the wolf must be "in the act of" biting or killing, may the owner strive, belatedly, to protect his/her animal.

151. The animal's owner logically must be given the latitude to step in lethally to "protect" his or her animal against the "threat" that his or her animal may be killed or injured by the wolf posing such threat.

152. These "take" provisions are further onerous in that for the federal permittee, he or she must first have an USFWS permit. As with a private landowner, the issuance of that USFWS permit is discretionary and is "in conjunction with a removal action."

153. The federal agency discretion to issue "take" permits is unregulated and thus is susceptible to arbitrary conduct on the part of the USFWS.

154. Moreover, the permit provisions are vague, because the USFWS has yet to prepare procedures to govern the application and grant of them. *See* ROD at 17 ("The process of applying for and obtaining a permit will be provided in a revised management plan and Standard Operating Procedures (SOPs) for the Reintroduction Project.").

155. The purpose to the management flexibility allowed under Section 10(j) was to make reintroduction compatible with human activities, such as livestock grazing and hunting. *See Defenders of Wildlife v. Tuggle*, 607 F. Supp.2d 1095, 1101 (D. Ariz. 2009).

156. These onerous "take" provisions are not compatible with human activities and the fact that they exist, including the permission to kill in self-defense and the permission to the Service to kill wolves that are habituated to humans, which the released wolves necessarily are, only illustrates the irreconcilable incompatibility of USFWS's introduction program that involves the release of wolves into a landscape populated by human beings.

157. The 2015 10(j) Rule, the 2015 ROD and the FEIS fail to provide adequate mitigation thus are not in accordance with law and are arbitrary or capricious.

Second Claim
Violations of the Endangered Species Act

158. Petitioners restate the foregoing paragraphs as if fully stated herein.

159. The APA, 5 U.S.C. § 551 *et seq*., provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §

702. "[F]inal agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704.

A. *The FWS Decision to Release Mexican Wolves into Unsuitable Habitat is Arbitrary and Capricious and Not in Accordance with Law*

160. Petitioners restate the foregoing paragraphs as if fully stated herein.

161. Title 50 C.F.R. § 17.81(a) requires that the Mexican wolves be released into "suitable natural habitat."

162. The habitat which the released Mexican wolves will be allowed to enter and thereafter remain and occupy is not suitable habitat.

163. Under the 2015 10(j) Rule, the MWEPA is divided into zones. Zone 1, an area of 12,507 square miles, has approximately 83% suitable habitat. Zone 2, an area of 78,756 square miles, has approximately 27% suitable habitat. Zone 3, an area of 62,590 square miles, has approximately 1% suitable habitat. *See* FEIS, ES-6.

164. Because Mexican wolves are going to be released into an area or remain in an area with admittedly unsuitable habitat, the 2015 10(j) Rule, the FEIS, and the ROD are not in accordance with law, are in excess of statutory authority, are arbitrary or capricious and not supported by substantial evidence.

B. *The FWS Decision Must Fail Because there is No Appropriate Means to Identify Experimental Population or Quantify the Number Released*

165. Petitioners restate the foregoing paragraphs as if fully stated herein.

166. Title 50 C.F.R. § 17.81(c)(1) states that an experimental population regulation must provide an appropriate means to identify the experimental population, including location, migration, number of specimens to be released and other criteria.

167. The 2015 10(j) Rule fails to satisfy these criteria.

168. The amended regulation at 50 C.F.R. § 17.84(k) does not provide a method to identify the population, expected migration or number of specimens, i.e, wolves, to be released from captivity into areas within the MWEPA. Although asserting a population objective of 300-325, which can change depending on a new recovery plan, the USFWS has no evident means to determine when that objective is reached or exceeded.

169. The USFWS states that it would attempt to maintain at least two radio collars per pack. However, a majority of the Mexican wolves may not have radio collars as the population grows. *See* 2015 Rule 10(j) at 45.

170. So as not to exceed the population objective, the USFWS states that it would prefer to transfer wolves to other Mexican wolf populations, but that would not ease the burden on landowners and inhabitants of the MWEPA. There has not been a Mexican wolf population in New Mexico for over 30 years. Based on the mortality of reintroduced Mexican wolves in New Mexico from 2011 to 2013, the USFWS does not expect a population to be established for at least several years. *See* 2015 Final Listing Rule at 52.

171. Petitioners have no way of knowing when the USFWS will stop releasing captive wolves, how many it will release, or how the USFWS will know when to stop releasing wolves.

172. Based upon these failures, the 2015 10(j) Rule does not comply with 50 C.F.R. § 17.81(c)(1).

C. *No Likelihood of Success and No Consideration of Recovery*

173. Petitioners restate the foregoing paragraphs as if fully stated herein.

174. Title 50 C.F.R. § 17.81 provides that before releasing an experimental population, the Secretary must consider the likelihood that the experimental population will become established and survive in the foreseeable future and the effects that establishment of an experimental population will have on recovery of the species.

175. Title 16 U.S.C. § 1533(f) provides that the Secretary shall develop and implement recovery plans for a listed endangered species, unless the Secretary finds that such a plan will not promote conservation of the species.

176. In issuing her 2015 10(j) Rule to establish an experimental population of the Mexican wolf, the Secretary has given no consideration to a recovery plan and, in fact, has completely excluded "recovery" from consideration in the FEIS and the ROD, which implement the 2015 10(j) Rule.

177. In its ROD, the USFWS states that given the time constraints imposed by its settlement agreement with the plaintiff in *Center for Biological Diversity v. Jewell*, which required that the USFWS have issued its 2015 10(j) Rule by January 12, 2015, the USFWS did not have sufficient time to develop and obtain public comment through the NEPA process of a recovery plan. *See* ROD at 19-20. The USFWS states: "We have been clear in the consideration of issues that were within the scope of the EIS and those which we considered to be beyond the scope. We specifically excluded those issues that we felt were related to recovery and the development of a recovery plan and for which

we did not have time to expand the scope of the EIS so that we could adequately consider them in the NEPA analysis."

178. The USFWS's ROD further states: "We adopted a population objective for the Mexican wolf experimental population in the MWEPA ... that ... we believe is large enough to achieve our goal of improving the probability of persistence of the experimental population.... However, full recovery is beyond the scope of the EIS and the population objective for the experimental population cannot, and should not, be used to extrapolate a hypothetical number for the metapopulation of Mexican wolves needed for recovery." *See* ROD at pages 14-15.

179. In its 1998 experimental population rule for the Mexican wolf, the USFWS had designated the White Sands area as a wolf recovery area, but the USFWS did not use it, because, upon reevaluation, the USFWS decided that the area would not support wolves. *See* FEIS, ch. 1at 29. Without explanation, that area is now included as a potential release site for Mexican wolves.

180. In its 1998 experimental population rule for the Mexican wolf, the USFWS had also designated the Blue Range area as a wolf recovery area. In this area, the USFWS, for the period of 1998 to 2013, had released 93 wolves. Some disappeared and for those that had known outcomes (72), only 15 were considered successful. *See* FEIS, Table 1-5, ch. 1 at 23.

181. In its 2015 endangered species Final Listing Rule, the USFWS notes the significant difficulties associated with establishing a population, such as inbreeding, loss

of adaptive potential, limited number and relatedness of the founders of the captive population, loss of genetic material, etc. *See* Final Listing Rule at 102.

182. The USFWS states that, while it intends its new 2015 10(j) Rule to "contribute to recovery, full recovery is beyond the scope of this EIS." *See* FEIS, ch. 1 at 17.

183. The USFWS states that, under its 1998 rule, its release sites in the Blue Range, termed PRZ (primary recovery zone), are the lowest in suitability compared to certain wilderness areas. *See* FEIS, ch. 1 at 24.

184. The USFWS states that, under its 1998 rule, the released wolves established home ranges within much of the PRZ where elk are present and, as a result, suitable release sites have become difficult to identify. Conversely, it states that releases are more likely to be successful in areas that have an abundant prey base of elk. *See* FEIS, ch. 1 at 24.

185. The USFWS states that wolves with no wild experience are more likely to be involved in nuisance behavior after release. *See* FEIS, ch. 1 at 24.

186. The only wolves to be released are those in captivity. "The wolves in the captive population are the only source of animals for release into the wild." *See* FEIS, ch. 1 at 4. Being habituated to humans and dependent on humans for food, shelter and medical care, the wolves are all necessarily "problem" wolves and thus are likely to engage in nuisance behaviors.

187. The USFWS states that it hopes to improve the genetic variation within the experimental population, yet the only animals they are using for that population are those now in captivity. *See* FEIS, ES-3.

188. The USFWS's previous population objective of 100 is now regarded as inadequate. *See* FEIS, ch. 1 at 17.

189. Regarding the 2015 Rule 10(j), the USFWS states: "We intend for the experimental population of Mexican wolves that we reestablish within the MWEPA to contribute to recovery. Until future recovery planning efforts are able to determine a population goal for range-wide recovery, setting a population objective for the experimental population ... can help us achieve 'the first step toward recovery'....". *See* FEIS, ch. 1 at 19-20.

190. The USFWS has not shown that its 2015 10(j) Rule is "likely" to achieve success in both survival and establishment of its experimental population, and its past failure and neglect in undertaking the proper analyses and studies to properly inform itself is further evidence that the current rule is likely to fail, as well.

191. Also indicating that its wolf establishment program is not likely to succeed is the fact that it is dependent on private control measures. The USFWS states:

> While wolf control undertaken by a governmental agency is the primary tool we use to manage problem wolves, control measures implemented by landowners and livestock owners or their agents is also a necessary element of the Reintroduction Project. Aversive and preventative non-lethal management techniques include the use of flandry and hazing, the use of non-lethal projectiles, livestock husbandry assistance, the use of calving pastures, and purchase of feed/hap to reduce the risk of depredation.... [L]ethal control of chronic depredating wolves may still be necessary.... Lethal control measures may be taken ... by landowners and livestock owners or their agents under specific limited circumstances.

See FEIS, ch. 1 at 31.

192. The USFWS states: "Under voluntary management agreements ... we could release or translocate wolves at release sites on private land in Zones 1 and 2." *See* FEIS, ch. 4 at 4.

193. The USFWS is now attempting to take its second "first step" without any regard to recovery and without regard to any informed population objective, which it admits is a "moving target," depending on its future plans.

194. Without a recovery plan and lacking sufficient studies to inform itself, the USFWS is merely proceeding forward with its 2015 10(j) Rule in order to comply with a deadline in a settlement agreement and without regard for the lives and property of those who will suffer as a result of its hasty actions.

195. The USFWS fails to take into account the fact that it is releasing "problem wolves," those previously in captivity by humans and that are, necessarily, habituated to humans, an important factor in considering the likelihood of success. *See* 2015 10(j) Rule definition at 50 C.F.R. § 17.84(k)(3).

196. As its FEIS states, ch. 4 at 62-63:

> Food conditioning occurs in wolves and other wild animals when the animal learns to associate food with the presence of people.... [F]ood conditioned wild animals are almost always habituated. (Carnes 2004) ... Food conditioning was a known or suspected factor in 16 cases of habituated behavior examined by McNay (2002a). Carnes (2004) determined that habituation of wolves to humans was a contributing factor in 75% of the reports of human injuries, caused by presumably healthy wild wolves that he examined.

197. "[W]olves released from captivity may be more prone to initial fearless behavior toward humans...". *See* FEIS, ch. 4 at 67.

198. The USFWS' 2015 10(j) Rule, its ROD, and its FEIS are not in accordance with law, are arbitrary or capricious and are not supported by substantial evidence.

D. *ESA Requires that to Maximum Extent Possible, the FWS is to Reach an Agreement with "Persons Holding an Interest in Land*

199. Petitioners restate the foregoing paragraphs as if fully stated herein.

200. USFWS regulations at 50 C.F.R. § 17.81(d) require USFWS to consult with, among others, States and "persons holding any interest in land" in developing experimental population rules, including the 2015 10(j) Rules at issue in this case. This regulation requires that:

> Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

50 C.F.R. § 18.81(d).

201. Petitioner Chilton owns land that will be greatly impacted by the Mexican wolf 10(j) Rule. The USFWS has not attempted to reach an agreement with him regarding the establishment of an experimental population of Mexican wolves on his property.

202. Petitioner Group 1 Membership Organizations all represent landowners owning property that will be greatly impacted by the Mexican wolf 10(j) Rule. The USFWS has not attempted to reach an agreement with any of these landowners represented by the Group 1 Membership Organizations regarding the establishment of an experimental population of Mexican wolves on his property.

203. The USFWS' 2015 10(j) Rule, its ROD, and its FEIS are not in accordance with law, are arbitrary or capricious and are not supported by substantial evidence.

Third Claim
Violation of the Regulatory Flexibility Act

204. Petitioners restate the foregoing paragraphs as if fully stated herein.

205. The RFA requires all agencies, as part of the rulemaking process, to conduct a "regulatory flexibility analysis" for their proposed rules. 5 U.S.C. §§ 603-604. In the analysis, the agency must evaluate how the proposed rule will affect small entities, consider alternatives that would "minimize the significant economic impact on small entities," and explain "why each one of the other alternatives" was rejected. *See* 5 U.S.C. § 604(a)(6).

206. In the context of ranching and the raising of livestock, a "small entity" means an agricultural enterprise (including its affiliates) that has annual receipts not exceeding $750,000. *See* 5 U.S.C. § 601(3) and (6); 15 U.S.C. § 632(a)(1).

207. The agency does not have to prepare a flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). Such certification must be published with the rulemaking notice "along with a statement providing the factual basis for such certification." *Id.*

208. The conclusion that the Mexican wolf 10(j) Rule does not impact small businesses is not supported by the evidence and its analysis is defective. For example, under the USFWS analysis, the costs to small businesses is significant, especially over

the long-term and recognizing that the wolves continue to have pups. Given that admission, the costs to small businesses is significant.

209. Additionally, the USFWS expects a 3.4% annual depredation rate. However, the USFWS did not factor in the fact that there may be eight times as many actual kills as there are confirmed wolf kills.

210. Additionally, the USFWS states that the depredation rate equates to $430,553 (annually).

211. The USFWS also factors in livestock weight loss.

212. Inconsistently however, the USFWS minimize these losses by looking to compensation funds, which may or may not be paid. Therefore, the USFWS finds that the depredation effects are not substantial and significant.

213. Additionally, the USFWS states that wolves concentrate in certain areas—yet the USFWS also states that even with a greater number, wolves will disperse and, therefore, the density ratio will not increase from present status with a fewer number.

214. The Respondents findings are inconsistent and thus are arbitrary and capricious.

Fourth Claim
Violation of the E.O. 12898 – Environmental Justice

215. Petitioners restate the foregoing paragraphs as if fully stated herein.

216. Section 1-101 of E.O. 12898 states that federal agencies, to the greatest extent practicable and permitted by law, shall make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse

human health or environmental effects of its programs and activities on minority and low-income population.

217. Although E.O. 12898 also states, in § 6-609, that the order does not create a right to judicial review, in this case, the Respondents chose to complete an E.O. 12898 analysis as part of the Mexican wolf 2015 10(j) Rule FEIS. Therefore, this analysis is reviewable by this court.

218. The USFWS made significant changes from its analysis in the draft EIS to the FEIS. Specifically, the USFWS does conclude that the 2015 10(j) Rule will have a disproportionate impact on minorities. FEIS Ch. 4 pages 80-2.

219. The USFWS has defined "fair treatment" at ch. 3, 97, to mean that no ethnic group should bear a disproportionate share of negative consequences.

220. In its ROD, the USFWS states:

> Although we predict less than significant overall direct adverse effects economic impacts to ranching/livestock production within Zones 1 and 2, we also recognize that adverse economic impacts to individual small ranch operations could be significant. Because a large percentage of focus minority groups in Arizona and New Mexico are identified as principal operators of beef cattle ranches, these adverse economic impacts could be disproportionately distributed. Tribal members are also engaged in livestock production and could also suffer disproportionate economic impacts from implementation of Alternative One [the chosen alternative]. Economic losses to some small individual ranchers/livestock producers from wolf depredation could also be cumulatively more significant when combined with the aggregate effects of human caused global climate change. However, we expect that the financial losses that may be experienced by individual ranchers/livestock producers will be minimized through the mitigation measures available under this alternative. Therefore, while individual ranchers/livestock producers may experience short-term economic impacts, no significant long-term effects on overall livestock production in the project area are expected. For these reasons, we do not expect implementation of Alternative One will adversely affect

> the long-term productivity or beneficial uses of the human environment in the MWEPA.

See ROD at 8.

221. Minority groups seemingly do not count in the USFWS's view of long-term productivity in the MWEPA.

222. The adverse effects of the wolves on minority groups are also unfairly minimized by the USFWS' aggregating the effects of so-called "global climate change," although the USFWS' FEIS states that no effects on climate change would occur as a result of the Proposed Action and its alternatives. *See* FEIS, ch. 3 at 1.

223. However, the FEIS then concludes "However, we expect any adverse disproportionate impacts ... to be less than significant due to mitigation measures available under this alternative."

224. Given that the mitigation measures proposed by the USFWS are not assured nor are they adequate, it is arbitrary and capricious to the assume that there is no disproportionate impact on minorities.

REQUEST FOR RELIEF

Accordingly, Petitioners respectfully request this Court:

A. Declare that Respondents violated NEPA, the ESA, the RFA, E.O. 12898 and the APA in implementing its Record of Decision, FEIS and 2015 10(j) Rule related to the Mexican wolf ENE population;

B. Set aside and vacate the final agency action implementing USFWS's ROD and FEIS;

C. Award Petitioners their reasonable fees, costs, and expenses (including attorney's fees) incurred as a result of this litigation; and

D. Grant Petitioners such further or additional relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

/s/Andrea R. Buzzard
Andrea R. Buzzard (NM Bar # 392)
Karen Budd-Falen (*Pro Hac Vice* pending)
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003
(307)632-5105 Telephone
(307)637-3891 Telefax
andrea@buddfalen.com
karen@buddfalen.com

JOHN C. CRUDEN
Assistant Attorney General

KEVIN W. McARDLE
Senior Attorney (DC Bar No. 454569)
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0219
Fax: (202) 305-0275
Kevin.McArdle@usdoj.gov

Attorneys for Defendants

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.

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Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ Kevin W. McArdle
KEVIN W. McARDLE, Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0219/Fax: (202) 305-0275
Kevin.McArdle@usdoj.gov

Attorneys for Defendant