

Nos. 16-2189, 16-2202

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NEW MEXICO DEPARTMENT OF GAME AND FISH,
Plaintiff-Appellee;

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Defendant-Appellants;

DEFENDERS OF WILDLIFE, *et al.*,
Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO, NO. 1:16-CV-00462-WJ-KBM
(HON. WILLIAM P. JOHNSON)

DEFENDANT-INTERVENOR-APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Intervenor-Appellants Defenders of Wildlife, Center for Biological Diversity, WildEarth Guardians, and New Mexico Wilderness Alliance state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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GLOSSARY

APA: Administrative Procedure Act

ESA: Endangered Species Act

FEIS: Final Environmental Impact Statement for the Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (“Revised 10(j) Rule”) (Nov. 2014)

Revised 10(j) Rule: “Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf,” 80 Fed. Reg. 2512 (Jan. 16, 2015)

1998 10(j) Rule: “Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico,” 63 Fed. Reg. 1752 (Jan. 12, 1998).

STATEMENT OF RELATED CASES

This case is a consolidation of two appeals arising from the same district court order. Case No. 16-2189 is an appeal by Defendant-Intervenor-Appellants Defenders of Wildlife et al. Case No. 16-2202 is an appeal by Defendant-Appellants Department of the Interior et al.

Although Defenders is unaware of any other related appeals, this case is related to four cases pending in the U.S. District Court for the District of Arizona challenging the U.S. Fish and Wildlife Service's ("FWS") 2015 Final Rule governing management of the reintroduced Mexican wolf population (referred to as the "Revised 10(j) Rule" below). See Aplt's. App. at 154-55 (order finding that complaint challenges Revised 10(j) Rule); 80 Fed. Reg. 2512 (Jan. 16, 2015). Two of the Intervenor here, Defenders of Wildlife and Center for Biological Diversity, are challenging the Revised 10(j) Rule in Center for Biological Diversity v. Jewell, No. 4:15-cv-00019-TUC-JGZ (D. Ariz.) ("Center v. Jewell"). Intervenor WildEarth Guardians and New Mexico Wilderness Alliance are challenging the Revised 10(j) Rule in WildEarth Guardians v. Ashe, No. 4:15-cv-00285-TUC-JGZ (D. Ariz.) (consolidated with Center v. Jewell). Defenders of Wildlife and Center for Biological Diversity have also intervened on behalf of FWS in two other cases in part to defend the provision expanding the geographic area for wolf releases into New Mexico relevant to this case. See Arizona and New Mexico Coalition of Counties for Economic Growth v U.S. Fish and

Wildlife Serv., No. 4:15-CV-00179-TUC-JGZ (D. Ariz.) (consolidated with Center v. Jewell (lead)); Safari Club Int'l v. Jewell, No. 4:16-cv-00094-TUC-JGZ (D. Ariz.).

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction, 28 U.S.C. § 1331, over Plaintiff-Appellees New Mexico Department of Game and Fish's ("New Mexico") federal law claims. The district court lacked jurisdiction over New Mexico's state law claims, as described in Section III.A of the Argument below.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Defendant-Intervenor-Appellants Defenders of Wildlife et al. (collectively, "Defenders," unless individually named) and Defendant-Appellant Department of Interior et al. (collectively, "FWS") seek review of a June 10, 2016 district court order granting New Mexico's preliminary injunction motion. Defenders and FWS timely filed their notices of appeal on July 28, 2016 and August 8, 2016, respectively. Aplt's. App. at 7 (ECF 39), 8 (ECF 43).

QUESTION PRESENTED FOR REVIEW

1. Did the district court err in determining that New Mexico was entitled to a preliminary injunction against FWS's importation and release of federally-protected Mexican wolves in New Mexico?

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The Endangered Species Act

As this Court has explained, "Congress' overriding goal in enacting the Endangered Species Act is to promote the protection and, ultimately, the recovery of

endangered and threatened species.” Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1237 (10th Cir. 2000) (emphasis added); see also Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 704 (10th Cir. 2010) (“Congress enacted the [ESA] in 1973 to ‘provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction.’”) (quoting Wyo. Farm Bureau, 199 F.3d at 1231). Indeed, one of the express purposes of the ESA is “to provide a program for the conservation of ... endangered species and threatened species.” 16 U.S.C. § 1531(b). “Conserve” or “conservation” means “to use and the use of all methods and procedures which are necessary to bring any endangered species ... to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3); Center for Native Ecosystems v. Cables, 509 F.3d 1310, 1322 (10th Cir. 2007) (“Under this definition, conservation encompasses recovery.”).

To achieve the ESA’s goals of preventing extinction and providing for recovery, FWS promulgates by regulation a list of species that are “threatened” or “endangered” according to specified criteria. See 16 U.S.C. § 1533(a), (b) (describing criteria and procedures for listing). Once a species is listed under the ESA, “federal agencies assume special obligations to conserve, recover and protect that species.” Wyo. Farm Bureau, 199 F.3d at 1231; Forest Guardians, 611 F.3d at 704 (quoting id.). For example, pursuant to ESA section 7(a)(1), “[t]he Secretary shall review other programs administered by [her] and utilize such programs in furtherance of the

purposes of this chapter.” 16 U.S.C. § 1536(a)(1).¹ In addition, the statute’s express Congressional policy requires that “all Federal departments and agencies shall seek to conserve endangered species ... and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). Thus, the ESA requires FWS to use its statutory authorities to recover threatened and endangered species. See id. § 1531(b) (“purpose” of ESA includes “conservation”); id. § 1532(3) (“conservation” means recovery).

Among FWS’s statutory authorities is the ability to reintroduce endangered species outside of their current range. While FWS already had the authority to reintroduce species, Congress amended the ESA in 1982 to add section 10(j), 16 U.S.C. § 1539(j), in order to provide FWS with more flexibility in doing so. See Wyo. Farm Bureau, 199 F.3d at 1231-32. Pursuant to section 10(j), “[FWS] may authorize the release (and the related transportation) of any population ... of an endangered species or a threatened 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). These populations are referred to as “experimental.” 50 C.F.R. § 17.80.

¹ For the Mexican wolf, the “Secretary” refers to the Secretary of the Interior. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(b).

B. FWS's Section 10(j) Regulations

Prior to authorizing a reintroduction, FWS must develop a specific regulation to govern the management of the population once individuals are released into the wild. 50 C.F.R. § 17.81. This management rule – generally referred to as a “10(j) rule” – must meet several requirements. Relevant to this case, the 10(j) rule must implement the ESA’s recovery mandate. See Wyo. Farm Bureau, 199 F.3d at 1236 (noting that section 10(j) provides FWS more management flexibility, which allows the Secretary to “better conserve and recover endangered species”). Specifically, the ESA requires the rule to demonstrate that the release of the experimental population “will further the conservation of such species.” 16 U.S.C. § 1539(j)(2)(A); see also 50 C.F.R. § 17.81(b). In addition, to increase management flexibility, every experimental population “shall be treated as a threatened species,” 16 U.S.C. § 1539(2)(j)(C), which makes the population subject to “such regulations as [FWS] deems necessary and advisable to provide for the conservation of such species,” id. § 1533(d). See also 50 C.F.R. § 17.82. Thus, the reintroduced population must “further” and “provide for” the recovery of the species.

In developing a 10(j) rule, FWS’s regulations also require the agency to “consult” with state fish and wildlife agencies, local agencies, other federal agencies and private landowners. 50 C.F.R. § 17.81(d). “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.” Id. (emphasis added).

C. The Department of the Interior’s Fish and Wildlife Policy

In 1983, the Department of the Interior (“Interior”) promulgated a “Fish and Wildlife Policy” describing its approach to state-federal relationships with respect to all wildlife laws (including the ESA), for all Interior agencies. 43 C.F.R. Part 24. This policy recognizes that “Congress has charged the Secretary of the Interior with responsibilities for the management of certain fish and wildlife resources, e.g., endangered and threatened species....” 43 C.F.R. § 24.3(c). However, “Federal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law.” Id. § 24.1(a). Relevant to this case, the policy states that, in carrying out “programs involving reintroduction of fish and wildlife,” FWS “shall”:

Consult with the States and comply with State permit requirements in connection with [reintroduction programs], except in instances where the Secretary of the Interior determines that such compliance would prevent [her] from carrying out [her] statutory responsibilities.

Id. § 24.4(i)(5)(i) (emphasis added).

II. FACTUAL BACKGROUND

A. The Mexican Wolf Reintroduction Program

1. The Endangered Mexican Wolf

The Mexican gray wolf is one of the nation’s most endangered mammals. It is the “rarest, southern-most occurring, and most genetically distinct subspecies of all

the North American gray wolves.” Final Environmental Impact Statement (“FEIS”) (Nov. 2014), Chapter 1, at 3.² Once ranging across the southwestern United States and Mexico, Mexican wolves were eradicated from the U.S. by the early 1970s and from Mexico by 1980. 80 Fed. Reg. 2512, 2514 (Jan. 16, 2015) (“Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf”) (hereinafter, “Revised 10(j) Rule”).

FWS first listed the Mexican wolf as endangered under the ESA in 1976. Between 1977 and 1980, the United States and Mexico initiated a program to capture the last known wild Mexican wolves in Mexico, supplement that population with Mexican wolves held in captivity in both countries, and establish a captive-breeding program. See id. at 2515. This program prevented the species’ extinction and was intended to provide wolves for eventual reintroduction into the wild. Id.

In 1998, pursuant to its ESA section 10(j) authority, FWS began releasing Mexican wolves from the captive-breeding program into the wild. 80 Fed. Reg. at 2515. As the ESA requires, FWS promulgated a management rule for the

² The complete FEIS is available on FWS’s website, at https://www.fws.gov/southwest/es/mexicanwolf/pdf/EIS_for_the_Proposed_Revision_to_the_Regulations_for_the_Nonessential_Experimental_Population_of_the_Mexican_Wolf.pdf. As FWS explained, courts may take judicial notice of agency documents that are available on agency websites. FWS Br. at 9 n.5. For the Court’s convenience, Defenders reproduced the cited excerpts from the FEIS with the Addendum.

reintroduced population (the “1998 10(j) Rule”). See 63 Fed. Reg. 1752 (Jan. 12, 1998).

Today, the wild population is struggling to survive, threatened by dangerously depressed levels of genetic diversity, an artificially limited range, and overly-permissive rules for killing of wolves. FWS admits that the population “can neither be considered viable nor self-sustaining.” 80 Fed. Reg. at 2551; see also FEIS, Chapter 1, at 22 (“[T]he wild population is considered small, genetically impoverished, and significantly below estimates of viability appearing in the scientific literature...”) (internal citations omitted).

2. The Wild Population’s Genetic Imperilment

The wolf releases at issue in this case are critical to addressing at least one of the challenges facing the reintroduced population – its genetic imperilment. Every Mexican wolf alive today is descended from seven wolves in the captive breeding program. 80 Fed. Reg. at 2515. However, the captive population was not initially managed to retain genetic variation and lost much of its genetic diversity. See FEIS, Chapter 1, at 20. The wild population is in even worse condition. See 80 Fed. Reg. 2488, 2506 (Jan. 16, 2015) (Mexican wolf subspecies listing rule describing genetic status of wild population). On average, the wolves in the wild population are as closely related to each other as siblings. See FEIS, Chapter 1, at 21; 80 Fed. Reg. at 2504-05 (“Mexican wolves have pronounced genetic challenges resulting from an ongoing and severe genetic bottleneck... caused by its near extirpation in the wild and

the small number of founders upon which the captive population was established.”). As a result, the wild population is already exhibiting “evidence of strong inbreeding depression,” including reduced litter sizes. 80 Fed. Reg. at 2506; see also FEIS, Chapter 1, at 21; Appendix G at 10. Left unaddressed, the consequences of this lack of genetic diversity will worsen. 80 Fed. Reg. at 2506.

The most effective available management tool to improve genetic diversity in the wild population is to release more genetically diverse wolves from captivity. FEIS, Chapter 1, at 21-22; see 80 Fed. Reg. at 2542 (“Increased initial releases can improve the genetic composition of the [wild] population because the captive population contains Mexican wolves with genetic material that is currently unrepresented (or underrepresented) in the [wild] population...”). However, under the 1998 10(j) Rule, “initial releases” of captive wolves into the wild were limited to a small area located entirely in Arizona. 63 Fed. Reg. at 1764-66, 1772; 80 Fed. Reg. at 2516 (map of pre-2015 zones); see also FEIS, Chapter 1, at 23-24. This small territory can only support a limited number of wolves, and, as a result, wolves released here are unlikely to survive and establish new territories. FEIS, Chapter 1, at 24.

Without more, and successful, releases of captive wolves, FWS predicts that “the negative effects of inbreeding will continue,” and, combined with other factors, may “ultimately caus[e] an extinction vortex” for the wild population. FEIS, Chapter 1, at 25; see 80 Fed. Reg. at 2506 (concluding that if FWS does not take additional management actions, the “inbreeding will accumulate” and genetic diversity will

continue to decline more quickly than in the captive population). To avoid this fate, FWS concluded wolves must be released in a larger geographic area to increase their odds of successfully establishing new territories. FEIS, Chapter 1, at 23-24.

B. FWS's Revised 10(j) Rule for the Mexican Wolf

In January 2015, FWS finalized a revision to its 1998 10(j) Rule in part to address the wild wolf population's genetic crisis. 80 Fed. Reg. 2512 (codified at 50 C.F.R. § 17.84(k)). In the Revised 10(j) Rule, FWS expanded the geographic area available for initial releases to include suitable wolf habitat in a newly-named "Zone 1," which includes the Gila National Forest and part of the Cibola National Forest in New Mexico. 50 C.F.R. § 17.84(k)(3) (definition of Zone 1); 80 Fed. Reg. at 2519 (map of geographic boundaries, including new Zone 1). The Revised 10(j) Rule anticipated the release of at least two packs (a wolf pair and their pups) every wolf generation. 80 Fed. Reg. at 2524. The Rule also allows for "cross-fostering" of newly-born wolf pups into wild packs with similar-aged litters. *Id.* at 2558.

According to FWS, the changes in the Revised 10(j) Rule are intended to ensure the survival of the wild population and to serve as a "first step" toward recovery. 80 Fed. Reg. at 2551. Without these changes, FWS concluded that it could not achieve the "necessary population growth, distribution, and recruitment that would contribute to the persistence of, and improve the genetic variation within, the experimental population." *Id.* at 2517. Given the dire genetic condition of the wild population, the need to release wolves into New Mexico is acute.

Consistent with FWS's 10(j) regulations requiring that FWS "consult" with state, local, and other federal agencies in developing the Revised 10(j) Rule (50 C.F.R. § 17.81(d)), FWS invited 84 local, state, federal, and tribal agencies to participate as "cooperating agencies" in the development of the EIS prepared pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* *See* 80 Fed. Reg. at 2534, 2552. New Mexico participated as a cooperating agency for the development of the EIS, and FWS met with New Mexico during the EIS process to discuss New Mexico's concerns. *Id.* In response to requests by the States of Arizona and New Mexico, FWS agreed to modify several significant aspects of the rule from the original proposal. *See* 80 Fed. Reg. at 2534. FWS concluded that the Revised 10(j) Rule represented an agreement between affected parties "to the maximum extent practicable." 80 Fed. Reg. at 2518, 2533, 2534, 2552; *see* 50 C.F.R. § 17.81(d).

C. FWS's Attempts to Obtain Permits From New Mexico

FWS's opening brief details New Mexico's demands that FWS obtain permits in 2015 prior to importing and releasing wolves within the state, and New Mexico's subsequent denials of those permits. FWS Br. at 13-14. As FWS described, New Mexico denied the permits primarily because it believes that FWS should complete a recovery plan prior to releasing wolves in New Mexico in order to comply with state regulations. *Id.*³ FWS did not release any wolves while engaging in the permit

³ New Mexico relies on N.M. Code R. § 19.35.7.8; *id.* § 19.35.7.19; *id.* § 19.31.10.11.

process, thereby losing the opportunity to conduct initial releases during the 2015 season. Aplt's App. at 124 ¶ 7.

In October 2015, FWS Director Dan Ashe sent New Mexico a letter explaining his determination that FWS would go forward with the wolf releases in 2016 without state permits because the wolf releases are necessary to meet the agency's "statutory responsibilities" under 43 C.F.R. § 24.4(i)(5)(i). Aplt's App. at 78. According to Director Ashe,

The Service will not be able to meet our Endangered Species Act (ESA) responsibilities if we are precluded from taking actions to promote the conservation of Mexican wolves because we do not possess permits from the State of New Mexico. Based on the best available scientific information, the Service needs to improve the genetic diversity and reduce the kinship of the Mexican wolves in the wild to achieve recovery. The Service is unable to address these genetic concerns without the ability to release wolves from captivity in the Mexican Wolf Experimental Area in both New Mexico and Arizona.

Aplt's App. at 78-79. FWS subsequently developed a release plan for 2016, and "cross-fostered" two wolf pups into a pack in New Mexico in April 2016. Aplt's App. at 80-88; 124 ¶ 8; 126 ¶ 8b; 134 ¶ 13. FWS planned to cross-foster up to four more wolf pups and to release a captive pack on federal lands in New Mexico during the spring and summer of 2016. Id. at 81-87; 124 ¶ 8a; 126-127 ¶ 8c. The district court's order enjoined these releases.

III. PROCEDURAL HISTORY

On May 20, 2016, New Mexico filed its Complaint for Declaratory and Injunctive Relief and a Motion for Preliminary Injunction and Temporary Restraining

Order. Aplt. App. at 10, 25. In its motion, New Mexico alleged that FWS's wolf releases violated the Administrative Procedure Act (APA) and 43 C.F.R. § 24.4(i)(5)(i) because FWS did not possess state permits. Aplt. App. at 38-40; id. at 19 (fourth claim for relief). New Mexico also alleged that FWS's importation of wolves and wolf releases violate state law. Id. at 38-40; id. at 16-18 (first, second, and third claims for relief). New Mexico did not address its fifth claim for relief in its preliminary injunction motion. Id. at 38-40; id. at 20-21 (fifth claim for relief).

On June 10, 2016, the district court granted New Mexico's motion. Id. at 166-68. The court concluded that FWS likely violated 43 C.F.R. § 24.4(i)(5)(i) by deciding to proceed with wolf releases without state permits. Id. at 161-63. 43 C.F.R. § 24.4(i)(5)(i) generally requires FWS to comply with state permitting requirements in connection with reintroduction actions, but contains an exception in instances where compliance would "prevent" FWS from "carrying out" its "statutory responsibilities." 43 C.F.R. § 24.4(i)(5)(i). The court reasoned that because FWS would release the wolves pursuant to ESA section 10(j)'s "grant of authority," rather than a "statutory directive," the exception in 43 C.F.R. § 24.4(i)(5)(i) does not apply. Aplt. App. at 161-62. The district court also concluded that New Mexico's state law claims are not preempted by the ESA because Interior voluntarily constrained its authority through 43 C.F.R. § 24.4(i)(5)(i). Aplt. App. at 162. The court enjoined FWS from importing or releasing Mexican wolves into New Mexico without first obtaining state permits

and enjoined FWS from importing or releasing Mexican wolves in violation of prior state permits. Id. at 167.

Defenders moved to intervene on June 6, 2016, less than three weeks after New Mexico filed its complaint. Id. at 6 (ECF 20). On July 13, 2016, approximately one month after granting New Mexico's preliminary injunction motion, the district court granted Defenders' motion to intervene. Id. at 7 (ECF 38).

SUMMARY OF THE ARGUMENT

The ESA requires FWS to recover endangered species. FWS determined that releasing captive Mexican wolves into suitable habitat on federal land in New Mexico is essential to achieve wolf recovery. Because New Mexico refused to grant FWS permission to release wolves in New Mexico, FWS determined that New Mexico's permitting requirements would "prevent" the agency from "carrying out" its "statutory responsibilities" to recover the Mexican wolf. As a result, and consistent with 43 C.F.R. § 24.4(i)(5)(i), FWS determined that it could proceed with wolf releases without state permits. Instead of deferring to FWS's acknowledgment of its statutory obligation to recover the species, the district court substituted its own narrow interpretation of FWS's responsibilities. The court's interpretation cannot be reconciled with the ESA because it ignores the fundamental purpose of the statute and prevents FWS from fulfilling its obligation to effectuate that purpose.

Not only does the district court's ruling block FWS's ability to implement the ESA as directed by Congress, it strips FWS of its statutory authority to reintroduce

species if a state refuses to issue permits, thereby granting individual states veto power over reintroductions of federally-protected species. This result cannot be reconciled with the ESA or FWS's 10(j) regulations, which require cooperation with states only "to the maximum extent practicable," and do not grant states veto authority over FWS's decisions implementing the statute. The district court's ruling also renders the exception in 43 C.F.R. § 24.4(i)(5)(i) meaningless because there is no scenario, under the court's reading, in which the exception could apply.

For all of these reasons, the court's conclusion that New Mexico was likely to succeed on its claim alleging FWS violated federal law by failing to comply with 43 C.F.R. § 24.4(i)(5)(i) constitutes legal error and cannot support issuance of a preliminary injunction.

New Mexico's state law claims fare no better. As an initial matter, the district court did not have jurisdiction over these claims. The APA does not waive the federal government's sovereign immunity for state law claims. Even if the district court had jurisdiction, New Mexico's state law claim regarding importation of wolves is expressly preempted by ESA section 6(f), 16 U.S.C. § 1535(f). Further, regardless of whether express preemption applies, all three state law claims are preempted under "conflict preemption" principles.

Because the district court's ruling on the merits constitutes legal error, the Court need not address the equitable prongs of the preliminary injunction test. Nonetheless, to the extent the Court does so, Defenders agrees with and adopts

FWS's arguments that the court abused its discretion in evaluating each of those factors.

ARGUMENT

I. STANDARD OF REVIEW FOR PRELIMINARY INJUNCTIONS

To obtain a preliminary injunction, New Mexico was required to demonstrate: (1) a likelihood of success on the merits; (2) a likelihood that it will suffer irreparable harm in the absence of injunctive relief; (3) that the balance of equities tips in its favor; and (4) that an injunction was in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

The Tenth Circuit reviews a district court's ruling on a preliminary injunction motion for an abuse of discretion. Schrier v. Univ. of Colorado, 427 F.3d 1253, 1258 (10th Cir. 2005). "Under this standard of review, 'we examine the district court's legal determinations de novo, and its underlying findings for clear error'...." Citizens United v. Gessler, 773 F.3d 200, 209 (10th Cir. 2014) (internal citations omitted). This appeal presents issues of statutory and regulatory interpretation that are reviewed de novo. See Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1189 (10th Cir. 2014) ("We review questions of statutory interpretation de novo.").

II. THE DISTRICT COURT ERRED IN FINDING THAT NEW MEXICO IS LIKELY TO SUCCEED ON ITS FEDERAL LAW CLAIM

The district court concluded that New Mexico was likely to succeed on the merits of its claim that FWS's wolf releases violate 43 C.F.R. § 24.4(i)(5)(i). Aplt's.

App. at 161-62; *id.* at 167 (order granting injunction based on likely violation of federal law). While this Interior policy generally requires FWS to comply with state permitting requirements, it contains an exception for instances where compliance would “prevent” FWS from “carrying out” its “statutory responsibilities.” 43 C.F.R. § 24.4(i)(5)(i). The court reasoned that this exception does not apply here because FWS seeks to release wolves pursuant to the ESA section 10(j) “grant of authority,” not a “specific statutory directive.” *Aplts. App.* at 161-62. This interpretation of the ESA and FWS’s responsibilities under the ESA constitutes legal error. As described below, FWS’s primary statutory responsibility under the ESA is to recover the Mexican wolf, and it is impossible for FWS to carry out that responsibility and comply with New Mexico’s permit requirements.

A. The ESA Requires FWS to Recover Mexican Wolves

The ESA requires FWS to use all its statutory authorities, including its section 10(j) authority where appropriate, to recover the Mexican wolf. *See supra* at 1-3. Compliance with this statutory obligation implements one of the express purposes of the ESA: to recover federally-protected species so that they no longer need the Act’s protection. *See Wyo. Farm Bureau*, 199 F.3d at 1231 (noting that in interpreting the ESA, courts must “consider the language of the relevant statutory scheme as illuminated by ‘the provisions of the whole law, and ... its object and policy’”) (citations omitted); *see supra* at 1-3. Congress intended the section 10(j) grant of authority to assist FWS in meeting this obligation – i.e., by providing FWS with

greater management flexibility in order to “better conserve and recover endangered species.” Wyo. Farm Bureau, 199 F.3d at 1234 (quoting United States v. McKittrick, 142 F.3d 1170, 1174 (9th Cir. 1998) (finding that FWS’s “implementation of section 10(j) in creating the experimental wolf population [in the northern Rockies] effectuates the ESA’s purpose and is within the Secretary’s authority”). Indeed, to ensure that every reintroduction effectuates the ESA’s purpose, every 10(j) rule must demonstrate that it will “further the conservation” and “provide for the conservation” of the species. See supra at 4.

Here, New Mexico’s permitting requirements prevent FWS from carrying out the very actions FWS has determined are essential to recover the Mexican wolf. As described above, successful recovery of the Mexican wolf depends entirely on the implementation of a successful reintroduction program. 80 Fed. Reg. at 2515 (FWS has “focused our recovery efforts on the establishment of Mexican wolves as an experimental population . . . in Arizona and New Mexico”). In the Revised 10(j) Rule, FWS determined that wolf releases in New Mexico are critical to ensuring that the wild population can contribute to recovery of the species. 80 Fed. Reg. at 2513 (explaining FWS’s position that the Revised 10(j) Rule “furthers the conservation” of wolves and “contains the prohibitions and exemptions necessary and advisable to conserve” wolves); id. at 2550-51 (describing FWS’s findings regarding its recovery obligations). Among other things, wolf releases in New Mexico are essential for Mexican wolf recovery in order to improve the dwindling genetic diversity in the wild

population. Without more, and successful, releases, the effects of inbreeding will increase, and the wild population may not be able to survive. See supra at 7-9.

Accordingly, FWS's determination that New Mexico's permitting requirements would prevent the agency from carrying out its "statutory responsibilities" was not only reasonable, it is the only possible reading of FWS's ESA obligations. See Wyo. Farm Bureau, 199 F.3d at 1231 (noting that courts defer to FWS's construction of the ESA unless it is "unreasonable or impermissible").

Nonetheless, the district court impermissibly substituted its own interpretation of FWS's ESA responsibilities. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984) (explaining that courts "may not substitute [their] own construction of a statutory provision for a reasonable interpretation" by the agency). The district court's conclusion that the phrase "statutory responsibilities" in 43 C.F.R. § 24.4(i)(5)(i) cannot encompass actions taken pursuant to an ESA "grant of authority" makes it impossible for FWS to carry out the statute's core purpose and meet its obligation to provide for recovery of the Mexican wolf. See WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d 677, 685 (10th Cir. 2015) (rejecting interpretation of statute that "clearly thwarts" the statute's purpose). Courts "are never permitted to disregard clear statutory directions in favor of administrative rules." Elwell v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma, 693 F.3d 1303, 1313 (10th Cir. 2012).

In short, FWS's conclusion that its "statutory responsibilities" include taking actions necessary to recover the Mexican wolf is the only conclusion that is consistent with the purpose of the ESA and FWS's obligation to effectuate that purpose. The court's contrary conclusion should be reversed for this reason alone.

B. The District Court's Ruling is Inconsistent with ESA Section 6(a)

The district court's conclusion that FWS must obtain permission from New Mexico to release wolves also constitutes legal error because it cannot be reconciled with ESA section 6(a), 16 U.S.C. § 1535(a).⁴ Congress directed FWS to exercise its authority under the ESA in cooperation with the states to the "maximum extent practicable." *Id.* ("In carrying out the programs authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States."). This Court has concluded that this same phrase in section 4 of the ESA, 16 U.S.C. § 1533(b)(3)(A), "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." Biodiversity Legal Foundation v. Babbitt, 146 F.3d 1249, 1254 (10th Cir. 1998) (quotation omitted) (emphasis added); see Milner v. Dep't of Navy, 562 U.S. 562, 570 (2011) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.") (quoting Ratzlaf v. United States, 510 U.S. 135 (1994)). Similarly, in interpreting the National Wildlife Refuge System Improvement Act, this Court relied, in part, on

⁴ As described below, the court's ruling with respect to importation of wolves is also in conflict with ESA section 6(f), 16 U.S.C. § 1535(f). See infra at 26-27.

provisions requiring that FWS cooperate with the states “to the extent practicable” to support its conclusion that states do not have preeminent authority over Refuge lands or wildlife. Wyoming v. United States, 279 F.3d 1214, 1232-35 (10th Cir. 2002); see also Cure Land, LLC v. U.S. Dep’t of Agriculture, -- F.3d --, 2016 WL 4254932, *9 (10th Cir. 2016) (finding that NEPA provision requiring agency to involve the public “to the extent practicable,” confers “considerable discretion to decide the extent to which such public involvement is ‘practicable’”) (internal quotations and citation omitted).

Consistent with these interpretations, ESA section 6(a) requires FWS to cooperate with states in carrying out all provisions of the ESA, including its Mexican wolf reintroduction program, but only to the extent that such cooperation is feasible or possible. Thus, section 6(a) does not allow states to exercise veto authority over FWS’s implementation of the ESA, and 43 C.F.R. § 24.4(i)(5)(i) should be read consistently with the statute. See Hamm v. Ameriquest Mortgage Co., 506 F.3d 525, 530 (7th Cir. 2007) (“[a] statute and its implementing regulations should be read as a whole, and, where possible, afforded a harmonious interpretation.”) (citation omitted).

The district court’s ruling does the opposite. The court’s reading of 43 C.F.R. § 24.4(i)(5)(i) creates an exception to ESA section 6(a) by effectively granting New Mexico and other states veto power over proposed FWS reintroductions of federally-

protected species within state borders.⁵ Nothing in the ESA suggests that Congress intended to carve out such an exception. As a result, the district court's ruling cannot be reconciled with ESA section 6(a).⁶

C. The District Court's Ruling is Inconsistent with FWS's Section 10(j) Regulations

The district court's ruling also renders certain aspects of the FWS's section 10(j) regulations and the Revised 10(j) Rule meaningless. FWS's regulations require that every 10(j) rule "shall, to the maximum extent practicable, represent an agreement" between FWS, state and federal agencies, and private landowners. 50 C.F.R. § 17.81(d). To that end, at FWS's invitation, New Mexico participated as a "cooperating agency" in developing the EIS for the 10(j) Rule, and FWS responded to

⁵ Had FWS affirmatively granted New Mexico this effective veto power over its wolf releases, such a grant may have been an unlawful subdelegation of federal authority. See U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) (holding that "subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization"); G.H. Daniels III & Assocs., Inc. v. Perez, 626 Fed. Appx. 205, 212 (10th Cir. 2015) (quoting same) (unpublished).

⁶ For similar reasons, the district court's holding violates the governmental immunity doctrine. "[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation." Hancock v. Train, 426 U.S. 167, 179 (1976) (internal quotations and citations omitted). The Supreme Court requires "a clear congressional mandate" or "specific congressional action" to find the federal government has submitted to state regulation. Id. Here the only relevant congressional pronouncement is that found in 16 U.S.C. § 1535(a) requiring federal cooperation with the states to "the maximum extent practicable." This is less than the required clear congressional mandate subjecting FWS's ESA program to state regulation. Accordingly, FWS cannot be required to obtain state permits because Congress has not directed it to submit to state regulation. See FWS Brf. at 36-37.

New Mexico's concerns by changing some of the provisions of the Rule between the propose and final version. See supra at 10. In promulgating the Revised 10(j) Rule, FWS determined that the Rule represents an agreement with all affected state, federal, and local authorities "to the maximum extent practicable." 80 Fed. Reg. at 2518, 2533, 2534, 2552. Consistent with the ordinary meaning of "to the maximum extent practicable," this does not mean that each of the participating agencies agreed with all aspects of the Revised 10(j) Rule, nor did FWS have an obligation to ensure complete agreement. See id. at 2552.

Given that FWS's regulations do not grant a state (or any other governmental or private entity) veto authority over the development of a 10(j) Rule, it makes little sense to grant a state veto power over the implementation of a 10(j) Rule through permit denials. A state would have little incentive to negotiate in good faith during the development of a particular rule if it can simply veto individual actions implementing that rule at a later date. As a result, the district court's interpretation has the effect of rendering the framework for cooperation in FWS's section 10(j) regulations meaningless.

D. The District Court's Ruling Renders the Exception in 43 C.F.R. § 24.4(i)(5)(i) Meaningless

The district court's interpretation of 43 C.F.R. § 24.4(i)(5)(i) is also impermissible because it renders the exception for compliance with state permitting requirements superfluous. The exception in 43 C.F.R. § 24.4(i)(5) provides that FWS

need not comply with state permitting requirements where compliance would “prevent” the agency from “carrying out” its “statutory responsibilities.” Subsection (i)(5) applies to the “activities listed below,” which for subsection (i)(5)(i) are limited to research programs and reintroductions. 43 C.F.R. § 24.4(i)(5)(i). Under the district court’s rationale, both of these activities are “grants of authority” under the ESA, not “specific statutory directives.” Aplt. App. at 161 (court order). Thus, according to this reading, FWS could not invoke the exception in 43 C.F.R. § 24.4(i)(5)(i) in connection with either activity. As a result, the district court’s reasoning renders this exception meaningless, contrary to basic statutory and regulatory construction principles. See, e.g., Bennett v. Spear, 520 U.S. 154, 173 (1997) (noting that the “‘cardinal principle of statutory construction’ ... is [that] [i]t is our duty ‘to give effect, if possible, to every clause and word of a statute’”) (citation omitted); Quarles v. U.S. ex rel. Bureau of Indian Affairs, 372 F.3d 1169, 1172 (10th Cir. 2004) (noting “we give effect, if possible, to every word of the statute”); Biodiversity Conservation Alliance v. Jiron, 762 F.3d 1036, 1062 (10th Cir. 2014) (“Regulations are generally subject to same rules of construction as statutes.”) (citation omitted).

III. THE DISTRICT COURT ERRED IN FINDING THAT NEW MEXICO IS LIKELY TO SUCCEED ON ITS STATE LAW CLAIMS

A. The District Court Lacked Jurisdiction Over New Mexico’s State Law Claims

The district court also concluded that New Mexico was likely to succeed on the merits of its three state law claims alleging violations of state permit requirements.

Aplts. App. at 162-63 (court's findings on state law claims); id. at 167 (order granting injunction based on likely violations of state law); id. at 16-18 (state law claims in complaint). However, the court lacked jurisdiction over these three claims asserting violations of state law and thus committed legal error by entering an injunction on this basis.

As explained by FWS, the United States cannot be sued in the absence of an express waiver of its sovereign immunity. FWS Br. at 36; see Aplts. App. at 109-110 (FWS raising issue in district court). The only potentially relevant waiver is that found in the APA. 5 U.S.C. § 702; see also Aplts. App. at 141-42 (New Mexico's Reply Brief pointing to APA section 702 as supplying the necessary waiver). Defenders agrees with FWS that this broad waiver of sovereign immunity extends to claims brought both inside and outside of the scope of the APA, FWS Br. at 36, n.8, but the majority of authority holds this waiver runs only to claims arising under federal law. See Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 775 (7th Cir. 2011) (allowing claim based on federal common law of public nuisance and holding the waiver in section 702 "applies when any federal statute authorizes review of agency action, as well as in cases involving constitutional challenges and other claims arising under federal law.") (emphases added) (citations omitted); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 854 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States"); Wild Fish Conservancy v.

Salazar, 688 F. Supp. 2d 1225, 1231-32 (E.D. Wash. 2010) (finding the APA waived sovereign immunity for “indirect violation(s) of federal reclamation law” premised on the violation of state laws, only because the state laws had been incorporated into the relevant federal statute). Cf. Treasurer of New Jersey v. U.S. Dep’t of the Treasury, 684 F.3d 382, 400 n.19 (3d Cir. 2010). Absent an effective waiver of sovereign immunity, the district court lacked jurisdiction over New Mexico’s state law claims and those claims cannot support the court’s issuance of a preliminary injunction.

B. New Mexico’s State Law Claims Are Preempted

Even if the district court had jurisdiction over New Mexico’s state law claims, New Mexico’s permitting requirements, as applied in this case, are preempted by the ESA. See Aplt’s. App. at 162 (district court order finding state laws are not preempted). The Supremacy Clause of the Constitution, Art. VI, cl. 2, invalidates state laws that “interfere with, or are contrary to,” federal law)(quotation omitted). Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985). As described below, New Mexico’s claim regarding importation of wolves is expressly preempted by ESA section 6(f), 16 U.S.C. § 1535(f). Regardless of whether the importation requirement is expressly preempted, all of New Mexico’s state law claims are preempted under “conflict preemption” principles.

1. New Mexico's State Law Claim Regarding Importation of Wolves is Expressly Preempted by ESA Section 6(f)

With respect to the importation of wolves into New Mexico, ESA section 6(f) expressly preempts state laws that prohibit importation of endangered species when there is a federal regulation or permit allowing those very same imports. 16 U.S.C. § 1535(f); see English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) (describing express preemption); Aplt's. App. at 16-17 (first claim for relief); id. at 167 (order enjoining importation of Mexican wolves).⁷ Here, as part of the Revised 10(j) Rule, FWS issued

⁷ FWS raised the preemption issue below (Aplt's. App. at 111-12) and the district court ruled the state law claims were not preempted under conflict preemption principles (id. at 162-63). However, Defenders' express preemption argument was not briefed in the district court. Nonetheless, it is appropriate for this Court to consider Defenders' argument. See Yee v. City of Escondido, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (citation omitted), abrogation on other grounds recognized by Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170, 1175 (10th Cir. 2011); United States v. Johnson, 821 F.3d 1194, 1199 (10th Cir. 2016) (same, quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995)). Moreover, appellate courts have discretion to hear and decide cases based on any argument. Singleton v. Wulff, 428 U.S. 106, 120-21 (1976). Though the general rule disfavors resolving issues first raised on appeal, here the preemption issue was raised below, and the general rule is subject to exception when the issue raised is one of law and does not require the introduction of evidence. See Tele-Communications, Inc. v. Comm'r of Internal Revenue, 104 F.3d 1229, 1232 (10th Cir. 1997) (one purpose of general rule is to allow introduction of evidence in district court); Lesesne v. Doe, 712 F.3d 584, 588 (D.C. Cir. 2013) (it is appropriate for appellate court to examine issue not raised in the district court when it involved "straightforward legal question"); United States v. Krynicki, 689 F.2d 289, 291-92 (1st Cir. 1982) (reaching issue first raised on appeal, in part, because "the new issue is purely legal, and the record pertinent to resolution of this issue can be developed no further"). Indeed, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and

a permit pursuant to ESA section 10(a)(1)(A), 16 U.S.C. § 1539(a)(1)(A), to import wolves from specified captive wolf facilities around the United States to New Mexico in order to carry out its reintroduction program. 80 Fed. Reg. at 2512 (explaining that FWS will issue Permit TE 091551-0 to implement certain provisions of Revised 10(j) Rule); see Permit TE 091551-0, ¶1 (reproduced with Addendum).⁸ Accordingly, New Mexico's importation regulation, N.M. Code R. § 19.35.7.8, is preempted to the extent that New Mexico's application of the regulation blocks importation of wolves pursuant to FWS's ESA section 10(a)(1)(A) permit. See Man Hing Ivory and Imports, Inc. v. Deukmejian, 702 F.2d 760, 763 (9th Cir. 1983) (holding that section 6(f) preempts state law that prohibits trade in African elephant products because ESA regulations allow such trade under certain conditions).

apply the proper construction of governing law." Kamen v. Kemper Financial Servs., 500 U.S. 90, 99 (1991).

⁸ Pursuant to Fed. R. Evid. 201, Defenders requests the Court take judicial notice of Permit TE 091551-0, which implemented certain provisions of the Revised 10(j) Rule and is reproduced in its entirety with the Addendum. The authenticity and contents of this document are not subject to reasonable dispute. This Permit is part of the administrative record submitted to the U.S. District Court for the District of Arizona in litigation concerning the issuance of this Permit. Center v. Jewell, CV-15-00019-TUC-JGZ (ECF 91-1 at 1, ¶ 2) (certification of the administrative record relating to the issuance of Permit TE 091551-0). This Court may take judicial notice of court records from another case. See e.g. United States v. Ahidley, 486 F.3d 1184, 1192, n.5 (10th Cir. 2007) (citing St. Louis Baptist Temple, Inc. v. Fed. Dep. Ins. Corp., 605 F.2d 1169, 1172 (10th Cir. 1979)).

2. New Mexico's State Law Claims Are Preempted Under "Conflict Preemption" Principles

The district court concluded that New Mexico's state permitting requirements were not preempted by the ESA under "conflict preemption" principles because Interior had voluntarily constrained its authority under federal law through the Interior policy at 43 C.F.R. § 24.4(i)(5)(i). Aplt. App. at 162-63. As described above, the court's interpretation of 43 C.F.R. § 24.4(i)(5)(i) is legally unsupportable. As a result, the district court's reasoning with respect to all of New Mexico's state law claims constitutes legal error.

Conflict preemption "turns on the identification of actual conflict" between federal and state law. Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000) (internal quotations omitted). A conflict occurs where "'compliance with both federal and state regulations is impossible," or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015) (citing California v. ARC American Corp., 490 U.S. 93, 100, 101 (1989)). "In either situation, federal law must prevail." Id.

Here, the ESA provides FWS with paramount powers to manage endangered species. See Wyoming, 279 F.3d at 1226-27 (noting that state authority over wildlife is

subject to preemption).⁹ The ESA requires FWS to cooperate to the extent practicable, but does not grant states veto power over FWS decisions. See supra at 19-21; 43 C.F.R. § 24.1(a). Here it is clear that FWS cannot implement its statutory obligation to recover Mexican wolves as authorized under the Revised 10(j) Rule while also complying with New Mexico's permit requirements. As a result, New Mexico's application of its regulations to deny those permits stands as an obstacle to fulfilling Congressional objectives and are preempted. Hillsborough County, Fla., 471 U.S. at 712; see Nat'l Audubon Soc'y v. Davis, Inc., 307 F.3d 835, 852 (9th Cir. 2002), opinion amended on denial of reh'g, 312 F.3d 416 (9th Cir. 2002) (holding that "to the extent [a state statute] prevents federal agencies from protecting ESA-listed species, it is preempted by the ESA").

IV. THE DISTRICT COURT ERRED IN FINDING THAT THE EQUITABLE PRONGS OF THE PRELIMINARY INJUNCTION STANDARD ARE IN NEW MEXICO'S FAVOR

Because New Mexico must demonstrate that each of the four factors for a preliminary injunction are in its favor, the Court can reverse the district court based on the court's legal errors regarding New Mexico's likelihood of success on the merits alone. To the extent the Court evaluates all four factors, FWS addressed the district court's legal errors with respect to the equitable prongs of the preliminary injunction

⁹ See also Missouri v. Holland, 252 U.S. 416, 434 (1920) ("No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers.")

test. See FWS Br. at 23-29. Defenders agrees with FWS's arguments and therefore does not repeat them here.

CONCLUSION

For the reasons stated above, the district court's decision granting New Mexico's Motion for Preliminary Injunction should be reversed and the preliminary injunction lifted.

DATED: September 23, 2016

s/McCrystie Adams

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STATEMENT REGARDING ORAL ARGUMENT

Defenders believes that due to the importance of the issues presented, oral argument would assist the Court in resolving this appeal. In an August 24, 2016 Order, the Court advised the parties that it has taken Defenders and FWS's unopposed request to hear this case at the January 2017 Term of Court under advisement.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the page limitation set by the Court's August 24, 2016 Order because it contains 30 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

DATED: September 23, 2016

s/McCrystie Adams
McCrystie Adams

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) All required privacy redactions have been made pursuant to 10th Cir. R. 25.5;
- (2) That all hard copies filed are exact copies of ECF submissions;
- (3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Webroot Secure Anywhere, Version 9.0.11.70, updated September 23, 2016, and according to the program the brief is free of viruses.

Date: September 23, 2016

s/ McCrystie Adams
McCrystie Adams

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§ 702. Right of review

[Currentness](#)

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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; [Pub.L. 94-574](#), § 1, Oct. 21, 1976, 90 Stat. 2721.)

[Notes of Decisions \(1217\)](#)

5 U.S.C.A. § 702, 5 USCA § 702
Current through P.L. 114-219.

End of Document

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§ 1531. Congressional findings and declaration of purposes and policy, 16 USCA § 1531

United States Code Annotated

Title 16. Conservation

Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1531

§ 1531. Congressional findings and declaration of purposes and policy

Currentness

(a) Findings

The Congress finds and declares that--

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;
- (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--
 - (A) migratory bird treaties with Canada and Mexico;
 - (B) the Migratory and Endangered Bird Treaty with Japan;
 - (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
 - (D) the International Convention for the Northwest Atlantic Fisheries;

§ 1531. Congressional findings and declaration of purposes and policy, 16 USCA § 1531

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress 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 this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

CREDIT(S)

(Pub.L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub.L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426; Pub.L. 100-478, Title I, § 1013(a), Oct. 7, 1988, 102 Stat. 2315.)

[Notes of Decisions \(51\)](#)


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16 U.S.C.A. § 1531, 16 USCA § 1531
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§ 1532. Definitions, 16 USCA § 1532

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1532

§ 1532. Definitions

[Currentness](#)

For the purposes of this chapter--

(1) The term “alternative courses of action” means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term “commercial activity” means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term “Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term “critical habitat” for a threatened or endangered species means--

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [section 1533](#) of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

§ 1532. Definitions, 16 USCA § 1532

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [section 1533](#) of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term “Federal agency” means any department, agency, or instrumentality of the United States.

(8) The term “fish or wildlife” means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term “foreign commerce” includes, among other things, any transaction--

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term “import” means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes

§ 1532. Definitions, 16 USCA § 1532

an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term “permit or license applicant” means, when used with respect to an action of a Federal agency for which exemption is sought under [section 1536](#) of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of [section 1536\(a\)](#) of this title to such agency action.

(13) The term “person” means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term “plant” means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term “Secretary” means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term “State agency” means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

§ 1532. Definitions, 16 USCA § 1532

(21) The term “United States”, when used in a geographical context, includes all States.

CREDIT(S)

(Pub.L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub.L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub.L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub.L. 100-478, Title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

[Notes of Decisions \(75\)](#)


16 U.S.C.A. § 1532, 16 USCA § 1532
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§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Limitation Recognized by [Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers](#), 11th Cir.(Fla.), Sep. 15, 2010

 KeyCite Yellow Flag - Negative Treatment Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

[Currentness](#)

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

(A) in any case in which the Secretary of Commerce determines that such species should--

§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under [section 670a](#) of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

(ii) Nothing in this paragraph affects the requirement to consult under [section 1536\(a\)\(2\)](#) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with [section 1538](#) of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a) (1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been--

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553\(e\) of Title 5](#), to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that--

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B) (i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7¹ to prevent a significant risk to the well being of any such species.

§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553\(e\) of Title 5](#), to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of [section 553 of Title 5](#) (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall--

(A) not less than 90 days before the effective date of the regulation--

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B) (i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B) (ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either--

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

§ 1533. Determination of endangered species and threatened species, 16 USCA § 1533

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor [section 553 of Title 5](#) shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

[OMITTED]

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [section 1538\(a\)\(1\)](#) of this title, in the case of fish or wildlife, or [section 1538\(a\)\(2\)](#) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to [section 1535\(c\)](#) of this title only to the extent that such regulations have also been adopted by such State.

[OMITTED]

CREDIT(S)

([Pub.L. 93-205](#), § 4, Dec. 28, 1973, 87 Stat. 886; [Pub.L. 94-359](#), § 1, July 12, 1976, 90 Stat. 911; [Pub.L. 95-632](#), §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; [Pub.L. 96-159](#), § 3, Dec. 28, 1979, 93 Stat. 1225; [Pub.L. 97-304](#), § 2(a), Oct. 13, 1982, 96 Stat. 1411; [Pub.L. 100-478, Title I, §§ 1002 to 1004](#), Oct. 7, 1988, 102 Stat. 2306; [Pub.L. 108-136](#), Div. A, Title III, § 318, Nov. 24, 2003, 117 Stat. 1433.)

[Notes of Decisions \(355\)](#)

Footnotes

¹


So in original. Probably should be “paragraph (7)”.

16 U.S.C.A. § 1533, 16 USCA § 1533
Current through P.L. 114-219.

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§ 1535. Cooperation with States, 16 USCA § 1535

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16 U.S.C.A. § 1535

§ 1535. Cooperation with States

[Currentness](#)

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

[OMITTED]

(f) Conflicts between Federal and State laws

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

[OMITTED]

§ 1535. Cooperation with States, 16 USCA § 1535

[OMITTED]

CREDIT(S)

([Pub.L. 93-205](#), § 6, Dec. 28, 1973, 87 Stat. 889; [Pub.L. 95-212](#), Dec. 19, 1977, 91 Stat. 1493; [Pub.L. 95-632](#), § 10, Nov. 10, 1978, 92 Stat. 3762; [Pub.L. 96-246](#), May 23, 1980, 94 Stat. 348; [Pub.L. 97-304](#), §§ 3, 8(b), Oct. 13, 1982, 96 Stat. 1416, 1426; [Pub.L. 100-478](#), Title I, § 1005, Oct. 7, 1988, 102 Stat. 2307.)


[Notes of Decisions \(12\)](#)

16 U.S.C.A. § 1535, 16 USCA § 1535
Current through P.L. 114-219.

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§ 1536. Interagency cooperation, 16 USCA § 1536

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

[Currentness](#)

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to [section 1533](#) of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under [section 1533](#) of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

[OMITTED]

§ 1536. Interagency cooperation, 16 USCA § 1536

CREDIT(S)

([Pub.L. 93-205](#), § 7, Dec. 28, 1973, 87 Stat. 892; [Pub.L. 95-632](#), § 3, Nov. 10, 1978, 92 Stat. 3752; [Pub.L. 96-159](#), § 4, Dec. 28, 1979, 93 Stat. 1226; [Pub.L. 97-304](#), §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; [Pub.L. 99-659](#), Title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3742; [Pub.L. 100-707](#), Title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

[Notes of Decisions \(653\)](#)


16 U.S.C.A. § 1536, 16 USCA § 1536
Current through P.L. 114-219.

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§ 1539. Exceptions, 16 USCA § 1539

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Limitation Recognized by [Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers](#), 11th Cir.(Fla.), Sep. 15, 2010

 KeyCite Yellow Flag - Negative Treatment Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1539

§ 1539. Exceptions

[Currentness](#)

[OMITTED]

(j) Experimental populations

(1) For purposes of this subsection, the term “experimental population” means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

§ 1539. Exceptions, 16 USCA § 1539

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and 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.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that--

(i) solely for purposes of [section 1536](#) of this title (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under [section 1533](#) of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

CREDIT(S)

([Pub.L. 93-205](#), § 10, Dec. 28, 1973, 87 Stat. 896; [Pub.L. 94-359](#), §§ 2, 3, July 12, 1976, 90 Stat. 911, 912; [Pub.L. 95-632](#), § 5, Nov. 10, 1978, 92 Stat. 3760; [Pub.L. 96-159](#), § 7, Dec. 28, 1979, 93 Stat. 1230; [Pub.L. 97-304](#), § 6(1) to (3), (4)(A), (5), (6), Oct. 13, 1982, 96 Stat. 1422 to 1424; [Pub.L. 100-478](#), Title I, §§ 1011, 1013(b), (c), Oct. 7, 1988, 102 Stat. 2314, 2315.)

[Notes of Decisions \(63\)](#)

Footnotes

1

So in original. No. cl. (ii) has been enacted.

16 U.S.C.A. § 1539, 16 USCA § 1539
Current through P.L. 114-219.

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§ 24.1 Introduction., 43 C.F.R. § 24.1

Code of Federal Regulations

Title 43. Public Lands: Interior

Subtitle A. Office of the Secretary of the Interior

Part 24. Department of the Interior Fish and Wildlife Policy: State–Federal Relationships (Refs & Annos)

43 C.F.R. § 24.1

§ 24.1 Introduction.

Currentness

(a) In 1970, the Secretary of the Interior developed a policy statement on intergovernmental cooperation in the preservation, use and management of fish and wildlife resources. The purpose of the policy ([36 FR 21034](#), Nov. 3, 1971) was to strengthen and support the missions of the several States and the Department of the Interior respecting fish and wildlife. Since development of the policy, a number of Congressional enactments and court decisions have addressed State and Federal responsibilities for fish and wildlife with the general effect of expanding Federal jurisdiction over certain species and uses of fish and wildlife traditionally managed by the States. In some cases, this expansion of jurisdiction has established overlapping authorities, clouded agency jurisdictions and, due to differing agency interpretations and accountabilities, has contributed to confusion and delays in the implementation of management programs. Nevertheless, Federal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law.

(b) The Secretary of the Interior reaffirms that fish and wildlife must be maintained for their ecological, cultural, educational, historical, aesthetic, scientific, recreational, economic, and social values to the people of the United States, and that these resources are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans. Because fish and wildlife are fundamentally dependent upon habitats on private and public lands managed or subject to administration by many Federal and State agencies, and because provisions for the protection, maintenance and enhancement of fish and wildlife and the regulation for their use are established in many laws and regulations involving a multitude of Federal and State administrative structures, the effective stewardship of fish and wildlife requires the cooperation of the several States and the Federal Government.

(c) It is the intent of the Secretary to strengthen and support, to the maximum legal extent possible, the missions of the States¹ and the Department of the Interior to conserve and manage effectively the nation's fish and wildlife. It is, therefore, important that a Department of the Interior Fish and Wildlife Policy be implemented to coordinate and facilitate the efforts of Federal and State agencies in the attainment of this objective.

SOURCE: [36 FR 21034](#), Nov. 3, 1971, as amended at [48 FR 11642](#), Mar. 18, 1983, unless otherwise noted.

AUTHORITY: [43 U.S.C. 1201](#).

§ 24.1 Introduction., 43 C.F.R. § 24.1

Current through September 8, 2016; 81 FR 62360.

Footnotes

1

“States” refers to all of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, the Commonwealth of Northern Mariana Islands and other territorial possessions, and the constituent units of government upon which these entities may have conferred authorities related to fish and wildlife matters.

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§ 24.3 General jurisdictional principles., 43 C.F.R. § 24.3

Code of Federal Regulations

Title 43. Public Lands: Interior

Subtitle A. Office of the Secretary of the Interior

Part 24. Department of the Interior Fish and Wildlife Policy: State–Federal Relationships (Refs & Annos)

43 C.F.R. § 24.3

§ 24.3 General jurisdictional principles.

Currentness

(a) In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State. Under the Property Clause of the Constitution, Congress is given the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” In the exercise of power under the Property Clause, Congress may choose to preempt State management of fish and wildlife on Federal lands and, in circumstances where the exercise of power under the Commerce Clause is available, Congress may choose to establish restrictions on the taking of fish and wildlife whether or not the activity occurs on Federal lands, as well as to establish restrictions on possessing, transporting, importing, or exporting fish and wildlife. Finally, a third source of Federal constitutional authority for the management of fish and wildlife is the treaty making power. This authority was first recognized in the negotiation of a migratory bird treaty with Great Britain on behalf of Canada in 1916.

(b) The exercise of Congressional power through the enactment of Federal fish and wildlife conservation statutes has generally been associated with the establishment of regulations more restrictive than those of State law. The power of Congress respecting the taking of fish and wildlife has been exercised as a restrictive regulatory power, except in those situations where the taking of these resources is necessary to protect Federal property. With these exceptions, and despite the existence of constitutional power respecting fish and wildlife on Federally owned lands, Congress has, in fact, reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands.

(c) Congress has charged the Secretary of the Interior with responsibilities for the management of certain fish and wildlife resources, e.g., endangered and threatened species, migratory birds, certain marine mammals, and certain aspects of the management of some anadromous fish. However, even in these specific instances, with the limited exception of marine mammals, State jurisdiction remains concurrent with Federal authority.

SOURCE: 36 FR 21034, Nov. 3, 1971, as amended at 48 FR 11642, Mar. 18, 1983, unless otherwise noted.

AUTHORITY: 43 U.S.C. 1201.

Notes of Decisions (16)

§ 24.3 General jurisdictional principles., 43 C.F.R. § 24.3

Current through September 8, 2016; 81 FR 62360.

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§ 24.4 Resource management and public activities on Federal lands., 43 C.F.R. § 24.4

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| Code of Federal Regulations |
| Title 43. Public Lands: Interior |
| Subtitle A. Office of the Secretary of the Interior |
| Part 24. Department of the Interior Fish and Wildlife Policy: State–Federal Relationships (Refs & Annos) |

43 C.F.R. § 24.4

§ 24.4 Resource management and public activities on Federal lands.

Currentness

(a) The four major systems of Federal lands administered by the Department of the Interior are lands administered by the Bureau of Reclamation, Bureau of Land Management, units of the National Wildlife Refuge System and national fish hatcheries, and units of the National Park System.

(b) The Bureau of Reclamation withdraws public lands and acquires non-Federal lands for construction and operation of water resource development projects within the 17 Western States. Recreation and conservation or enhancement of fish and wildlife resources are often designated project purposes. General authority for Reclamation to modify project structures, develop facilities, and acquire lands to accommodate fish and wildlife resources is given to the fish and Wildlife Coordination Act of 1946, as amended (16 U.S.C. 661–667e). That act further provides that the lands, waters and facilities designated for fish and wildlife management purposes, in most instances, should be made available by cooperative agreement to the agency exercising the administration of these resources of the particular State involved. The Federal Water Project Recreation Act of 1965, as amended, also directs Reclamation to encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement. Reclamation withdrawal, however, does not enlarge the power of the United States with respect to management of fish and resident wildlife and, except for activities specified in Section III.3 above, basic authority and responsibility for management of fish and resident wildlife on such lands remains with the State.

(c) BLM-administered lands comprise in excess of 300 million acres that support significant and diverse populations of fish and wildlife. Congress in the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) directed that non-wilderness BLM lands be managed by the Secretary under principles of multiple use and sustained yield, and for both wilderness and non-wilderness lands explicitly recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands. Concomitantly, the Secretary of the Interior is charged with the responsibility to manage non-wilderness BLM lands for multiple uses, including fish and wildlife conservation. However, this authority to manage lands for fish and wildlife values is not a preemption of State jurisdiction over fish and wildlife. In exercising this responsibility the Secretary is empowered to close areas to hunting, fishing or trapping for specified reasons viz., public safety, administration, or compliance with provisions of applicable law. The closure authority of the Secretary is thus a power to close areas to particular activities for particular reasons and does not in and of itself constitute a grant of authority to the Secretary to manage wildlife or require or authorize the issuance of hunting and/or fishing permits or licenses.

(d) While the several States therefore possess primary authority and responsibility for management of fish and resident

§ 24.4 Resource management and public activities on Federal lands., 43 C.F.R. § 24.4

wildlife on Bureau of Land Management lands, the Secretary, through the Bureau of Land Management, has custody of the land itself and the habitat upon which fish and resident wildlife are dependent. Management of the habitat is a responsibility of the Federal Government. Nevertheless, Congress in the Sikes Act has directed the Secretary of the Interior to cooperate with the States in developing programs on certain public lands, including those administered by BLM and the Department of Defense, for the conservation and rehabilitation of fish and wildlife including specific habitat improvement projects.

(e) Units of the National Wildlife Refuge System occur in nearly every State and constitute Federally owned or controlled areas set aside primarily as conservation areas for migratory waterfowl and other species of fish or wildlife. Units of the system also provide outdoor enjoyment for millions of visitors annually for the purpose of hunting, fishing and wildlife-associated recreation. In 1962 and 1966, Congress authorized the use of National Wildlife Refuges for outdoor recreation provided that it is compatible with the primary purposes for which the particular refuge was established. In contrast to multiple use public lands, the conservation, enhancement and perpetuation of fish and wildlife is almost invariably the principal reason for the establishment of a unit of the National Wildlife Refuge System. In consequence, Federal activity respecting management of migratory waterfowl and other wildlife residing on units of the National Wildlife Refuge System involves a Federal function specifically authorized by Congress. It is therefore for the Secretary to determine whether units of the System shall be open to public uses, such as hunting and fishing, and on what terms such access shall be granted. However, in recognition of the existing jurisdictional relationship between the States and the Federal Government, Congress, in the National Wildlife Refuge System Administration Act of 1966 ([16 U.S.C. 668dd](#)), has explicitly stated that nothing therein shall be construed as affecting the authority of the several States to manage fish and resident wildlife found on units of the system. Thus, Congress has directed that, to the maximum extent practicable, such public uses shall be consistent with State laws and regulations. Units of the National Wildlife Refuge System, therefore, shall be managed, to the extent practicable and compatible with the purposes for which they were established, in accordance with State laws and regulations, comprehensive plans for fish and wildlife developed by the States, and Regional Resource Plans developed by the Fish and Wildlife Service in cooperation with the States.

(f) Units of the National Park System contain natural, recreation, historic, and cultural values of national significance as designated by Executive and Congressional action. Specific enabling legislation has authorized limited hunting, trapping or fishing activity within certain areas of the system. As a general rule, consumptive resource utilization is prohibited. Those areas which do legislatively allow hunting, trapping, or fishing, do so in conformance with applicable Federal and State laws. The Superintendent may, in consultation with the appropriate State agency, fix times and locations where such activities will be prohibited. Areas of the National Park System which permit fishing generally will do so in accordance with applicable State and Federal Laws.

(g) In areas of exclusive Federal jurisdiction, State laws are not applicable. However, every attempt shall be made to consult with the appropriate States to minimize conflicting and confusing regulations which may cause undue hardship.

(h) The management of habitat for species of wildlife, populations of wildlife, or individual members of a population shall be in accordance with a Park Service approved Resource Management Plan. The appropriate States shall be consulted prior to the approval of management actions, and memoranda of understanding shall be executed as appropriate to ensure the conduct of programs which meet mutual objectives.

(i) Federal agencies of the Department of the Interior shall:

§ 24.4 Resource management and public activities on Federal lands., 43 C.F.R. § 24.4

(1) Prepare fish and wildlife management plans in cooperation with State fish and wildlife agencies and other Federal (non-Interior) agencies where appropriate. Where such plans are prepared for Federal lands adjoining State or private lands, the agencies shall consult with the State or private landowners to coordinate management objectives;

(2) Within their statutory authority and subject to the management priorities and strategies of such agencies, institute fish and wildlife habitat management practices in cooperation with the States to assist the States in accomplishing their fish and wildlife resource plans;

(3) Provide for public use of Federal lands in accordance with State and Federal laws, and permit public hunting, fishing and trapping within statutory and budgetary limitations and in a manner compatible with the primary objectives for which the lands are administered. The hunting, fishing, and trapping, and the possession and disposition of fish, game, and fur animals, shall be conducted in all other respects within the framework of applicable State and Federal laws, including requirements for the possession of appropriate State licenses or permits.

(4) For those Federal lands that are already open for hunting, fishing, or trapping, closure authority shall not be exercised without prior consultation with the affected States, except in emergency situations. The Bureau of Land Management may, after consultation with the States, close all or any portion of public land under its jurisdiction to public hunting, fishing, or trapping for reasons of public safety, administration, or compliance with provisions of applicable law. The National Park Service and Fish and Wildlife Service may, after consultation with the States close all or any portion of Federal land under their jurisdictions, or impose such other restrictions as are deemed necessary, for reasons required by the Federal laws governing the management of their areas; and

(5) Consult with the States and comply with State permit requirements in connection with the activities listed below, except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities:

(i) In carrying out research programs involving the taking or possession of fish and wildlife or programs involving reintroduction of fish and wildlife;

(ii) For the planned and orderly removal of surplus or harmful populations of fish and wildlife except where emergency situations requiring immediate action make such consultation and compliance with State regulatory requirements infeasible; and

(iii) In the disposition of fish and wildlife taken under paragraph (i)(5)(i) or (i)(5)(ii) of this section.

SOURCE: [36 FR 21034](#), Nov. 3, 1971, as amended at [48 FR 11642](#), Mar. 18, 1983, unless otherwise noted.

AUTHORITY: [43 U.S.C. 1201](#).

§ 24.4 Resource management and public activities on Federal lands., 43 C.F.R. § 24.4

Current through September 8, 2016; 81 FR 62360.

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§ 17.81 Listing., 50 C.F.R. § 17.81

Code of Federal Regulations

Title 50. Wildlife and Fisheries

Chapter I. United States Fish and Wildlife Service, Department of the Interior

Subchapter B. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants

Part 17. Endangered and Threatened Wildlife and Plants (Refs & Annos)

Subpart H. Experimental Populations (Refs & Annos)

50 C.F.R. § 17.81

§ 17.81 Listing.

Currentness

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed), subject to the further conditions specified in this section; provided, that all designations of experimental populations must proceed by regulation adopted in accordance with [5 U.S.C. 553](#) and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding the Secretary shall utilize the best scientific and commercial data available to consider:

- (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;
- (2) The likelihood that any such experimental population will become established and survive in the foreseeable future;
- (3) The relative effects that establishment of an experimental population will have on the recovery of the species; and
- (4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in subsections 10(d) and (j) of the Act, to allow acts necessary for the establishment and maintenance of an experimental

§ 17.81 Listing., 50 C.F.R. § 17.81

population.

(c) Any regulation promulgated under paragraph (a) of this section shall provide:

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

(d) The Fish and Wildlife Service shall consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. 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.

(e) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart shall be identified by special rule in § 17.84–§ 17.86 as appropriate and separately listed in § 17.11(h) (wildlife) or § 17.12(h) (plants) as appropriate.

(f) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential populations. In those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no critical habitat shall be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.

SOURCE: [40 FR 44415](#), Sept. 26, 1975; [49 FR 33893](#), Aug. 27, 1984; [52 FR 29780](#), Aug. 11, 1987; [54 FR 5938](#), Feb. 7, 1989; [54 FR 38946](#), Sept. 21, 1989; [55 FR 39416](#), Sept. 27, 1990; [77 FR 75297](#), Dec. 19, 2012, unless otherwise noted.

§ 17.81 Listing., 50 C.F.R. § 17.81

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

[Notes of Decisions \(77\)](#)

Current through September 8, 2016; 81 FR 62360.

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§ 17.82 Prohibitions., 50 C.F.R. § 17.82

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|---|
| Code of Federal Regulations |
| Title 50. Wildlife and Fisheries |
| Chapter I. United States Fish and Wildlife Service, Department of the Interior |
| Subchapter B. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants |
| Part 17. Endangered and Threatened Wildlife and Plants (Refs & Annos) |
| Subpart H. Experimental Populations (Refs & Annos) |

50 C.F.R. § 17.82

§ 17.82 Prohibitions.

Currentness

Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The Special rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

SOURCE: 40 FR 44415, Sept. 26, 1975; 49 FR 33893, Aug. 27, 1984; 52 FR 29780, Aug. 11, 1987; 54 FR 5938, Feb. 7, 1989; 54 FR 38946, Sept. 21, 1989; 55 FR 39416, Sept. 27, 1990; 77 FR 75297, Dec. 19, 2012, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

Notes of Decisions (3)

Current through September 8, 2016; 81 FR 62360.

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§ 17.84 Special rules—vertebrates., 50 C.F.R. § 17.84

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| Code of Federal Regulations |
| Title 50. Wildlife and Fisheries |
| Chapter I. United States Fish and Wildlife Service, Department of the Interior |
| Subchapter B. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants |
| Part 17. Endangered and Threatened Wildlife and Plants (Refs & Annos) |
| Subpart H. Experimental Populations (Refs & Annos) |

50 C.F.R. § 17.84

§ 17.84 Special rules—vertebrates.

Effective: December 16, 2015

[Currentness](#)

[OMITTED]

(k) Mexican wolf (*Canis lupus baileyi*). This paragraph (k) sets forth the provisions of a rule to establish an experimental population of Mexican wolves.

(1) Purpose of the rule. The U.S. Fish and Wildlife Service (Service) finds that reestablishment of an experimental population of Mexican wolves into the subspecies' probable historical range will further the conservation of the Mexican wolf subspecies. The Service found that the experimental population was not essential under [§ 17.81\(c\)\(2\)](#).

(2) Determinations. The Mexican wolf population reestablished in the Mexican Wolf Experimental Population Area (MWEPA), identified in paragraph (k)(4) of this section, is one nonessential experimental population. This nonessential experimental population will be managed according to the provisions of this rule. The Service does not intend to change the nonessential experimental designation to essential experimental, threatened, or endangered. Critical habitat cannot be designated under the nonessential experimental classification, [16 U.S.C. 1539\(j\)\(2\)\(C\)\(ii\)](#).

(3) Definitions. Key terms used in this rule have the following definitions:

Active den means a den or a specific site above or below ground that is used by Mexican wolves on a daily basis to bear and raise pups, typically between approximately April 1 and July 31. More than one den site may be used in a single season.

Cross-foster means the removal of offspring from their biological parents and placement with surrogate parents.

Depredation means the confirmed killing or wounding of lawfully present domestic animals by one or more Mexican

§ 17.84 Special rules—vertebrates., 50 C.F.R. § 17.84

wolves. The Service, Wildlife Services, or other Service-designated agencies will confirm cases of wolf depredation on lawfully present domestic animals. Cattle trespassing on Federal lands are not considered lawfully present domestic animals.

Designated agency means a Federal, State, or tribal agency designated by the Service to assist in implementing this rule, all or in part, consistent with a Service-approved management plan, special management measure, conference opinion pursuant to section 7(a)(4) of the Act, section 6 of the Act as described in § 17.31 for State game and fish agencies with authority to manage Mexican wolves, or a valid permit issued by the Service through § 17.32.

Disturbance-causing land-use activity means any activity on Federal lands within a 1-mi (1.6-km) radius around release pens when Mexican wolves are in them, around active dens between April 1 and July 31, and around active Mexican wolf rendezvous sites between June 1 and September 30, which the Service determines could adversely affect reproductive success, natural behavior, or persistence of Mexican wolves. Such activities may include, but are not limited to, timber or wood harvesting, prescribed fire, mining or mine development, camping outside designated campgrounds, livestock husbandry activities (e.g., livestock drives, roundups, branding, vaccinating, etc.), off-road vehicle use, hunting, and any other use or activity with the potential to disturb wolves. The following activities are specifically excluded from this definition:

- (A) Lawfully present livestock and use of water sources by livestock;
- (B) Livestock drives if no reasonable alternative route or timing exists;
- (C) Vehicle access over established roads to non-Federal land where legally permitted activities are ongoing if no reasonable alternative route exists;
- (D) Use of lands within the National Park or National Wildlife Refuge Systems as safety buffer zones for military activities and Department of Homeland Security border security activities;
- (E) Fire-fighting activities associated with wildfires; and
- (F) Any authorized, specific land use that was active and ongoing at the time Mexican wolves chose to locate a den or rendezvous site nearby.

Domestic animal means livestock as defined in this paragraph (k)(3) and non-feral dogs.

Federal land means land owned and under the administration of Federal agencies including, but not limited to, the Service, National Park Service, Bureau of Land Management, U.S. Forest Service, Department of Energy, or Department of Defense.

Feral dog means any dog (*Canis familiaris*) or wolf-dog hybrid that, because of absence of physical restraint or conspicuous means of identifying it at a distance as non-feral, is reasonably thought to range freely without discernible, proximate control by any person. Feral dogs do not include domestic dogs that are penned, leashed, or otherwise restrained (e.g., by shock collar) or which are working livestock or being lawfully used to trail or locate wildlife.

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Harass means intentional or negligent actions or omissions that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.

In the act of biting, killing, or wounding means grasping, biting, wounding, or feeding upon a live domestic animal on non-Federal land or live livestock on Federal land. The term does not include feeding on an animal carcass.

Initial release means the release of Mexican wolves to the wild within Zone 1, as defined in this paragraph (k)(3), or in accordance with tribal or private land agreements in Zone 2, as defined in this paragraph (k)(3), that have never been in the wild, or releasing pups that have never been in the wild and are less than 5 months old within Zones 1 or 2. The initial release of pups less than 5 months old into Zone 2 allows for the cross-fostering of pups from the captive population into the wild, as well as enables translocation-eligible adults to be re-released in Zone 2 with pups born in captivity.

Intentional harassment means deliberate, preplanned harassment of Mexican wolves, including by less-than-lethal means (such as 12-gauge shotgun rubber-bullets and bean-bag shells) designed to cause physical discomfort and temporary physical injury, but not death. Intentional harassment includes situations where the Mexican wolf or wolves may have been unintentionally attracted—or intentionally tracked, waited for, chased, or searched out—and then harassed. Intentional harassment of Mexican wolves is only allowed under a permit issued by the Service or its designated agency.

Livestock means domestic alpacas, bison, burros (donkeys), cattle, goats, horses, llamas, mules, and sheep, or other domestic animals defined as livestock in Service-approved State and tribal Mexican wolf management plans. Poultry is not considered livestock under this rule.

Mexican Wolf Experimental Population Area (MWEPA) means an area in Arizona and New Mexico including Zones 1, 2, and 3, as defined in this paragraph (k)(3), that lies south of Interstate Highway 40 to the international border with Mexico.

Non-Federal land means any private, State-owned, or tribal trust land.

Occupied Mexican wolf range means an area of confirmed presence of Mexican wolves based on the most recent map of occupied range posted on the Service's Mexican Wolf Recovery Program Web site at <http://www.fws.gov/southwest/es/mexicanwolf/>. Specific to the prohibitions at paragraphs (k)(5)(iii) and (k)(5)(vii)(D) of this section, Zone 3, as defined in this paragraph (k)(3), and tribal trust lands are not considered occupied range.

Opportunistic harassment means scaring any Mexican wolf from the immediate area by taking actions such as discharging firearms or other projectile-launching devices in proximity to, but not in the direction of, the wolf, throwing objects at it, or making loud noise in proximity to it. Such harassment might cause temporary, non-debilitating physical injury, but is not reasonably anticipated to cause permanent physical injury or death. Opportunistic harassment of Mexican wolves can occur without a permit issued by the Service or its designated agency.

Problem wolves mean Mexican wolves that, for purposes of management and control by the Service or its designated agent(s), are:

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(A) Individuals or members of a group or pack (including adults, yearlings, and pups greater than 4 months of age) that were involved in a depredation on lawfully present domestic animals;

(B) Habituated to humans, human residences, or other facilities regularly occupied by humans; or

(C) Aggressive when unprovoked toward humans.

Rendezvous site means a gathering and activity area regularly used by Mexican wolf pups after they have emerged from the den. Typically, these sites are used for a period ranging from about 1 week to 1 month in the first summer after birth during the period from June 1 to September 30. Several rendezvous sites may be used in succession within a single season.

Service-approved management plan means management plans approved by the Regional Director or Director of the Service through which Federal, State, or tribal agencies may become a designated agency. The management plan must address how Mexican wolves will be managed to achieve conservation goals in compliance with the Act, this experimental population rule, and other Service policies. If a Federal, State, or tribal agency becomes a designated agency through a Service-approved management plan, the Service will help coordinate their activities while retaining authority for program direction, oversight, guidance, and authorization of Mexican wolf removals.

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)).

Translocate means the release of Mexican wolves into the wild that have previously been in the wild. In the MWEPA, translocations will occur only in Zones 1 and 2, as defined in this paragraph (k)(3).

Tribal trust land means any lands title to which is either: Held in trust by the United States for the benefit of any Indian tribe or individual; or held by any Indian tribe or individual subject to restrictions by the United States against alienation. For purposes of this rule, tribal trust land does not include land purchased in fee title by a tribe. We consider fee simple land purchased by tribes to be private land.

Unacceptable impact to a wild ungulate herd will be determined by a State game and fish agency based upon ungulate management goals, or a 15 percent decline in an ungulate herd as documented by a State game and fish agency, using their preferred methodology, based on the preponderance of evidence from bull to cow ratios, cow to calf ratios, hunter days, and/or elk population estimates.

Unintentional take means the take of a Mexican wolf by any person if the take is unintentional and occurs while engaging in an otherwise lawful activity, occurs despite the use of due care, is coincidental to an otherwise lawful activity, and is not done on purpose. Taking a Mexican wolf by poisoning or shooting will not be considered unintentional take.

Wild ungulate herd means an assemblage of wild ungulates (bighorn sheep, bison, deer, elk, or pronghorn) living in a given area.

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Wildlife Services means the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services.

Wounded means exhibiting scraped or torn hide or flesh, bleeding, or other evidence of physical damage caused by a Mexican wolf bite.

Zone 1 means an area within the MWEPA in Arizona and New Mexico into which Mexican wolves will be allowed to naturally disperse and occupy and where Mexican wolves may be initially released from captivity or translocated. Zone 1 includes all of the Apache, Gila, and Sitgreaves National Forests; the Payson, Pleasant Valley, and Tonto Basin Ranger Districts of the Tonto National Forest; and the Magdalena Ranger District of the Cibola National Forest.

Zone 2 is an area within the MWEPA into which Mexican wolves will be allowed to naturally disperse and occupy, and where Mexican wolves may be translocated.

(A) On Federal land in Zone 2, initial releases of Mexican wolves are limited to pups less than 5 months old, which allows for the cross-fostering of pups from the captive population into the wild, as well as enables translocation-eligible adults to be re-released with pups born in captivity. On private and tribal land in Zone 2, Mexican wolves of any age, including adults, can also be initially released under a Service- and State-approved management agreement with private landowners or a Service-approved management agreement with tribal agencies.

(B) The northern boundary of Zone 2 is Interstate Highway 40; the western boundary extends south from Interstate Highway 40 and follows Arizona State Highway 93, Arizona State Highway 89/60, Interstate Highway 10, and Interstate Highway 19 to the United States–Mexico international border; the southern boundary is the United States–Mexico international border heading east, then follows New Mexico State Highway 81/146 north to Interstate Highway 10, then along New Mexico State Highway 26 to Interstate Highway 25; the boundary continues along New Mexico State Highway 70/54/506/24; the eastern boundary follows the eastern edge of Otero County, New Mexico, to the north and then along the southern and then eastern edge of Lincoln County, New Mexico, until it intersects with New Mexico State Hwy 285 and follows New Mexico State Highway 285 north to the northern boundary of Interstate Highway 40. Zone 2 excludes the area in Zone 1, as defined in this paragraph (k)(3).

Zone 3 means an area within the MWEPA into which Mexican wolves will be allowed to disperse and occupy, but neither initial releases nor translocations will occur there.

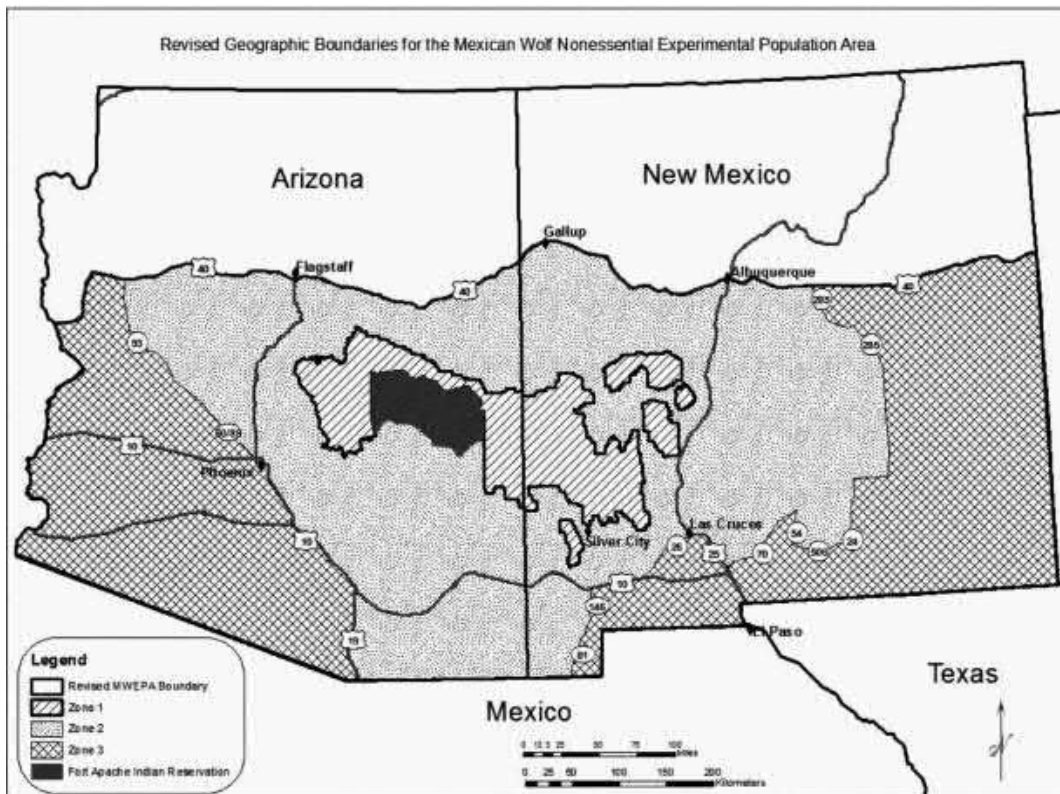
(A) Zone 3 is an area of less suitable Mexican wolf habitat where Mexican wolves will be more actively managed under the authorities of this rule to reduce human conflict. We expect Mexican wolves to occupy areas of suitable habitat where ungulate populations are adequate to support them and conflict with humans and their livestock is low. If Mexican wolves move outside of areas of suitable habitat, they will be more actively managed.

(B) Zone 3 is two separate geographic areas on the eastern and western sides of the MWEPA. One area of Zone 3 is in western Arizona, and the other is in eastern New Mexico. In Arizona, the northern boundary of Zone 3 is Interstate Highway 40; the eastern boundary extends south from Interstate Highway 40 and follows State Highway 93, State Highway 89/60, Interstate Highway 10, and Interstate Highway 19 to the United States–Mexico international border; the southern boundary is the United States–Mexico international border; the western boundary is the Arizona–California State border. In New Mexico, the northern boundary of Zone 3 is Interstate Highway 40; the eastern boundary is the

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New Mexico–Texas State border; the southern boundary is the United States–Mexico international border heading west, then follows State Highway 81/146 north to Interstate Highway 10, then along State Highway 26 to Interstate Highway 25, the southern boundary continues along State Highway 70/54/506/24; the western boundary follows the eastern edge of Otero County to the north and then along the southern and then eastern edge of Lincoln County until it follows State Highway 285 north to the northern boundary of Interstate Highway 40.

(4) Designated area. The designated experimental population area for Mexican wolves classified as a nonessential experimental population by this rule is within the subspecies’ probable historical range and is wholly separate geographically from the current range of any known Mexican wolves. The boundaries of the MWEPA are the portions of Arizona and New Mexico that are south of Interstate Highway 40 to the international border with Mexico. A map of the MWEPA follows:



(5) Prohibitions. Take of any Mexican wolf in the experimental population is prohibited, except as provided in paragraph (k)(7) of this section. Specifically, the following actions are prohibited by this rule:

(i) No person may possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any Mexican wolf or wolf part from the experimental population except as authorized in this rule or by a valid permit issued by the Service under § 17.32. If a person kills or injures a Mexican wolf or finds a dead or injured wolf or wolf parts, the person must not disturb them (unless instructed to do so by the Service or a designated agency), must minimize disturbance of the area around them, and must report the incident to the Service’s Mexican Wolf Recovery Coordinator or a designated agency of the Service within 24 hours as described in paragraph (k)(6) of this section.

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(ii) No person may attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this rule.

(iii) Taking a Mexican wolf with a trap, snare, or other type of capture device within occupied Mexican wolf range is prohibited (except as authorized in paragraph (k)(7)(iv) of this section) and will not be considered unintentional take, unless due care was exercised to avoid injury or death to a wolf. With regard to trapping activities, due care includes:

(A) Following the regulations, proclamations, recommendations, guidelines, and/or laws within the State or tribal trust lands where the trapping takes place.

(B) Modifying or using appropriately sized traps, chains, drags, and stakes that provide a reasonable expectation that the wolf will be prevented from either breaking the chain or escaping with the trap on the wolf, or using sufficiently small traps (less than or equal to a Victor #2 trap) that allow a reasonable expectation that the wolf will either immediately pull free from the trap or span the jaw spread when stepping on the trap.

(C) Not taking a Mexican wolf using neck snares.

(D) Reporting the capture of a Mexican wolf (even if the wolf has pulled free) within 24 hours to the Service as described in paragraph (k)(6) of this section.

(E) If a Mexican wolf is captured, trappers can call the Interagency Field Team (1-888-459-WOLF [9653]) as soon as possible to arrange for radio-collaring and releasing of the wolf. Per State regulations for releasing nontarget animals, trappers may also choose to release the animal alive and subsequently contact the Service or Interagency Field Team.

(6) Reporting requirements. Unless otherwise specified in this rule or in a permit, any take of a Mexican wolf must be reported to the Service or a designated agency within 24 hours. We will allow additional reasonable time if access to the site is limited. Report any take of Mexican wolves, including opportunistic harassment, to the Mexican Wolf Recovery Program, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Road, NE., Albuquerque, NM 87113; by telephone 505-761-4704; or by facsimile 505-346-2542. Additional contact information can also be found on the Mexican Wolf Recovery Program's Web site at <http://www.fws.gov/southwest/es/mexicanwolf/>. Unless otherwise specified in a permit, any wolf or wolf part taken legally must be turned over to the Service, which will determine the disposition of any live or dead wolves.

(7) Allowable forms of take of Mexican wolves. Take of Mexican wolves in the experimental population is allowed as follows:

(i) Take in defense of human life. Under section 11(a)(3) of the Act and § 17.21(c)(2), any person may take (which

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includes killing as well as nonlethal actions such as harassing or harming) a Mexican wolf in self-defense or defense of the lives of others. This take must be reported as specified in accordance with paragraph (k)(6) of this section. If the Service or a designated agency determines that a Mexican wolf presents a threat to human life or safety, the Service or the designated agency may kill the wolf or place it in captivity.

(ii) Opportunistic harassment. Anyone may conduct opportunistic harassment of any Mexican wolf at any time provided that Mexican wolves are not purposefully attracted, tracked, searched out, or chased and then harassed. Such harassment of Mexican wolves might cause temporary, non-debilitating physical injury, but is not reasonably anticipated to cause permanent physical injury or death. Any form of opportunistic harassment must be reported as specified in accordance with paragraph (k)(6) of this section.

(iii) Intentional harassment. After the Service or its designated agency has confirmed Mexican wolf presence on any land within the MWEPA, the Service or its designated agency may issue permits valid for not longer than 1 year, with appropriate stipulations or conditions, to allow intentional harassment of Mexican wolves. The harassment must occur in the area and under the conditions specifically identified in the permit. Permittees must report this take as specified in accordance with paragraph (k)(6) of this section.

(iv) Take on non-Federal lands.

(A) On non-Federal lands anywhere within the MWEPA, domestic animal owners or their agents may take (including kill or injure) any Mexican wolf that is in the act of biting, killing, or wounding a domestic animal, as defined in paragraph (k)(3) of this section. After the take of a Mexican wolf, the Service must be provided evidence that the wolf was in the act of biting, killing, or wounding a domestic animal at the time of take, such as evidence of freshly wounded or killed domestic animals. This take must be reported as specified in accordance with paragraph (k)(6) of this section. The take of any Mexican wolf without evidence of biting, killing, or wounding domestic animals may be referred to the appropriate authorities for investigation.

(B) Take of Mexican wolves by livestock guarding dogs, when used to protect livestock on non-Federal lands, is allowed. If such take by a guard dog occurs, it must be reported as specified in accordance with paragraph (k)(6) of this section.

(C) Based on the Service's or a designated agency's discretion and in conjunction with a removal action authorized by the Service, the Service or designated agency may issue permits to domestic animal owners or their agents (e.g., employees, land manager, local officials) to take (including intentional harassment or killing) any Mexican wolf that is present on non-Federal land where specified in the permit. Permits issued under this provision will specify the number of days for which the permit is valid and the maximum number of Mexican wolves for which take is allowed. Take by permittees under this provision will assist the Service or designated agency in completing control actions. Domestic animal owners or their agents must report this take as specified in accordance with paragraph (k)(6) of this section.

(v) Take on Federal land.

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(A) Based on the Service's or a designated agency's discretion and in conjunction with a removal action authorized by the Service, the Service may issue permits to livestock owners or their agents (e.g., employees, land manager, local officials) to take (including intentional harassment or killing) any Mexican wolf that is in the act of biting, killing, or wounding livestock on Federal land where specified in the permit.

(1) Permits issued under this provision will specify the number of days for which the permit is valid and the maximum number of Mexican wolves for which take is allowed. Take by permittees under this provision will assist the Service or designated agency in completing control actions. Livestock owners or their agents must report this take as specified in accordance with paragraph (k)(6) of this section.

(2) After the take of a Mexican wolf, the Service must be provided evidence that the wolf was in the act of biting, killing, or wounding livestock at the time of take, such as evidence of freshly wounded or killed livestock. The take of any Mexican wolf without evidence of biting, killing, or wounding domestic animals may be referred to the appropriate authorities for investigation.

(B) Take of Mexican wolves by livestock guarding dogs, when used to protect livestock on Federal lands, is allowed. If such take by a guard dog occurs, it must be reported as specified in accordance with paragraph (k)(6) of this section.

(C) This provision for take on Federal land does not exempt Federal agencies and their contractors from complying with sections 7(a)(1) and 7(a)(4) of the Act, the latter of which requires a conference with the Service if they propose an action that is likely to jeopardize the continued existence of the Mexican wolf. In areas within the National Park System and National Wildlife Refuge System, Federal agencies must treat Mexican wolves as a threatened species for purposes of complying with section 7 of the Act.

(vi) Take in response to unacceptable impacts to a wild ungulate herd. If the Arizona or New Mexico game and fish agency determines that Mexican wolf predation is having an unacceptable impact to a wild ungulate herd, as defined in paragraph (k)(3) of this section, the respective State game and fish agency may request approval from the Service that Mexican wolves be removed from the area of the impacted wild ungulate herd. Upon written approval from the Service, the State (Arizona or New Mexico) or any designated agency may be authorized to remove (capture and translocate in the MWEPA, move to captivity, transfer to Mexico, or lethally take) Mexican wolves. These management actions must occur in accordance with the following provisions:

(A) The Arizona or New Mexico game and fish agency must prepare a science-based document that:

(1) Describes what data indicate that the wild ungulate herd is below management objectives, what data indicate that the impact on the wild ungulate herd is influenced by Mexican wolf predation, why Mexican wolf removal is a warranted solution to help restore the wild ungulate herd to State game and fish agency management objectives, the type (level and duration) of Mexican wolf removal management action being

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proposed, and how wild ungulate herd response to wolf removal will be measured and control actions adjusted for effectiveness;

(2) Demonstrates that attempts were and are being made to identify other causes of wild ungulate herd declines and possible remedies or conservation measures in addition to wolf removal;

(3) If appropriate, identifies areas of suitable habitat for Mexican wolf translocation; and

(4) Has been subjected to peer review and public comment prior to its submittal to the Service for written concurrence. In order to comply with this requirement, the State game and fish agency must:

(i) Conduct the peer review process in conformance with the Office of Management and Budget's most recent Final Information and Quality Bulletin for Peer Review and include in their proposal an explanation of how the bulletin's standards were considered and satisfied; and

(ii) Obtain at least three independent peer reviews from individuals with relevant expertise other than staff employed by the State (Arizona or New Mexico) requesting approval from the Service that Mexican wolves be removed from the area of the affected wild ungulate herd.

(B) Before the Service will allow Mexican wolf removal in response to impacts to wild ungulates, the Service will evaluate the information provided by the requesting State (Arizona or New Mexico) and provide a written determination to the requesting State game and fish agency on whether such actions are scientifically based and warranted.

(C) If all of the provisions above are met, the Service will, to the maximum extent allowable under the Act, make a determination providing for Mexican wolf removal. If the request is approved, the Service will include in the written determination which management action (capture and translocate in MWEPA, move to captivity, transfer to Mexico, lethally take, or no action) is most appropriate for the conservation of the Mexican wolf subspecies.

(D) Because tribes are able to request the capture and removal of Mexican wolves from tribal trust lands at any time, take in response to impacts to wild ungulate herds is not applicable on tribal trust lands.

(vii) Take by Service personnel or a designated agency. The Service or a designated agency may take any Mexican wolf in the experimental population in a manner consistent with a Service-approved management plan, special management measure, biological opinion pursuant to section 7(a)(2) of the Act, conference opinion pursuant to section 7(a)(4) of the Act, section 6 of the Act as described in § 17.31 for State game and fish agencies with authority to manage Mexican wolves, or a valid permit issued by the Service through § 17.32.

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(A) The Service or designated agency may use leg-hold traps and any other effective device or method for capturing or killing Mexican wolves to carry out any measure that is a part of a Service-approved management plan, special management measure, or valid permit issued by the Service under § 17.32, regardless of State law. The disposition of all Mexican wolves (live or dead) or their parts taken as part of a Service-approved management activity must follow provisions in Service-approved management plans or interagency agreements or procedures approved by the Service on a case-by-case basis.

(B) The Service or designated agency may capture; kill; subject to genetic testing; place in captivity; or euthanize any feral wolf-like animal or feral wolf hybrid found within the MWEPA that shows physical or behavioral evidence of: Hybridization with other canids, such as domestic dogs or coyotes; being a wolf-like animal raised in captivity, other than as part of a Service-approved wolf recovery program; or being socialized or habituated to humans. If determined to be a pure Mexican wolf, the wolf may be returned to the wild.

(C) The Service or designated agency may carry out intentional or opportunistic harassment, nonlethal control measures, translocation, placement in captivity, or lethal control of problem wolves. To determine the presence of problem wolves, the Service will consider all of the following:

(1) Evidence of wounded domestic animal(s) or remains of domestic animal(s) that show that the injury or death was caused by Mexican wolves;

(2) The likelihood that additional Mexican wolf-caused depredations or attacks of domestic animals may occur if no harassment, nonlethal control, translocation, placement in captivity, or lethal control is taken;

(3) Evidence of attractants or intentional feeding (baiting) of Mexican wolves; and

(4) Evidence that Mexican wolves are habituated to humans, human residences, or other facilities regularly occupied by humans, or evidence that Mexican wolves have exhibited unprovoked and aggressive behavior toward humans.

(D) Wildlife Services will not use M-44's and choking-type snares in occupied Mexican wolf range. Wildlife Services may restrict or modify other predator control activities pursuant to a Service-approved management agreement or a conference opinion between Wildlife Services and the Service.

(viii) Unintentional take.

(A) Take of a Mexican wolf by any person is allowed if the take is unintentional and occurs while engaging in an

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otherwise lawful activity. Such take must be reported as specified in accordance with paragraph (k)(6) of this section. Hunters and other shooters have the responsibility to identify their quarry or target before shooting; therefore, shooting a Mexican wolf as a result of mistaking it for another species will not be considered unintentional take. Take by poisoning will not be considered unintentional take.

(B) Federal, State, or tribal agency employees or their contractors may take a Mexican wolf or wolf-like animal if the take is unintentional and occurs while engaging in the course of their official duties. This includes, but is not limited to, military training and testing and Department of Homeland Security border security activities. Take of Mexican wolves by Federal, State, or tribal agencies must be reported as specified in accordance with paragraph (k)(6) of this section.

(C) Take of Mexican wolves by Wildlife Services employees while conducting official duties associated with predator damage management activities for species other than Mexican wolves may be considered unintentional if it is coincidental to a legal activity and the Wildlife Services employees have adhered to all applicable Wildlife Services' policies, Mexican wolf standard operating procedures, and reasonable and prudent measures or recommendations contained in Wildlife Service's biological and conference opinions.

(ix) Take for research purposes. The Service may issue permits under § 17.32, and designated agencies may issue permits under State and Federal laws and regulations, for individuals to take Mexican wolves pursuant to scientific study proposals approved by the agency or agencies with jurisdiction for Mexican wolves and for the area in which the study will occur. Such take should lead to management recommendations for, and thus provide for the conservation of, the Mexican wolf.

(8) Disturbance-causing land-use activities. For any activity on Federal lands that the Service determines could adversely affect reproductive success, natural behavior, or persistence of Mexican wolves, the Service will work with Federal agencies to use their authorities to temporarily restrict human access and disturbance-causing land-use activities within a 1-mi (1.6-km) radius around release pens when Mexican wolves are in them, around active dens between approximately April 1 and July 31, and around active Mexican wolf rendezvous sites between approximately June 1 and September 30, as necessary.

(9) Management.

(i) On private land within Zones 1 and 2, as defined in paragraph (k)(3) of this section, of the MWEPA, the Service or designated agency may develop and implement management actions to benefit Mexican wolf recovery in cooperation with willing private landowners, including initial release and translocation of Mexican wolves onto such lands in Zones 1 or 2 if requested by the landowner and with the concurrence of the State game and fish agency.

(ii) On tribal trust land within Zones 1 and 2, as defined in paragraph (k)(3) of this section, of the MWEPA, the Service or a designated agency may develop and implement management actions in cooperation with willing tribal governments, including: occupancy by natural dispersal, initial release, and translocation of Mexican wolves onto such lands. No agreement between the Service and a Tribe is necessary for the capture and removal of Mexican wolves from tribal trust

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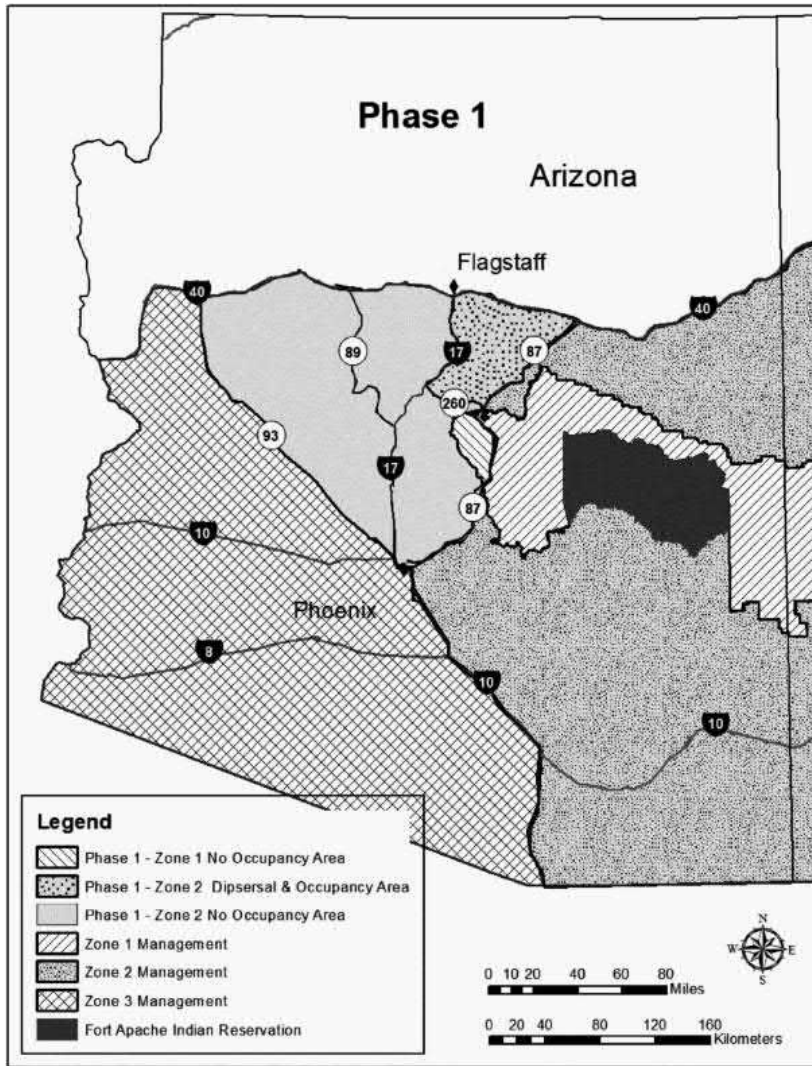
lands if requested by the tribal government.

(iii) Based on end-of-year counts, we will manage for a population objective of 300 to 325 Mexican wolves in the MWEPA in Arizona and New Mexico. So as not to exceed this population objective, we will exercise all management options with preference for translocation to other Mexican wolf populations to further the conservation of the subspecies. The Service may change this provision as necessary to accommodate a new recovery plan.

(iv) We are implementing a phased approach to Mexican wolf management within the MWEPA in western Arizona as follows:

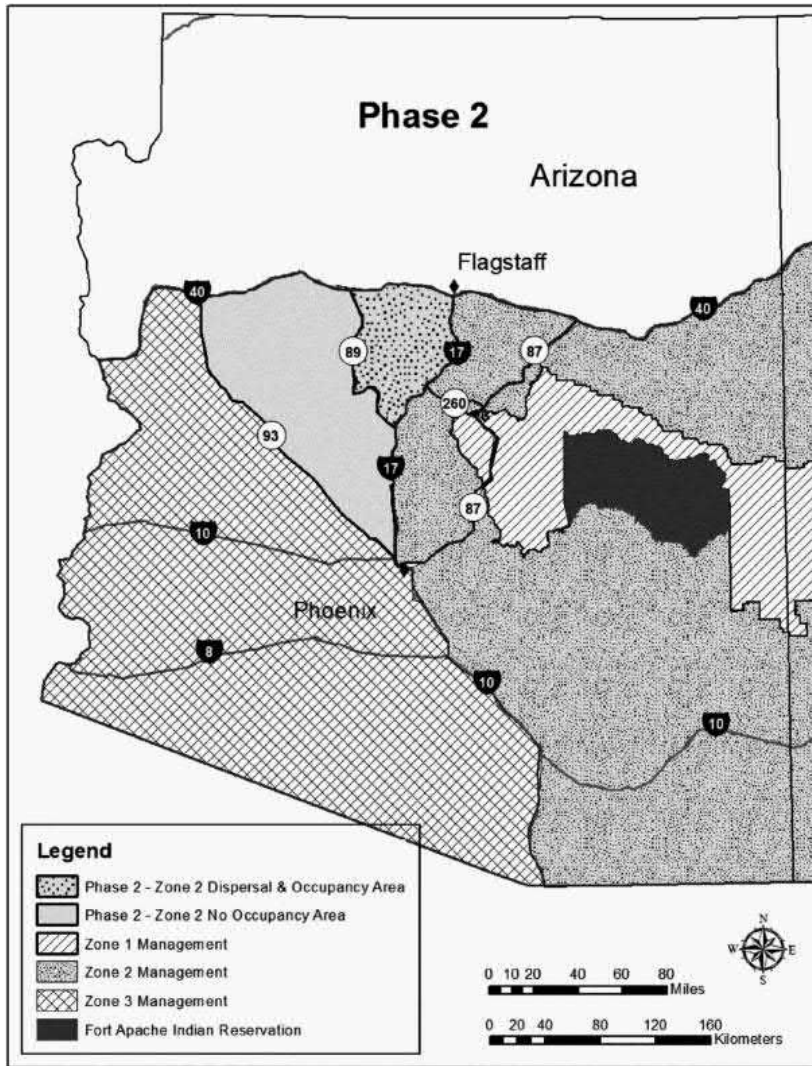
(A) Phase 1 will be implemented for the first 5 years following February 17, 2015. During this phase, initial releases and translocation of Mexican wolves can occur throughout Zone 1 with the exception of the area west of State Highway 87 in Arizona. No translocations can be conducted west of State Highway 87 in Arizona in Zone 2. Mexican wolves can disperse naturally from Zones 1 and 2 into, and occupy, the MWEPA (Zones 1, 2, and 3, as defined in paragraph (k)(3) of this section). However, during Phase 1, dispersal and occupancy in Zone 2 west of State Highway 87 will be limited to the area north of State Highway 260 and west to Interstate 17. A map of Phase 1 follows:

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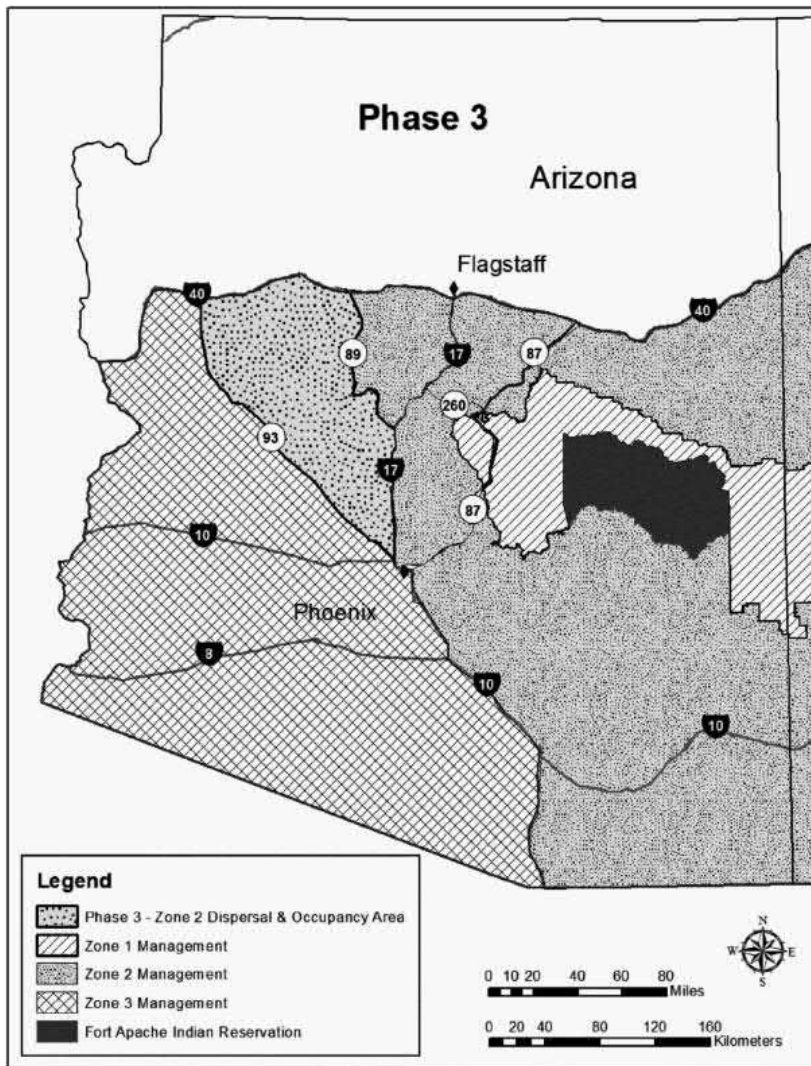
(B) In Phase 2, initial releases and translocation of Mexican wolves can occur throughout Zone 1 including the area west of State Highway 87 in Arizona. No translocations can be conducted west of Interstate Highway 17 in Arizona. Mexican wolves can disperse naturally from Zones 1 and 2 into, and occupy, the MWEPA (Zones 1, 2, and 3, as defined in paragraph (k)(3) of this section). However, during Phase 2, dispersal and occupancy west of Interstate Highway 17 will be limited to the area east of Highway 89 in Arizona. A map of Phase 2 follows:

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(C) In Phase 3, initial release and translocation of Mexican wolves can occur throughout Zone 1. No translocations can be conducted west of State Highway 89 in Arizona. Mexican wolves can disperse naturally from Zones 1 and 2 into, and occupy, the MWEPA (Zones 1, 2, and 3, as defined in paragraph (k)(3) of this section). A map of Phase 3 follows:

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(D) While implementing this phased approach, two evaluations will be conducted: The first evaluation will cover the first 5 years and the second evaluation will cover the first 8 years after February 17, 2015 in order to determine if we will move forward with the next phase.

(1) Each phase evaluation will consider adverse human interactions with Mexican wolves, impacts to wild ungulate herds, and whether or not the Mexican wolf population in the MWEPA is achieving a population number consistent with a 10 percent annual growth rate based on end-of-year counts, such that 5 years after February 17, 2015, the population of Mexican wolves in the wild is at least 150, and 8 years after February 17, 2015, the population of Mexican wolves in the wild is at least 200.

(2) If we have not achieved this population growth, we will move forward to the next phase. Regardless of the outcome of the two evaluations, by the beginning of year 12 from February 17, 2015, we will move to full implementation of this rule throughout the MWEPA, and the phased management approach will no longer apply.

(E) The phasing may be expedited with the concurrence of participating State game and fish agencies.

(10) Evaluation. The Service will evaluate Mexican wolf reestablishment progress and prepare periodic progress reports and detailed annual reports. In addition, approximately 5 years after February 17, 2015, the Service will prepare a one-time overall evaluation of the experimental population program that focuses on modifications needed to improve the efficacy of this rule, reestablishment of Mexican wolves to the wild, and the contribution the experimental population is making to the recovery of the Mexican wolf.

[OMITTED]

§ 17.84 Special rules—vertebrates., 50 C.F.R. § 17.84

Credits

[49 FR 35954, Sept. 13, 1984; 50 FR 30194, July 24, 1985; 51 FR 41797, Nov. 19, 1986; 52 FR 29780, Aug. 11, 1987; 53 FR 29337, Aug. 4, 1988; 53 FR 37580, Sept. 27, 1988; 54 FR 43969, Oct. 30, 1989; 56 FR 41488, Aug. 21, 1991; 56 FR 56334, Nov. 4, 1991; 58 FR 5657, Jan. 22, 1993; 58 FR 52031, Oct. 6, 1993; 59 FR 42691, 42693, 42711, 42714, Aug. 18, 1994; 59 FR 60264, 60279, Nov. 22, 1994; 60 FR 18947, April 13, 1995; 61 FR 11332, March 20, 1996; 61 FR 54057, Oct. 16, 1996; 62 FR 38939, July 21, 1997; 63 FR 1763, Jan. 12, 1998; 63 FR 52837, Oct. 1, 1998; 65 FR 60886, Oct. 13, 2000; 65 FR 69637, Nov. 17, 2000; 66 FR 33916, June 26, 2001; 67 FR 52427, Aug. 12, 2002; 68 FR 26508, May 16, 2003; 70 FR 1306, Jan. 6, 2005; 70 FR 17924, April 8, 2005; 71 FR 42314, July 26, 2006; 72 FR 52452, Sept. 13, 2007; 73 FR 4735, Jan. 28, 2008; 73 FR 10560, Feb. 27, 2008; 73 FR 74371, Dec. 8, 2008; 73 FR 75360, Dec. 11, 2008; 74 FR 15187, April 2, 2009; 75 FR 14498, March 26, 2010; 75 FR 65575, Oct. 26, 2010; 76 FR 6081, Feb. 3, 2011; 76 FR 25592, May 5, 2011; 76 FR 25609, May 5, 2011; 76 FR 35993, June 21, 2011; 77 FR 55604, Sept. 10, 2012; 77 FR 75297, Dec. 19, 2012; 78 FR 42713, July 17, 2013; 79 FR 26186, May 7, 2014; 80 FR 2557, Jan. 16, 2015; 80 FR 4807, Jan. 29, 2015; 80 FR 9224, Feb. 20, 2015; 80 FR 66837, Oct. 30, 2015; 80 FR 70717, Nov. 16, 2015]

SOURCE: 40 FR 44415, Sept. 26, 1975; 49 FR 33893, Aug. 27, 1984; 52 FR 29780, Aug. 11, 1987; 54 FR 5938, Feb. 7, 1989; 54 FR 38946, Sept. 21, 1989; 55 FR 39416, Sept. 27, 1990; 77 FR 75297, Dec. 19, 2012, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

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Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*)

Final

*Mexican Wolf Recovery
Program*



November 2014

Cover Sheet

Final Environmental Impact Statement

Title of Proposed Action: Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*)

Lead Agency: United States Fish and Wildlife Service, Southwest Region

Cooperating Agencies:

USDA Forest Service
USDA APHIS/Wildlife Services – Western Region
National Park Service – Intermountain Region//
Bureau of Indian Affairs – Southwest Region
Bureau of Land Management – Arizona State Office
Bureau of Land Management – New Mexico State Office
U.S. Army, Fort Huachuca, Arizona
U.S. Army, White Sands Missile Range, New Mexico
U.S. Customs and Border Protection
Arizona Game and Fish Department
New Mexico Department of Game and Fish
New Mexico Department of Agriculture
Eastern Arizona Counties Organization
Gila County, Arizona
Greenlee County, Arizona
Navajo County, Arizona
Graham County, Arizona
Cochise County, Arizona
Chaves County, New Mexico
Eddy County, New Mexico
Grant County, New Mexico
Hidalgo County, New Mexico
Lincoln County, New Mexico
Luna County, New Mexico
McKinley County, New Mexico
San Miguel County, New Mexico
Sierra County, New Mexico
Pueblo of Laguna

Abstract: The Service proposes to revise the regulations established in our 1998 Final Rule for the nonessential experimental population of the Mexican wolf. We also propose to extend the authority of the Mexican Wolf Recovery Program's Section 10(a)(1)(A) research and recovery permit to areas that are outside of the MWEPA. In this EIS we analyze the environmental consequences of a range of alternatives, including the Proposed Action and No Action alternative, for our proposal. The action would be implemented through a final nonessential experimental rule, a revised Section 10(a)(1)(A) research and recovery permit and the provision of federal funding.

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EXECUTIVE SUMMARY

The mission of the U.S. Fish and Wildlife Service is:

“Working with others, to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people”.

Under the provisions of the Endangered Species Act of 1973(16 USC §1531-1544), as amended (ESA, the Act), we have primary responsibility for the conservation of terrestrial and freshwater organisms. Section 4(f)(1) of the ESA directs the Secretary of the Interior to “develop and implement recovery plans for the conservation and survival of endangered species”. Section 10(j)(2)(A) of the Act specifies that the Secretary of the Interior may authorize the release...of any population...of an endangered species...if the Secretary determines that such release will further the conservation of such species.

The U.S. Fish and Wildlife Service (USFWS, we, us, the Service) propose to revise the regulations established in our 1998 Final Rule for the nonessential experimental population of the Mexican wolf. We also propose to extend the authority of the Mexican Wolf Recovery Program’s Section 10(a)(1)(A) research and recovery permit to areas that are outside of the MWEPA. In this EIS we analyze the environmental consequences of a range of alternatives, including the Proposed Action and No Action alternative, for our proposal. The action would be implemented through a final nonessential experimental rule, a revised Section 10(a)(1)(A) research and recovery permit and the provision of federal funding.

BACKGROUND

The Mexican wolf is the rarest, southern-most occurring, and most genetically distinct subspecies of all the North American gray wolves (Parsons 1996, Wayne and Vilá 2003, Leonard et al. 2005). The distinctiveness of the Mexican wolf and its recognition as a subspecies is supported by both morphometric (physical measurements) and genetic evidence (78 FR 35664, June 13, 2013). The Mexican wolf was listed as an endangered subspecies (*Canis lupus baileyi*) in 1976. The entire gray wolf species (*Canis lupus*) in North America south of Canada was listed as endangered in 1978, except in Minnesota where it was listed as threatened. Although this listing of the gray wolf species subsumed the previous Mexican wolf subspecies listing, the rule stated that the USFWS would continue to recognize valid biological subspecies for purposes of research and conservation.

In the United States, Mexican wolves were reintroduced to the wild in 1998 in Arizona and New Mexico as a nonessential experimental population pursuant to section 10(j) of the ESA. Captive-bred Mexican wolves can be released into a portion of the Blue Range Wolf Recovery Area (BRWRA), which is part of a larger Mexican Wolf Experimental Population Area (MWEPA). The BRWRA consists of all of the Apache and Gila National Forests. The MWEPA is a larger area surrounding the BRWRA that extends from Interstate Highway 10 to Interstate Highway 40 across Arizona and New Mexico and includes a small portion of Texas north of U.S. Highway 62/180 (63 FR 1752, January 12, 1998). Under current regulations, Mexican wolves can occupy any portion of the BRWRA, but are not allowed to establish in the MWEPA.

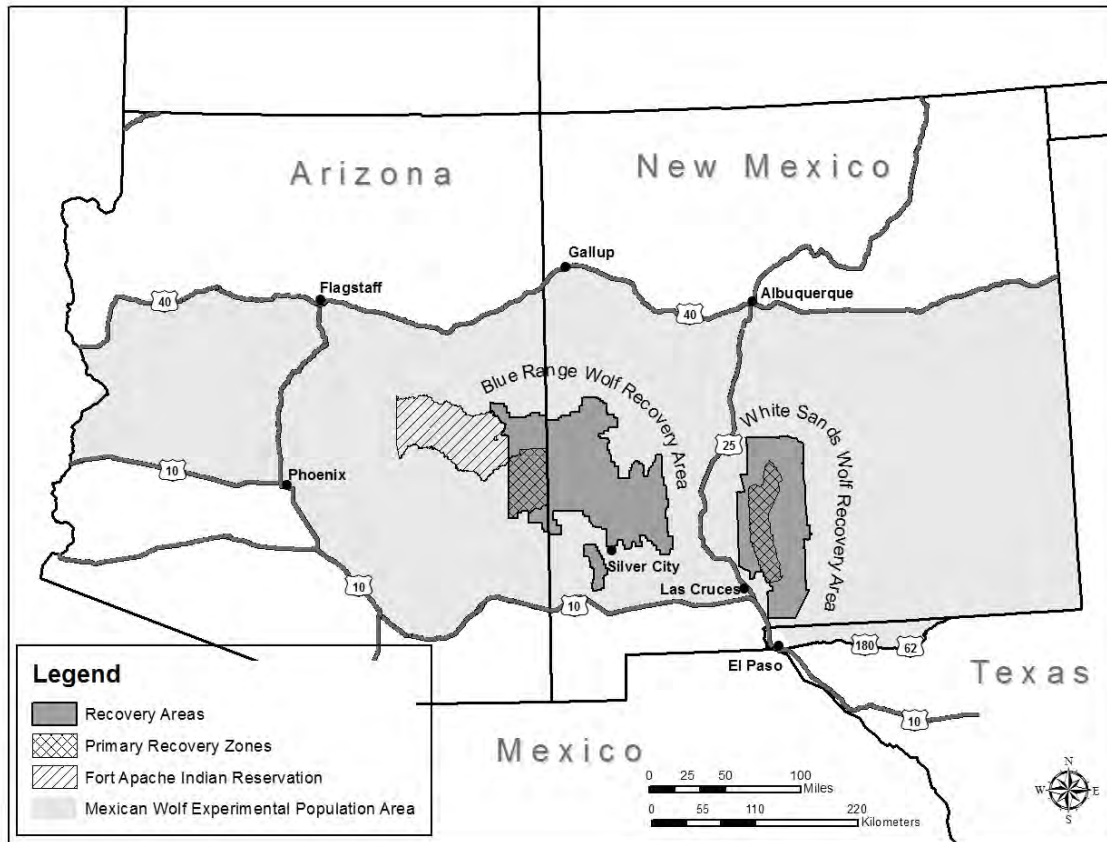


Figure ES-1. Geographic boundaries for the nonessential experimental population of the Mexican wolf as established under the 1998 Final Rule.

On June 13, 2013 we published a proposed 10(j) rule (Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf, 78 FR 35719) for the Mexican wolf nonessential experimental population in Arizona and New Mexico. This action was taken in coordination with our proposed rule, published on the same date in the Federal Register, to list the Mexican wolf as an endangered subspecies and delist the gray wolf [Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*Canis lupus baileyi*) by Listing It as Endangered (78 FR 35664)]. We published the proposed 10(j) rule to associate the nonessential experimental population of Mexican wolves with the Mexican wolf subspecies listing, if finalized, rather than with the listing of the gray wolf at the species level and because we are proposing revisions to the current Mexican wolf nonessential experimental population regulations.

On August 5, 2013 we published a Notice of Intent (NOI) to prepare the Mexican wolf EIS in the Federal Register, *Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (Canis lupus baileyi)* (78 FR 47268). The NOI solicited comments from the public, government agencies, Tribes, industry, the scientific community, or any other interested parties concerning the scope of the EIS, pertinent issues to address, and alternatives that should be analyzed. On September 5, 2013 we published notices in the Federal Register to extend the public comment period from September 11, 2013 to October 28, 2013 on both of the proposed rules; *Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf* (78 FR 54613) and *Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened*

Wildlife and Maintaining Protections for the Mexican Wolf (Canis lupus baileyi) by Listing It as Endangered (78 FR 54614). On July 25, 2014, we published a Notice of Availability (NOA) for the revised proposed rule, *Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf* (79 FR 43358) in the Federal Register, and announced the availability of the draft EIS, the scheduled public information sessions and hearings, and the opening of the 60-day public comment period running from July 25, 2014 through September 23, 2014.

PURPOSE AND NEED FOR THE PROPOSED ACTION

We propose revisions to the regulations established for the Mexican wolf reintroduction in the 1998 Final Rule and the Mexican Wolf Recovery Program's section 10(a)(1)(A) research and recovery permit (TE-091551-8 dated 04/04/2013). The **purpose** of our proposed action is to further the conservation of the Mexican wolf by improving the effectiveness of the Reintroduction Project in managing the experimental population. We intend to do this by: (1) modifying the geographic boundaries in which Mexican wolves are managed south of Interstate-40 in Arizona and New Mexico under section 10(j) of the Endangered Species Act; (2) modifying the management regulations that govern the initial release, translocation, removal and take (see the definition of "take" provided in the List of Definitions) of Mexican wolves; and (3) issuing a section 10(a)(1)(A) permit for the MWEPA and areas outside of the MWEPA. Revisions to the 1998 Final Rule and the section 10(a)(1)(A) permit are **needed** because: (1) 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; (2) there is a potential for Mexican wolves to disperse into southern Arizona and New Mexico from reintroduction areas in the states of Sonora and Chihuahua in northern Mexico; and (3) certain provisions lack clarity, are inadequate, and/or limit the efficacy and flexibility of our management of the experimental population of Mexican wolves.

In order to satisfy our purpose and need, our Proposed Action is intended to:

- Increase the total number of wolves in the experimental population and allow for their distribution over a larger area. A larger population of wolves distributed over a larger area has a higher probability of persistence than a small population in a small area.
- Provide additional areas for initial release of Mexican wolves into unoccupied suitable habitat thereby increasing the likelihood that those releases will be successful. More successful releases can provide the number of effective migrants per generation into the experimental population needed to improve the genetic variation within the population and to replace wolves that may be lost from the population due to management removal actions or mortalities.
- Improve the genetic variation within the experimental population. Higher levels of genetic variation decrease the risk of inbreeding depression and increase the probability of persistence (i.e., lowers the extinction risk) of a small population. With better representation of genetic variation, the experimental population is also better able to support the loss of individual wolves with a particular genetic make-up.
- Use the captive Mexican wolf population as the source population that will provide the genetic interchange necessary to improve the genetic variation within the experimental population. Until there are other populations of Mexican wolves established in the wild, the captive population is the only source of effective migrants to the experimental population.
- Accommodate natural dispersal behavior by allowing the experimental population to occupy and establish territories in areas of suitable habitat throughout an expanded MWEPA. Natural dispersal and colonization of new areas will improve the probability of persistence of the experimental population.

- Improve the effectiveness of the Reintroduction Project through the use of voluntary management agreements. Such agreements can further the conservation of the Mexican wolf through the proactive implementation of management actions taken in cooperation with willing private land owners and tribal governments.
- Effectively manage Mexican wolves within an expanded MWEPA in a manner that furthers the conservation of the Mexican wolf while being responsive to the needs of the local community in cases of depredation or nuisance behavior by wolves. We expect that modifying the provisions governing the take of Mexican wolves to provide clarity and consistency will contribute to our efforts to find the appropriate balance that supports wolf population growth while minimizing nuisance and depredation impacts on local stakeholders.
- Establish a coherent management regime under the proposed 10(j) rule in an expanded MWEPA. The area of Arizona and New Mexico south of I-10 may provide stepping stone habitat and dispersal corridors for wolves dispersing north from Mexico and south from the experimental population in the BRWRA. Management of all Mexican wolves in this area under the proposed 10(j) rule will improve the effectiveness of the Reintroduction Project in minimizing and mitigating wolf-human conflict.

PROPOSED ACTION AND ALTERNATIVES

We are proposing revisions to the regulations established for the Mexican wolf reintroduction in the 1998 Final Rule and the Mexican Wolf Recovery Program's section 10(a)(1)(A) research and recovery permit (TE-091551-8 dated 04/04/2013). In summary we propose to:

- Modify the geographic boundaries in which Mexican wolves are managed south of Interstate-40 in Arizona and New Mexico under section 10(j) of the Endangered Species Act.
- Modify the management regulations that govern the initial release, translocation, removal and take (see the definition of "take" provided in the List of Definitions) of Mexican wolves.
- Issue a section 10(a)(1)(A) permit for the MWEPA and areas outside of the MWEPA.

These actions would be implemented through a Final Nonessential Experimental Rule, an Endangered Species Act (Act) Section 10(a)(1)(A) research and recovery permit, and provision of federal funding.

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LIST OF DEFINITIONS

Active den means a den or a specific site above or below ground that is used by Mexican wolves on a daily basis to bear and raise pups, typically between on or about April 1 and July 31. More than one den site may be used in a single season.

Blue Range Wolf Recovery Area means the entirety of the Gila National Forest in New Mexico and the Apache National Forest in Arizona in which Mexican wolves may be initially released from captivity, translocated, and managed to reduce conflicts with humans and other land uses to achieve recovery.

Cross-fostering means offspring that are removed from their biological parents and placed with surrogate parents.

Depredation means the confirmed killing or wounding of lawfully present domestic animals by one or more Mexican wolves. The Service, U.S. Department of Agriculture, Animal and Plant Health Inspection Service (Wildlife Services), or other Service-designated agencies will confirm cases of wolf depredation on lawfully present domestic animals. Cattle trespassing on Federal lands are not considered lawfully present domestic animals.

Designated agency means a Federal, State, or tribal agency designated by the Service to assist in implementing this rule, all or in part, consistent with a Service-approved management plan, special management measure, conference opinion pursuant to section 7(a)(4) of the Act, section 6 of the Act as authorized pursuant to § 17.31 for State game and fish agencies with authority to manage Mexican wolves, or a valid permit issued by the Service under § 17.32.

Disturbance-causing land-use activity means any activity on Federal lands within a 1-mi (1.6-km) radius around release pens when Mexican wolves are in them, around active dens between April 1 and July 31, and around active Mexican wolf rendezvous sites between June 1 and September 30, that the Service determines could adversely affect reproductive success, natural behavior, or persistence of Mexican wolves. Such activities may include, but are not limited to—timber or wood harvesting, prescribed fire, mining or mine development, camping outside designated campgrounds, livestock husbandry activities (e.g. livestock drives, roundups, branding, vaccinating, etc.), off-road vehicle use, hunting, and any other use or activity with the potential to disturb wolves. The following activities are specifically excluded from this definition:

- (i) Lawfully present livestock and use of water sources by livestock;
- (ii) Livestock drives if no reasonable alternative route or timing exists;
- (iii) Vehicle access over established roads to non-Federal land where legally permitted activities are ongoing if no reasonable alternative route exists;
- (iv) Use of lands within the National Park or National Wildlife Refuge Systems as safety buffer zones for military activities and Department of Homeland Security border security activities;
- (v) Fire-fighting activities associated with wildfires; and
- (vi) Any authorized, specific land use that was active and ongoing at the time Mexican wolves chose to locate a den or rendezvous site nearby.

Domestic animal means livestock (domestic alpacas, bison, burros (donkeys), cattle, goats, horses, llamas, mules, and sheep, or other domestic animals defined as livestock in Service-approved State and tribal Mexican wolf management plans) and non-feral dogs.

Federal land means land owned and under the administration of Federal agencies including, but not limited to, the Service, National Park Service, Bureau of Land Management, U.S. Forest Service, Department of Energy, or Department of Defense.

Feral dog means any dog (*Canis familiaris*) or wolf–dog hybrid that, because of absence of physical restraint or conspicuous means of identifying it at a distance as non-feral, is reasonably thought to range freely without discernible, proximate control by any person. Feral dogs do not include domestic dogs that are penned, leashed, or otherwise restrained (e.g., by shock collar) or which are working livestock or being lawfully used to trail or locate wildlife.

Harass means intentional or negligent actions or omissions that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.

In the act of biting, killing, or wounding means grasping, biting, wounding, or feeding upon a live domestic animal on non-Federal land or live livestock on Federal land. The term does not include a Mexican wolf feeding on an animal carcass.

Initial release means the release of Mexican wolves to the wild within Zone 1, or in accordance with tribal or private land agreements in Zone 2, that have never been in the wild, or releasing pups that have never been in the wild and are less than 5 months old within Zones 1 or 2. The initial release of pups less than 5 months old into Zone 2 allows for the cross-fostering of pups from the captive population into the wild, as well as enables translocation-eligible adults to be re-released in Zone 2 with pups born in captivity.

Intentional harassment means deliberate, pre-planned harassment of Mexican wolves, including by less-than-lethal means (such as 12-gauge shotgun rubber-bullets and bean-bag shells) designed to cause physical discomfort and temporary physical injury, but not death. Intentional harassment includes situations where the Mexican wolf or wolves may have been unintentionally attracted, or intentionally tracked, waited for, chased, or searched out; and then harassed. Intentional harassment of Mexican wolves is only allowed under a permit issued by the Service or its designated agency.

Livestock means domestic alpacas, bison, burros (donkeys), cattle, goats, horses, llamas, mules, and sheep, or other domestic animals defined as livestock in Service-approved State and tribal Mexican wolf management plans. Poultry is not considered livestock under this rule.

Mexican Wolf Experimental Population Area (MWEPA) (definition from 1998 Final Rule) means an area in Arizona and New Mexico that lies south of Interstate Highway 40 to Interstate Highway 10 into which Mexican wolves are allowed to disperse from the blue Range Wolf Recovery Area and establish, but are managed by reducing conflicts with humans and land uses through such means as hazing, trapping, translocations, and removals. Under the proposed action and action alternatives MWEPA means an area in Arizona and New Mexico including Zones 1, 2, and 3, that lies south of Interstate Highway 40 to the international border with Mexico.

Non-Federal land means any private, state-owned, or tribal trust land.

Occupied Mexican wolf range means an area of confirmed presence of Mexican wolves based on the most recent map of occupied range posted on the Service's Mexican Wolf Recovery Program website at <http://www.fws.gov/southwest/es/mexicanwolf/>. Specific to Prohibitions (5)(iii) and (vii)(D) of the proposed rule, Zone 3 and tribal trust lands are not considered occupied range.

Opportunistic harassment means scaring any Mexican wolf from the immediate area by taking actions such as discharging firearms or other projectile-launching devices in proximity to, but not in the direction of, the wolf, throwing objects at it, or making loud noise in proximity to it. Such harassment might cause temporary, non-debilitating physical injury, but is not reasonably anticipated to cause permanent physical injury or death. Opportunistic harassment of Mexican wolves can occur without a permit issued by the Service or its designated agency.

Problem wolves mean Mexican wolves that, for purposes of management and control by the Service or its designated agent(s), are:

- (i) Individuals or members of a group or pack (including adults, yearlings, and pups greater than 4 months of age) that were directly involved in a depredation on lawfully present domestic animals;
- (ii) Habituated to humans, human residences, or other facilities regularly occupied by humans; or
- (iii) Unprovoked and aggressive towards humans.

Rendezvous site means a gathering and activity area regularly used by Mexican wolf pups after they have emerged from the den. Typically, these sites are used for a period ranging from about 1 week to 1 month in the first summer after birth during the period from June 1 to September 30. Several rendezvous sites may be used in succession within a single season.

Service-approved management plan means management plans approved by the Regional Director or Director of the Service through which Federal, State, or tribal agencies may become a designated agency. The management plan must address how Mexican wolves will be managed to achieve conservation goals in compliance with the Act, the experimental population rule, and other Service policies. If a Federal, State, or tribal agency becomes a designated agency through a Service-approved management plan, the Service will help coordinate their activities while retaining authority for program direction, oversight, guidance, and authorization of Mexican wolf removals.

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)).

Translocate means to release Mexican wolves into the wild that have previously been in the wild.

Tribal trust land means any lands title to which is either: held in trust by the United States for the benefit of any Indian tribe or individual; or held by any Indian tribe or individual subject to restrictions by the United States against alienation. For purposes of the proposed rule, tribal trust land does not include land purchased in fee title by a tribe. We consider fee simple land purchased by tribes to be private land.

Unacceptable impact to a wild ungulate herd shall be determined by a State game and fish agency based upon ungulate management goals, or a 15 percent decline in an ungulate herd as documented by a State game and fish agency, using their preferred methodology, based on the preponderance of evidence from bull to cow ratios, cow to calf ratios, hunter days, and/or elk population estimates.

Unacceptable impacts from wolf predation on game populations (definition from 1998 Final Rule) means two consecutive years with a cumulative 35 percent decrease in population or hunter harvest estimates for a particular species of ungulate in a game management unit or distinct herd segment compared to the pre-wolf 5-year average (unit or herd must contain average of greater than 10 animals). If wolf predation is shown to be a primary cause of ungulate population declines (greater than 50 percent of documented adult or young mortality), then wolves may be moved to reduce ungulate mortality rates and assist in herd recovery, but only in conjunction with application of other common, professionally acceptable, wildlife management techniques.

Unintentional take means the take of a Mexican wolf by any person if the take is unintentional and occurs while engaging in an otherwise lawful activity, is take that occurs despite the use of due care, is coincidental to an otherwise lawful activity, and is not done on purpose. Taking a Mexican wolf by poisoning or shooting will not be considered unintentional take.

Wild ungulate herd means an assemblage of wild ungulates (bighorn sheep, bison, deer, elk, or pronghorn) living in a given area.

Wounded means exhibiting scraped or torn hide or flesh, bleeding, or other evidence of physical damage caused by a Mexican wolf bite.

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1 INTRODUCTION, PURPOSE, AND NEED FOR ACTION

This Environmental Impact Statement (EIS) has been prepared by the Department of Interior, United States Fish and Wildlife Service (USFWS) in compliance with the National Environmental Policy Act (NEPA) of 1969 (42 United States Code [U.S.C.] § 4321 et seq.); the Council on Environmental Quality (CEQ) Regulations for Implementing NEPA (Title 40 Code of Federal Regulations [C.F.R.] §§ 1500-1508); DOI Regulations, (43 CFR Part 46 61292), USFWS 550 FW 1 Draft Fish and Wildlife Service NEPA Reference Handbook (USFWS 2013) and other applicable USFWS guidance and instructions. The NEPA process is intended to help public officials make decisions based on the understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment.

1.1 INTRODUCTION

The Mexican wolf (*Canis lupus baileyi*) (also known as the Mexican gray wolf) is listed as an endangered species protected by the Endangered Species Act of 1973, as amended (ESA, the Act). Efforts to reestablish the Mexican wolf in the wild are being conducted in both the United States and Mexico. In the United States the U.S. Fish and Wildlife Service (USFWS, we, us, the Service) is the Federal agency responsible for the recovery of the Mexican wolf. Under section 10(j) of the Act and our regulations at 50 CFR 17.81, the Service may designate a population of endangered or threatened species that has been or will be released into suitable habitat outside the species' current natural range as an experimental population. We established regulations for the experimental population of Mexican wolves in our Final 10(j) Rule entitled "*Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico*" (63 FR 1752, January 12, 1998, "1998 Final Rule"). This rule provides the regulatory guidelines under which the Mexican Wolf Reintroduction Project operates.

In 1998 we began reintroducing captive-bred Mexican wolves into the wild in the Blue Range Wolf Recovery Area (BRWRA) in Arizona and New Mexico as part of our strategy to recover the Mexican wolf. The BRWRA is part of the larger Mexican Wolf Experimental Population Area (MWEPA). The BRWRA consists of the entire Gila and Apache National Forests in east-central Arizona and west-central New Mexico. The MWEPA is a larger area surrounding the BRWRA that extends from Interstate Highway 10 to Interstate Highway 40 across Arizona and New Mexico and includes a small portion of Texas north of U.S. Highway 62/180 (63 FR 1752, January 12, 1998). The Mexican Wolf Recovery Program's Section 10(a)(1)(A) research and recovery permit (TE-091551-8 dated 04/04/2013) issued under 50 CFR 17.32 covers management activities for the nonessential experimental population of Mexican wolves. Authorized permittees may take any Mexican wolf in the nonessential experimental population in a manner consistent with a USFWS-approved management plan or special management measure adopted by the USFWS pursuant to the provisions of 50 CFR 17.84(k)(3)(ix), as well as to conduct activities related directly to the conservation, protection, and recovery of reintroduced nonessential experimental populations of Mexican gray wolves within Arizona and New Mexico.

The Service proposes to revise the regulations established in our 1998 Final Rule for the nonessential experimental population of the Mexican wolf. We also propose to extend the authority of the Mexican Wolf Recovery Program's Section 10(a)(1)(A) research and recovery permit to areas that are outside of the MWEPA. In this EIS we analyze the environmental consequences of a range of alternatives, including the Proposed Action and No Action alternative, for our proposal. The action would be implemented through a final nonessential experimental rule, a revised Section 10(a)(1)(A) research and recovery permit and the provision of federal funding.

1.1.1 Regulatory Background

The Mexican wolf was listed as an endangered subspecies (*Canis lupus baileyi*) on April 28, 1976 (41 FR 17740). The entire gray wolf species (*Canis lupus*) in North America south of Canada was listed as

endangered on March 9, 1978, except in Minnesota where it was listed as threatened (43 FR 9607). Although this listing of the gray wolf species subsumed the previous Mexican wolf subspecies listing, the rule stated that the USFWS would continue to recognize valid biological subspecies for purposes of research and conservation (43 FR 9607). On August 4, 2010, we published a 90-day finding on two petitions to list the Mexican wolf as an endangered subspecies with critical habitat (75 FR 46894). In the 90-day finding, we determined that the petitions presented substantial scientific information that the Mexican wolf may warrant reclassification as a subspecies or Distinct Population Segment (DPS). As a result of this finding, we initiated a status review. On October 9, 2012, we published our 12-month finding in the Federal Register (77 FR 61375) stating that the listing of the Mexican wolf as a subspecies or DPS was not warranted at that time because Mexican wolves already receive the protections of the Act under the species-level gray wolf listing of 1978. During 2011 and 2012, we conducted a 5-year review of the gray wolf finding that the entity currently described on the List of Endangered and Threatened Wildlife should be revised to reflect the distribution and status of gray wolf populations in the lower 48 States and Mexico by removing all areas currently included in its range, as described in the CFR, except where there is a valid species, subspecies, or DPS that is threatened or endangered (USFWS 2012).

On June 13, 2013 we published a proposed rule (*Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf*, 78 FR 35719) (proposed 10(j) rule) for the Mexican wolf nonessential experimental population in Arizona and New Mexico. This action was taken in coordination with our proposed rule, published on the same date in the Federal Register, to list the Mexican wolf as an endangered subspecies and delist the gray wolf [*Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (Canis lupus baileyi) by Listing It as Endangered* (78 FR 35664)]. We published the proposed 10(j) rule to associate the nonessential experimental population of Mexican wolves with the Mexican wolf subspecies listing, if finalized, rather than with the listing of the gray wolf at the species level and because we are proposing revisions to the current Mexican wolf nonessential experimental population regulations. Following review of public comments submitted on the proposed 10(j) rule, we published a revised proposed rule (*Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf*, 79 FR 43358) (revised proposed 10(j) rule) on July 25, 2014. In the same Federal Register notice we announced the availability of a Draft Environmental Impact Statement (DEIS) for the *Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (Canis lupus baileyi)*.

1.1.2 Previous Environmental Review

The environmental effects of the reintroduction of the Mexican wolf have been previously analyzed in the following National Environmental Policy Act (NEPA) documents:

- Final Environmental Impact Statement (FEIS) for the Reintroduction of the Mexican Wolf within its Historic Range in the Southwestern United States. November 06, 1996 (USFWS 1996).
- Final Environmental Assessment (FEA) for the Translocation of Mexican Wolves Throughout the Blue Range Wolf Recovery Area in Arizona and New Mexico. February 10, 2000 (USFWS 2000).
- Decision Memo, Mexican Wolf Reintroduction, Pen Installation and Associated Temporary Camp at Twenty-two Release Sites, 2008-2012. USDA Forest Service, Apache-Sitgreaves National Forest. February 18, 2009 (USFS 2009).
- Decision Memo, Installation of Temporary Mexican (Gray) Wolf Holding Pens, USDA Forest Service, Gila National Forest. March 16, 2006 (USFS 2006).

These documents are incorporated, where appropriate, by reference into this Environmental Impact Statement (CEQ, Sec 1502.21) in an effort to eliminate repetitive discussions of issues previously

addressed, exclude from consideration issues already decided, and to focus on the issues ripe for decision in this environmental review (CEQ, Sec. 1502.20 and Sec. 1508.28).

1.1.3 Description of the Mexican Wolf

The Mexican wolf is the rarest, southern-most occurring, and most genetically distinct subspecies of all the North American gray wolves (Parsons 1996, Wayne and Vilá 2003, Leonard et al. 2005). The distinctiveness of the Mexican wolf and its recognition as a subspecies is supported by both morphometric (physical measurements) and genetic evidence (78 FR 35664, June 13, 2013). Mexican wolves tend to be patchy black, brown to cinnamon, and cream in color and are somewhat smaller than other gray wolves (Figure 1-1). Adults are about five feet (1.5 meters) in length and generally weigh between 50-90 pounds (23-41 kilograms) with a height at the shoulder of approximately 2-2.5 feet (0.6-0.8 meters) (78 FR 35664, June 13, 2013).



(Credit: Jacquelyn M. Fallon)

Figure 1-1. Mexican wolves

Mexican wolves historically inhabited montane woodlands and adjacent grasslands in northern Mexico, New Mexico, Arizona, and the Trans-Pecos region of western Texas (Brown 1988) at elevations of 4000-5000 ft. where ungulate prey were numerous (Bailey 1931). The subspecies may have also ranged north into southern Utah and southern Colorado within zones of intergradation where interbreeding with other gray wolf subspecies may have occurred (Parsons 1996, Leonard et al. 2005).

Numbering in the thousands before European settlement, Mexican wolf populations declined rapidly in the 20th century primarily due to concerted Federal, state, and private predator control and eradication efforts (Mech and Boitani 2003). By the early 1970s, the Mexican wolf was considered extirpated from its historical range in the southwestern United States (USFWS 1982). No Mexican wolves were known to exist in the wild in the United States or Mexico from 1980 until the beginning of our Reintroduction Project in 1998 (USFWS 2010).

1.1.4 Description of the Mexican Wolf Recovery Program

The Service has been engaged in efforts to conserve and ensure the survival of the Mexican wolf for over three decades. The first Mexican Wolf Recovery Team was formed in 1979, and the United States and

Mexico signed the Mexican Wolf Recovery Plan in September 1982. The 1982 Mexican Wolf Recovery Plan did not provide recovery/delisting criteria, but did provide a prime objective:

“To conserve and ensure the survival of Canis lupus baileyi 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” (USFWS 1982).

This prime objective has since guided the reintroduction effort for the Mexican wolf in the United States under the auspices of the Mexican Wolf Recovery Program.

The current management structure of the Mexican wolf recovery effort distinguishes between the Service’s Mexican Wolf Recovery Program (Recovery Program) and the interagency Mexican Wolf Blue Range Reintroduction Project (Reintroduction Project). The Recovery Program encompasses captive breeding, reintroduction, and all related conservation activities for the Mexican wolf (USFWS 2010). The primary statute governing the Mexican Wolf Recovery Program is the Endangered Species Act. Section 4(f)(1) of the ESA states that the Secretary of the Interior shall develop and implement recovery plans for the conservation and survival of endangered species. Guidance for the specific activities conducted under the Mexican Wolf Recovery Program is provided within several documents including: (1) the 1982 Mexican Wolf Recovery Plan (USFWS 1982); (2) the 1996 Final Environmental Impact Statement (FEIS) (USFWS 1996) (3) the 1998 Final Rule; (4) the 1998 Mexican Wolf Interagency Management Plan (USFWS 1998); and (5) Federal Fish and Wildlife Permit number TE091551-8, dated 04 April 2013, issued under 50 CFR 17.32. The programmatic permit covers management activities for nonessential experimental wolves in Arizona and New Mexico (USFWS 2013a). The Reintroduction Project encompasses the management activities associated with the experimental population.

A comprehensive description of the Recovery Program and the Reintroduction Project is provided in the 2010 Mexican Wolf Conservation Assessment (USFWS 2010) and in annual reports available online at <http://www.fws.gov/southwest/es/mexicanwolf/>.

1.1.4.1 Captive Breeding Program

A binational captive-breeding program between the United States and Mexico was initiated in the late 1970s with the capture of the last remaining Mexican wolves in the wild. Referred to as the Mexican Wolf Species Survival Plan (SSP) the captive breeding program’s ultimate objective is to provide healthy offspring for release into the wild (Figure 1-2), while conserving the Mexican wolf subspecies genome (Lindsey and Siminski 2007). The establishment and success of the captive breeding program temporarily prevented immediate absolute extinction of the Mexican wolf and, by producing surplus animals, has enabled us to undertake the reestablishment of the Mexican wolf in the wild (USFWS 2010, 78 FR 35664, June 13, 2013). The wolves in the captive population are the only source of animals for release into the wild. All Mexican wolves alive today originated from three lineages (Ghost Ranch, Aragon and McBride) consisting of a total of seven wolves. From the breeding of these original seven “founding” Mexican wolves and generations of their offspring, the captive population has expanded to its current (July 2014) size of 248 wolves in 55 facilities (Figure 1-3) in the United States and Mexico (Siminski and Spevak 2013). The 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) (Fredrickson et. al 2007, 78 FR 35664, June 13, 2013).



(Credit: U.S. Fish and Wildlife Service)

Figure 1-2. Saddle Pack litter at the Sevilleta Wolf Management Facility Facility



(Credit: U.S. Fish and Wildlife Service)

Figure 1-3. The Sevilleta Wolf Management Facility

1.1.4.2 The Mexican Wolf Blue Range Reintroduction Project

The Mexican Wolf Blue Range Wolf Reintroduction Project (Reintroduction Project) has been working to restore a self-sustaining population of “at least 100” wild Mexican wolves distributed over 5,000 square miles (12,950 km²) of the Blue Range Wolf Recovery Area (BRWRA), consistent with the prime objective of the 1982 Mexican Wolf Recovery Plan (USFWS 1982, Paquet et al. 2001). The Reintroduction Project is a collaborative effort among Federal, state, county, and tribal agencies that: (a) have regulatory jurisdiction and management authority over Mexican wolves or the lands that Mexican wolves occupy in Arizona and New Mexico; or (b) are responsible for representing constituency interests while striving to make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting (MOU 2010).

Under the provisions of the 1998 Final Rule we established two recovery areas, the BRWRA and the White Sands Wolf Recovery Area (WSWRA), within the Mexican Wolf Experimental Population Area (MWEPA) (Figure 1-4). We designated primary recovery zones within each of these recovery areas where the initial release of Mexican wolves from captivity to the wild is authorized. Natural dispersal and translocations (re-release of wolves with previous wild experience) are allowed throughout the recovery areas. Wolves which establish territories wholly outside of the recovery areas must be captured and returned or placed in captivity (63 FR 1752, January 12, 1998). In collaboration with our partners in the Reintroduction Project, we began reintroducing Mexican wolves into the BRWRA in 1998. In 2000, the

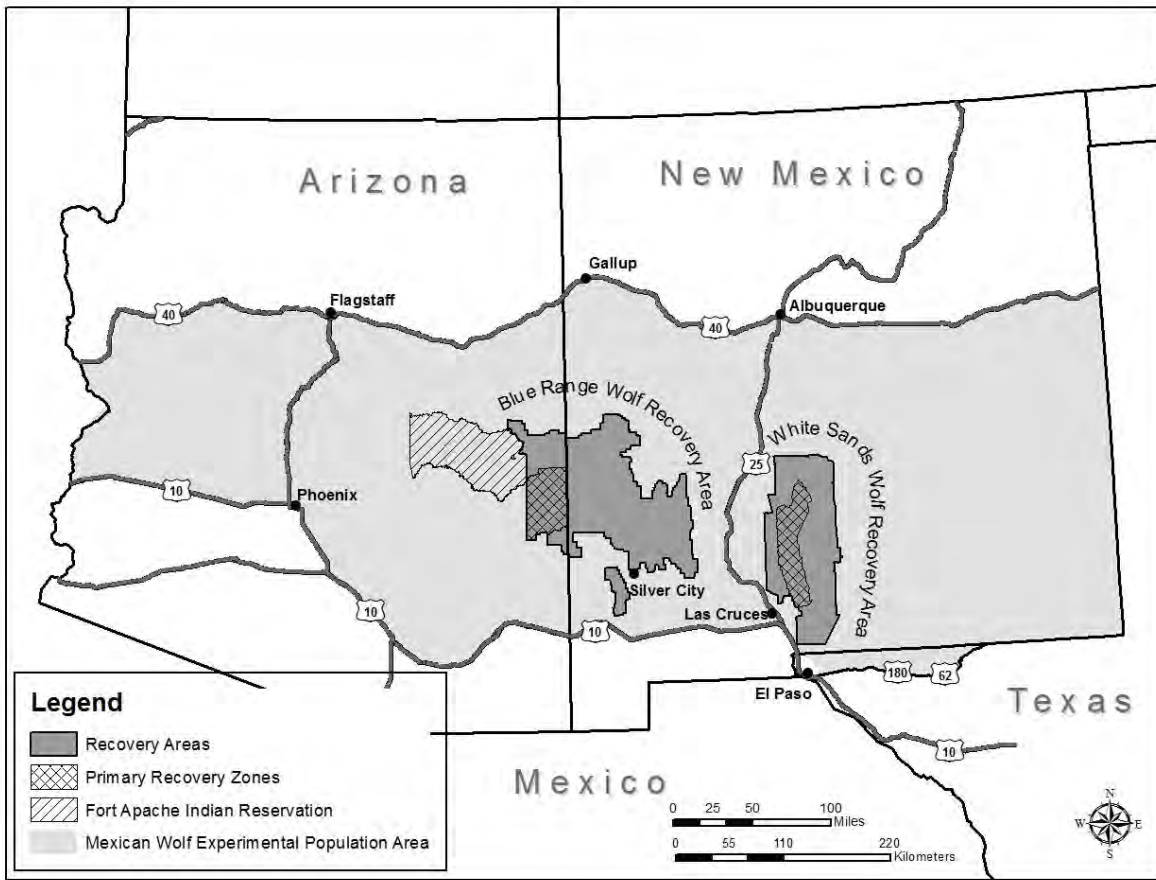


Figure 1-4. Geographic boundaries for the nonessential experimental population of the Mexican wolf as established under the 1998 Final Rule.

White Mountain Apache Tribe (WMAT) agreed to allow free-ranging Mexican wolves to inhabit the Fort Apache Indian Reservation (FAIR). Continued occupancy of Mexican wolves on the FAIR is dependent upon tribal agreement. We have only released Mexican wolves into the BRWRA and the FAIR. We have never utilized the WSWRA for the release of wolves.



(Credit: U.S. Fish and Wildlife Service)

Figure 1-5. Blue Range Wolf Recovery Area sign

The BRWRA is located wholly within the Apache and Gila National Forests in east-central Arizona and west-central New Mexico. It encompasses 7,212 square miles (mi²) (18,679 square kilometers (km²)). The adjoining FAIR provides an additional 2,627 mi² (6,804 km²) for wolf occupancy and releases subject to tribal agreement. The BRWRA is characterized by mixed conifer forests (Figure 1-6) in the higher elevations and semi-desert grasslands in the lower elevations, with ponderosa pine (*Pinus ponderosa*) forests dominating the area in between (USFWS 1996).



(Credit: Jacquelyn M. Fallon)

Figure 1-6. Mixed conifer forest within the Blue Range Wolf Recovery Area

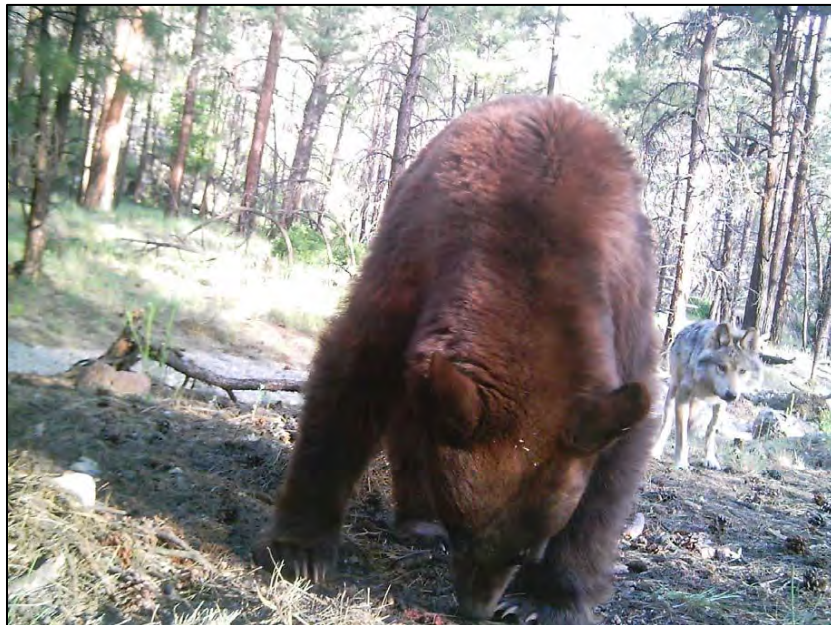
Potential native ungulate prey of Mexican wolves within the BRWRA include elk (*Cervus elaphus*) (Figure 1-7), white-tailed deer (*Odocoileus virginianus*), mule deer (*O. hemionus*), and to a lesser extent, pronghorn antelope (*Antilocapra americana*), javelina (*Tayassu tajacu*), and Rocky Mountain bighorn sheep (*Ovis canadensis*) (Parsons 1996). Other sources of prey include small mammals and birds (Reed et. al 2006).



(Credit: U.S. Fish and Wildlife Service)

Figure 1-7. Elk in the Blue Range Wolf Recovery Area

Other large predators in the BRWRA include coyotes (*Canis latrans*), cougars (*Puma concolor*), and black bears (Figure 1-8) (*Ursus americanus*) (USFWS 1996).



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-8. Black bear and Mexican wolf in the Blue Range Wolf Recovery Area

Cattle and sheep grazing are permitted within the BRWRA; some allotments are grazed year-round. The actual numbers of cattle (Figure 1-9) and sheep varies each year relative to environmental factors and are generally lower under drought conditions.

More information on the BRWRA is provided in Chapter 3 and can be found in the 5-Year Review (AMOC and IFT 2005) and the 1996 Final Environmental Impact Statement (USFWS 1996).



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-9. Cattle grazing in the Blue Range Wolf Recovery Area

Nonessential experimental status, as established by the 1998 Final Rule, allows for the reintroduction and ongoing management of wolves, including relaxing prohibitions on take (see the definition of “take” provided in the Definition of Terms), removal of problem wolves, and the translocation of wolves within the BRWRA. An Interagency Field Team (IFT), consisting of field staff from the Service and our partner agencies, carries out the majority of the routine management activities of the Reintroduction Project. The IFT has the primary responsibilities of collecting data, monitoring (Figure 1-10), and managing the experimental Mexican wolf population. On a daily basis IFT management activities and field work may include:

Monitoring individual wolves and pack movements

Adult and juvenile wolves and pups of appropriate size and weight that are released from captivity or trapped in the wild are radio collared with a goal to maintain a minimum of two collared wolves per pack. Collared wolves are radio-tracked periodically from the ground and a minimum of once a week from the air (weather permitting). Locational data are entered into the Reintroduction Project’s database to be correlated with reports for specific incidents (e.g., depredations, nuisance reports), management actions (e.g., captures, translocations, initial releases) and pack activities (e.g., denning, predation, mortalities).

Depredation response, outreach and education

In order to minimize the occurrence of depredation incidents and nuisance behavior IFT activities may include proactive outreach and education efforts with livestock producers and local residents. Response



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-10. Helicopter count and capture methods

to reports of depredation incidents or nuisance behavior may include the use of non-lethal techniques such as: capture/radio collar; guard animals; fladry; taste aversion; harassment using scare devices and noise (e.g., cracker shells) and/or non-lethal munitions (e.g., rubber bullets, bean bag rounds, paintballs); den disturbance; manipulation of pack movements using food caches; and movement of cattle away from dens and rendezvous sites (Figure 1-11, Figure 1-12, Figure 1-13). If the problem persists or becomes chronic the wolf (or wolves) may be captured and translocated or removed to captivity. Lethal control may be used in accordance with approved management plans, protocols, and with the authorization of the Service’s Mexican Wolf Recovery Coordinator.



(Credit: U.S. Fish and Wildlife Service)

Figure 1-11. Non-lethal munitions



(Credit: U.S. Fish and Wildlife Service)

Figure 1-12. Range rider, fladry and fencing



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-13. Fladry and fencing

Initial releases and translocations

Wolves that are released from captivity or translocated may be transported by vehicle, all-terrain vehicle, mule, or helicopter to release areas (Figure 1-14). At the release sites approved by the U.S. Forest Service, IFT personnel may build temporary mesh or chain link paneled pens (Figure 1-15). Food caches may be maintained as necessary until the wolves leave the area or demonstrate their ability to hunt and provide for themselves in the wild. Personnel often camp near the release site to monitor the wolves.



(Credit: George Andrejko, Arizona Game and Fish Department)

Figure 1-14. Transport by mule into wilderness area release site



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-15. Pair of Mexican wolves inside a modified soft release pen

Conduct research and collect information

These activities may include: aerial and ground telemetry monitoring; observation of wolves to obtain visual counts on pack size and composition (i.e. number of adults, juveniles, pups in a pack); depredation investigations; predation analysis; howling surveys; collection of biological data (blood, feces, physical

measurements and examination); and collaboration with researchers for data collection and analysis on approved projects (Figure 1-16, Figure 1-17).



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-16. A Mexican wolf being processed and fitted with a radio-telemetry collar



(Credit: Mexican Wolf Interagency Field Team)

Figure 1-17. Trail camera picture used for remote monitoring

We select wolves from the captive population for release to the wild based on several factors, including their genetic makeup, reproductive performance, behavior, physical suitability, and overall response to the adaptation process in pre-release facilities (Figure 1-18) (USFWS 2010). We conducted the initial release of 93 wolves from captivity into the Primary Recovery Zone (PRZ) of the BRWRA and the FAIR between 1998 and the end of 2013. The PRZ is approximately 1171 square miles (3033 km²) in area, or

approximately 16 percent of the entire BRWRA (Figure 1-4). It is situated entirely within the southern portion of the Apache National Forest in Arizona. The Secondary Recovery Zone (SRZ) encompasses all of the Gila National Forest in New Mexico and the northern part of the Apache National Forest in Arizona. It is the remainder of the BRWRA not included in the PRZ. Wolves released in the PRZ of the BRWRA or on the FAIR are allowed to naturally disperse into the SRZ.



(Credit: U.S. Fish and Wildlife Service)

Figure 1-18. Release of a collared Mexican wolf

We may translocate or temporarily place in captivity wild wolves for authorized management purposes such as: depredation behaviors that do not warrant removal from the BRWRA; nuisance behaviors that do not warrant removal from the BRWRA; boundary violations (e.g., wolves establishing territories wholly outside of the BRWRA or FAIR); necessary veterinary care; and facilitation of pair bonding. Wolves that we temporarily place in captivity may be translocated into the PRZ and SRZ of the BRWRA as well as the FAIR (contingent on WMAT concurrence); however, additional management considerations may prevent re-release of such animals (i.e. genetics, behavior). The Mexican Wolf Recovery Coordinator may authorize removals by lethal or non-lethal (capture and removal from the BRWRA) methods due to severe depredation or nuisance behavior. For the period 1998-2013, we permanently removed 36 wolves. This total includes 12 animals removed by lethal control. In summary, from 1998 to 2013 we released 93 wolves from captivity, permanently removed 36 wolves and conducted 124 temporary removals and 107 translocations (Table 1-1).

Table 1-1. Mexican Wolf Experimental Population Releases, Removals and Translocations (Blue Range Wolf Recovery Area and Fort Apache Indian Reservation) from 1998 to 2012

| Year | Wolves Released | Number of Permanent Removals | Number of Temporary Removals | Number of Translocations |
|------|-----------------|------------------------------|------------------------------|--------------------------|
| 1998 | 13 | 2 | 4 | 3 |
| 1999 | 21 | 0 | 12 | 2 |
| 2000 | 16 | 4 | 19 | 18 |
| 2001 | 15 | 1 | 9 | 6 |
| 2002 | 9 | 3 | 4 | 7 |
| 2003 | 8 | 1 | 14 | 15 |

| | | | | |
|-------|----|-----------------|------------------|------------------|
| 2004 | 5 | 1 | 6 | 9 |
| 2005 | 0 | 5 | 16 | 16 |
| 2006 | 4 | 8 | 10 | 6 |
| 2007 | 0 | 9 | 14 | 5 |
| 2008 | 1 | 0 | 2 | 6 |
| 2009 | 0 | 0 | 7 | 6 |
| 2010 | 0 | 0 | 0 | 1 |
| 2011 | 0 | 1 | 1 | 4 |
| 2012 | 0 | 1 | 0 | 0 |
| 2013 | 1 | 0 | 6 | 3 |
| Total | 93 | 36 ¹ | 124 ² | 107 ² |

¹ Permanent removals include 12 animals removed by lethal control.

² Temporary removals in excess of translocations equal net loss to population of 17 animals.

The IFT conducts an end-of-year count each January in order to establish the minimum number of wolves in the experimental population (Figure 1-19). The Mexican wolf minimum population count was 83 wolves in 2013 (Table 1-2).



(Credit: Mexican Wolf Interagency Field Team)

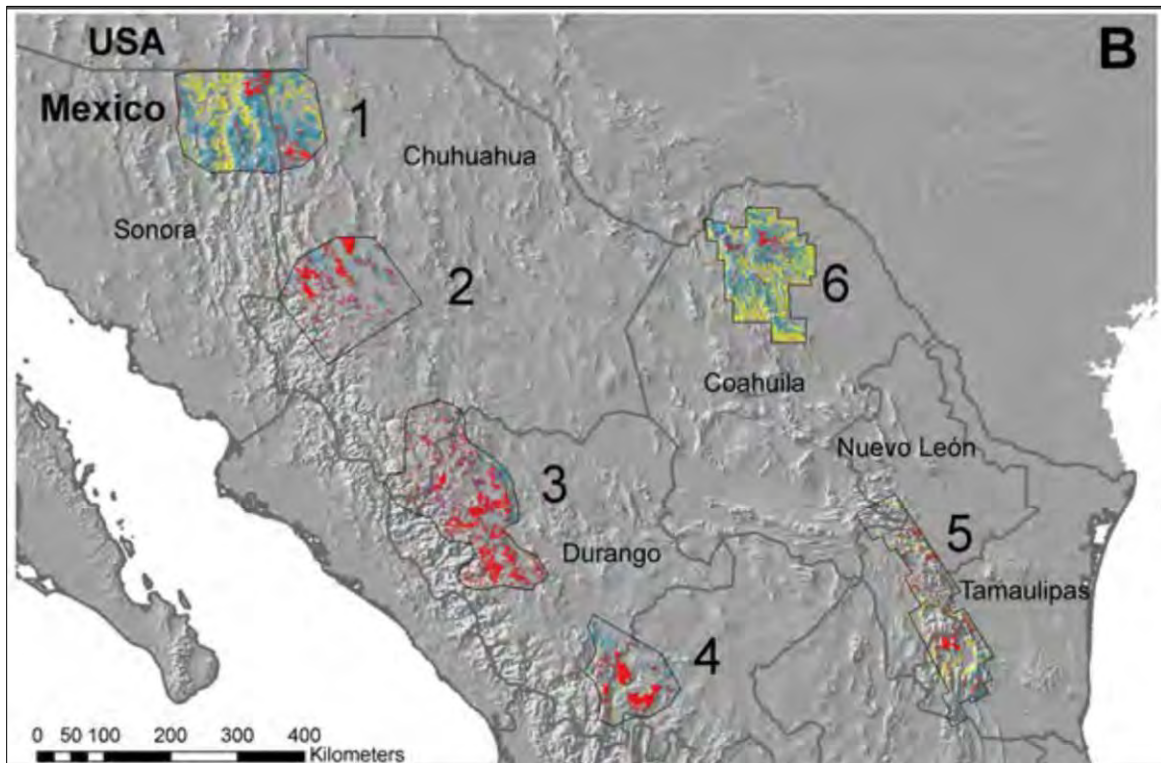
Figure 1-19. Mexican wolves in the Blue Range Wolf Recovery Area observed from aircraft during January end of year count

1.1.5 Mexican Wolf Recovery in Mexico

Responsibility for the reintroduction of the Mexican wolf in Mexico is shared by two Federal agencies, Comisión Nacional de Areas Naturales Protegidas (CONANP) and Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT's) Dirección General de Vida Silvestre. In October 2011, Mexico initiated the reestablishment of Mexican wolves to the wild with the release of five captive-bred Mexican wolves into the San Luis Mountains just south of the U.S.–Mexico border. Mexico has continued to release animals into the wild during the past few years. Through August 2014, Mexico released a total of 14 adult Mexican wolves, of which 11 died or are believed dead, and 1 was removed

for veterinary care. Of the 11 Mexican wolves that died or are believed dead: six were due to illegal killings (Four from poisoning and two were shot); one wolf was presumably killed by a mountain lion; three causes of mortality are unknown (presumed illegal killings because collars were found, but not the carcasses); and one disappeared (neither collar nor carcass has been found). The remaining two adult Mexican wolves were documented with five pups in 2014, marking the first successful reproductive event in Mexico.

The Mexican government has informed the Service of their plans to continue releases of Mexican wolves. Mortality due to illegal killing has resulted in setbacks to the reestablishment of a population of wolves in Mexico. However, with the likelihood of additional releases, we expect the number of Mexican wolves in the wild in Mexico to fluctuate from zero to several wolves or packs of wolves in or around Sonora, Chihuahua, or other Mexican States.



(Modified from Araiza et al. 2012)

Figure 1-20. Potential reintroduction areas in northern Mexico.

1, Sonora-Chihuahua; 2, Central Chihuahua; 3, Chihuahua-Durango; 4, Durango-Zacatecas; 5, Nuevo Leon-Tamaulipas; 6, Coahuila). Colored areas have intermediate probability of anthropogenic mortality within the reintroduction area. Red, Blue, and Yellow colors indicate high, intermediate and low quality habitat, respectively.

1.2 PURPOSE AND NEED FOR THE PROPOSED ACTION

We are proposing revisions to the regulations established for the Mexican wolf reintroduction in the 1998 Final Rule and the Mexican Wolf Recovery Program’s section 10(a)(1)(A) research and recovery permit (TE-091551-8 dated 04/04/2013). The **purpose** of our proposed action is to further the conservation of the Mexican wolf by improving the effectiveness of the Reintroduction Project in managing the experimental population. We intend to do this by: (1) modifying the geographic boundaries in which Mexican wolves are managed south of Interstate-40 in Arizona and New Mexico under section 10(j) of the Endangered Species Act; (2) modifying the management regulations that govern the initial release,

translocation, removal and take (see the definition of “take” provided in the List of Definitions) of Mexican wolves; and (3) issuing a section 10(a)(1)(A) permit for the MWEPA and areas outside of the MWEPA. Revisions to the 1998 Final Rule and the section 10(a)(1)(A) permit are **needed** because: (1) 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; (2) there is a potential for Mexican wolves to disperse into southern Arizona and New Mexico from reintroduction areas in the states of Sonora and Chihuahua in northern Mexico; and (3) certain provisions lack clarity, are inadequate, and/or limit the efficacy and flexibility of our management of the experimental population of Mexican wolves.

1.2.1 Our Purpose: To Further the Conservation of the Mexican Wolf

The mission statement of the U.S. Fish and Wildlife Service is:

“Working with others, to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people.”

Under the provisions of the Endangered Species Act of 1973 (16 USC §1531-1544), as amended (ESA, the Act), we have primary responsibility for the conservation of terrestrial and freshwater organisms. Section 4(f)(1) of the ESA directs the Secretary of the Interior to “develop and implement recovery plans for the conservation and survival of endangered species”. Section 10(j)(2)(A) of the Act specifies that the Secretary of the Interior may authorize the release...of any population...of an endangered species...if the Secretary determines that such release will further the conservation of such species. At the time the 1982 Mexican Wolf Recovery Plan was written the Mexican Wolf Recovery Team saw “no possibility for complete delisting of the Mexican wolf”. The team felt that “conserving and ensuring the survival of the Mexican wolf is the most that can be achieved today” and “worded its prime objective accordingly” (see Section 1.1.4) (USFWS 1982). The Mexican Wolf Recovery Team also recognized that, as written, the prime objective represented “a working hypothesis” which would be “subject to amendment as more data on the Mexican wolf are acquired” (USFWS 1982). We recognize that the reestablishment of a single experimental population of Mexican wolves is inadequate for recovery and we are 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” (USFWS 2010, Carroll et al. 2014). The successful reestablishment of an experimental population of Mexican wolves in the BRWRA was envisaged “as the first step toward recovery” (USFWS 1982; 63 FR 1752-1772). While we intend for the experimental population of Mexican wolves that we reestablish within the MWEPA to contribute to recovery, full recovery is beyond the scope of this EIS. Our intention, under Section 10(j)(2)(A) of the Act, is to “further the conservation” of the Mexican wolf by improving the effectiveness of the Reintroduction Project in managing the experimental population of Mexican wolves.

1.2.2 Our Need: Population Growth, Distribution and Recruitment

We have gained extensive knowledge over the last 16 years of the Reintroduction Project regarding the efficacy of the 1998 Final Rule. In particular, we have documented the synergistic or antagonistic interaction of our regulations and our management actions and their effect on the persistence and growth of, and the genetic variation within, the experimental population (USFWS 2010). For example, we have observed additive negative population effects of the regulations that restrict initial release and cause boundary removals and increased management related to removal of nuisance or depredating wolves. In the years 1998 through 2002, we conducted a high number of initial releases and translocations ($n = 110$) and a moderate number of removals ($n = 58$), which contributed to a net gain of 38 wolves in the overall population and the highest average population growth rate (1.003) (e.g. the average population growth was approximately 100 percent per year: calculated as the population count at year two minus the

population count at year one divided by the population at year one) experienced by the population. From 2003 through 2007, we conducted a moderate number of initial releases and translocations ($n = 68$) and a high number of temporary and permanent removals ($n = 84$), resulting in a net gain of 10 wolves in the overall population and an average population growth rate that was relatively flat (0.069). Between 2008 and 2013, which was characterized by a low number of releases and translocations ($n = 21$) but also a low number of temporary and permanent removals ($n = 17$), we observed a net gain of 31 wolves and a higher average population growth rate (0.095) than the previous phase (Tables 1-2 and 1-3).

Table 1-2. Mexican Wolf Experimental Population Growth from 1998 to 2013

| Year | Releases and Translocations | Number of Mortalities ¹ | Removals (Both permanent and temporary) ^{2,3} | Minimum Population Count (Observed) |
|-------|-----------------------------|------------------------------------|--|-------------------------------------|
| 1998 | 16 | 5 | 6 | 4 |
| 1999 | 23 | 3 | 12 | 15 |
| 2000 | 34 | 5 | 23 | 22 |
| 2001 | 21 | 9 | 10 | 26 |
| 2002 | 16 | 3 | 7 | 42 |
| 2003 | 23 | 12 | 15 | 55 |
| 2004 | 14 | 3 | 7 | 46 |
| 2005 | 16 | 4 | 21 | 42 |
| 2006 | 10 | 6 | 18 | 59 |
| 2007 | 5 | 4 | 23 | 52 |
| 2008 | 7 | 13 | 2 | 52 |
| 2009 | 6 | 8 | 7 | 42 |
| 2010 | 1 | 6 | 0 | 50 |
| 2011 | 4 | 8 | 2 | 67 |
| 2012 | 0 | 4 | 1 | 80 |
| 2013 | 4 | 7 | 6 | 83 |
| Total | 200 | 100 | 160 | N/A |

¹Mortalities include 55 due to illegal mortality (55%), 14 due to vehicle collision (14%), 18 due to natural causes (18%), 8 due to unknown causes (8%), 0 awaiting necropsy results, and 5 due to other causes (5%).

²Permanent removals include 12 animals removed by lethal control.

³Temporary removals in excess of translocations equal net loss to population of 17 animals.

Table 1-3. Mexican Wolf Experimental Population Growth Rate from 1998 to 2013

| Period | Releases and Translocations | Number of Mortalities ¹ | Removals (Both permanent and temporary) ^{2,3} | Net Gain in Population | Growth Rate |
|-----------|-----------------------------|------------------------------------|--|------------------------|-------------|
| 1998-2002 | 110 | 25 | 58 | 38 | 1.003 |
| 2003-2007 | 68 | 29 | 84 | 10 | 0.069 |
| 2008-2013 | 21 | 46 | 17 | 31 | 0.095 |

The effects of our management regime related to initial releases, translocations, and removals are apparent when assessing the status of the population. Our progress in establishing and growing the population has been much slower than expected (USFWS 1996, USFWS 2010). We expected to reach a population size of at least 100 wolves in 2006. We have yet to reach that objective based on our end-of-year minimum population counts (Table 1-2). The growth rates we have documented over time in the Mexican wolf population are within the range, but on the low side, of those documented in other wild wolf populations, which generally vary between 0.07 and 1.40 (Fuller et al. 2003). In a managed wild population such as ours, management removals are similar to mortality and releases are similar to recruitment (Paquet et al. 2001). Our observation of the growth rates of the experimental population, which have been near static over much of the reintroduction, correlated with the general phases of our management activity, validate the recommendations in the three (Paquet et al. 2001) and five year (AMOC and IFT 2005) reviews and our Mexican Wolf Conservation Assessment (USFWS 2010). These reports universally identified inflexible regulations resulting in a low number of initial releases and limits to dispersal as counterproductive to the achievement of the population growth and distribution needed for the successful establishment of an experimental population of Mexican wolves.

The size, growth and distribution of a population are important because they influence its likelihood of persistence. A species with a small population, narrowly distributed, is less likely to persist (in other words it has a higher risk of extinction) than a species that is widely and abundantly distributed. This is due to the sensitivity of small populations to stochastic (i.e., uncertain) demographic events such as low litter size or high adult mortality and to environmental stochasticity such as variation in prey base, catastrophic fire, drought, or disease epidemic. Small populations are also thought to be more vulnerable to extinction because of the deleterious effects of inbreeding (Lynch et al. 1995, Bijlsma et al. 2000, Whitlock 2000, Keller and Waller 2002, Fredrickson et al. 2007, USFWS 2010, Hoffman et al. 2014). The combination of a small number of animals with low genetic variation can have antagonistic effects on the population. When that happens, a self-amplifying cycle can be created in which mortality results in additional reduction in genetic variation, which leads to decreased fitness and lower survival rates. Because of this self-amplifying cycle, sometimes termed an “extinction vortex”, the rate of extinction for small populations is higher than predicted from the population size alone (Fagan and Holmes 2006, Palomares et al. 2012). Conversely, supporting the maintenance of genetic variation, once it is established, can be achieved by establishing larger, rather than smaller, effective (i.e., animals in the breeding population) population sizes. In other words, a larger population with more breeding animals has better potential maintenance of genetic variation than a small population with a small number of breeding animals. The Mexican wolf, in particular, is more susceptible to population decline than other gray wolf populations because of smaller litter sizes, less genetic variation, lack of immigration from other populations, and potential low pup recruitment (USFWS 2010).

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, based on the best available information, can help us achieve “the first step toward recovery” as envisaged in the 1982 Mexican Wolf Recovery Plan. There are several studies in the scientific literature that help inform our establishment of a population objective for the MWEPA. The recommendations of Wayne and Hedrick (2010) are based on the genetic aspects (effective population size) of the Mexican wolf relative to that of the Northern Rockies gray wolf. Because of the degree of inbreeding, higher level of human-caused mortality, and lower likelihood of persistence of Mexican wolves they suggest that the recovery goals for the Northern Rocky Mountains should serve as a starting point for Mexican wolf recovery goals. They conclude that for the successful recovery of the Mexican wolf a metapopulation with at least three connected subpopulations of 250 wolves would likely be necessary to achieve recovery. They also suggest that if natural gene flow (i.e., through natural dispersal and breeding) does not occur between these subpopulations then artificial movement (i.e., management actions such as translocations and initial releases) may be necessary (Wayne and Hedrick 2010).

Carroll et al. (2014) performed analyses of potential recovery scenarios for the Mexican wolf using a population viability model, pedigree analyses of Mexican wolves currently in the BRWRA or captivity, and habitat models related to connectivity. Carroll et al. (2014) analyzed the variation of mortality and dispersal metrics relative to extinction and quasi-extinction (i.e., the probability of being relisted as threatened from a delisted status) probabilities in a metapopulation structure consisting of three populations that were connected via dispersal. The metapopulation extinction threshold was established as a 5 percent population extinction risk, as is commonly used in recovery plans (Carroll et al. 2014). The risk of extinction varied by both population size and the number of effective migrants per generation (an effective migrant is an animal that comes from outside a population and successfully reproduces within the population). The risk of extinction for population sizes below 200 was affected by the number of migrants exchanging genetic information with the population. A population of 100 had a greater than 5 percent extinction risk, even with 3 effective migrants per generation, while a population of 125 was more secure with 2.5 to 3.0 effective migrants per generation, and a population of 150 was secure with greater than 0.5 effective migrants per generation (Carroll et al. 2014). This effect occurred because the migrants provided genetic exchange between the populations. Genetic exchange between populations leads to increased genetic variation within the population which improves the probability of persistence for each population and reduces the extinction and quasi-extinction risk. Carroll et al. (2014) also examined a quasi-extinction threshold. In this analysis, they demonstrated that at certain population sizes with higher levels of effective migration the probability of quasi-extinction was reduced (Carroll et al. 2014). A population comprised of between 175 and 200 wolves had a less than 50 percent probability of quasi-extinction depending on whether the population had 0.5 to 1.0 effective migrants per generation. Population sizes of 300 to 325 achieved closer to a 10 percent probability of quasi-extinction regardless of the number of effective migrants per generation. This analysis suggests that for larger population sizes (above 300) with adequate genetic variation, migration between populations becomes a less important factor affecting the probability of persistence (Carroll et al. 2014). Based on this best available information, we consider a population objective of 300 to 325 Mexican wolves within the MWEPA throughout both Arizona and New Mexico to be adequate as a “first step” that could contribute to recovery.

The genetic status of the Mexican wolf population in captivity and the wild is an important factor in our conservation efforts. Higher 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. The Mexican wolf captive breeding effort was initiated with seven founders from three Mexican wolf lineages. It was not managed to retain genetic variation until several years into the effort (Siminski and Spevak 2013). This captive population is the only source of Mexican wolves for initial release into the experimental population. The experimental population of Mexican wolves now

currently occupying the BRWRA 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 (population mean kinship) of these animals suggest that on average they are as related to one another as outbred full siblings are related to each other (Siminski and Spevak 2012). When gene diversity falls below 90% of that in the founding population, reproduction may be increasingly compromised by, among other factors, lower birth weights, smaller litter sizes, and greater neonatal mortality (Fredrickson et al. 2007, Siminski and Spevak 2012). As of July 2014, the experimental population of wolves in the BRWRA has a retained gene diversity of 74.52%, and when compared to 2010 has shown a slight decline in both retained gene diversity and FGE (Siminski and Spevak 2014). Currently, the animals in the experimental population (mean kinship = 0.2548) are 50% more closely related to one another than those in the captive population (mean kinship = 0.166) due to inadequate representation of two of the three Mexican wolf lineages in the wild population (Siminski and Spevak 2014). There is evidence of inbreeding depression in the experimental population (Fredrickson et al. 2007) and without management action to improve its genetic composition, inbreeding will accumulate and heterozygosity and alleles will be lost much faster than in the captive population (78 FR 35664, June 13, 2013).

Table 1-4. Population Projections Compared to Mexican Wolf End of Year Minimum Population Counts in New Mexico and Arizona from 1998 to 2013

| Year | Minimum Population Count (Observed) | Population Projected in 1996 Final Environmental Impact Statement (FEIS) ¹ |
|------|-------------------------------------|---|
| 1998 | 4 | 7 |
| 1999 | 15 | 14 |
| 2000 | 22 | 23 |
| 2001 | 26 | 35 |
| 2002 | 42 | 45 |
| 2003 | 55 | 55 |
| 2004 | 46 | 68 |
| 2005 | 42 | 83 |
| 2006 | 59 | 102 |
| 2007 | 52 | - |
| 2008 | 52 | - |
| 2009 | 42 | - |
| 2010 | 50 | - |
| 2011 | 67 | - |
| 2012 | 80 | - |
| 2013 | 83 | - |

¹FEIS projections were made only through 2006 (USFWS 1996)

Our management regime, especially related to initial releases, has had significant effect on the maintenance and improvement of the genetic variation of the population. We are able to influence the maintenance or improvement of the genetic variation in the experimental population by the selection for

initial release of genetically appropriate wolves from the captive population. Over the course of the Reintroduction Project we have not been able to conduct the number of initial releases that would give us the level of effective migrants per generation sufficient to establish or maintain adequate genetic variation in the experimental population. An effective migrant is an animal that comes from outside a population and successfully reproduces within the population. For wolves, a generation is every four years.

With its current level of genetic variation and at its current size of a minimum of 83 wolves the experimental population is considered small (Shaffer 1987, Boyce 1992, Mills 2007, USFWS 2010), genetically impoverished, and significantly below estimates of viability appearing in the scientific literature (Carroll et al. 2014, Wayne and Hedrick 2010). This would be true even at the 1982 Recovery Plan objective of “at least 100 wolves”. Due to wolves’ social structure and based on documented Mexican wolf pack size in the experimental population a census population of approximately 100 Mexican wolves would have an effective population (i.e. the number of breeding animals) of approximately 28 animals (Packard 2003 http://www.fws.gov/southwest/es/mexicanwolf/pdf/MW_popcount_web.pdf). An effective population size of 28 wolves is inadequate to ensure short or long-term genetic fitness for the experimental population of Mexican wolves in the BRWRA (USFWS 2010).

Current literature suggests that the single experimental population of Mexican wolves would have a higher likelihood of persistence if it is able to increase in size and have an adequate number of effective migrants to contribute to enhancing the population’s genetic variation (Carroll et al. 2014, Wayne and Hedrick 2010). The most commonly proposed rule of thumb for connectivity between populations states that one genetically effective migrant per generation into a population is sufficient to minimize the loss of polymorphism and heterozygosity within populations (Allendorf 1983 as cited in Carroll et al. 2014). However, a Vortex (population viability) model used by Carroll et al. (2014), which incorporated genetic data to evaluate the relationship between connectivity and persistence for a restored Mexican wolf metapopulation of three subpopulations of equal size, demonstrates that higher levels of effective migration are necessary to ensure persistence of the Mexican wolf, particularly until the population reaches a size of at least 250.

In the context of a metapopulation, effective migration is achieved through dispersal from one population to another. In the context of our current single experimental population we intend to apply the information from these studies (Carroll et al. 2014, Wayne and Hedrick 2010) by using initial releases from the captive population as a source of effective migrants to the experimental population. To do so we need to modify our regulations to increase the flexibility of the Reintroduction Project to conduct initial releases. If the genetic variation within the experimental population can be substantially improved by releasing more wolves from captivity with appropriate genetic background and the population is allowed to grow and disperse, natural reproduction and integration of those offspring into the population (i.e., recruitment) will serve to maintain genetic variation and lessen our need over time to conduct initial releases. Based on the best available information in current literature (Carroll et al. 2014, Wayne and Hedrick 2010), we need 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 (see Appendix D). Under its current regulations the Reintroduction Project has not achieved this level of “effective migration” via initial releases in the last 8 years (Table 1-5).

Table 1-5. Success Rate and Number of Initial Releases of Mexican Wolves in the Blue Range Wolf Recovery Area from 1998 to 2013

| Year | No. of Wolves Initially Released From Captivity | No. of Initially Released Wolves with Known Outcomes ¹ | No. of Initially Released Wolves Considered Successful ² | Percentage of Initially Released Wolves that Were Successful ³ |
|-------|---|---|---|---|
| 1998 | 13 | 12 | 1 | 8.3 |
| 1999 | 21 | 14 | 0 | 0.0 |
| 2000 | 16 | 12 | 5 | 41.7 |
| 2001 | 15 | 12 | 2 | 16.7 |
| 2002 | 9 | 6 | 3 | 50 |
| 2003 | 8 | 5 | 1 | 20 |
| 2004 | 5 | 5 | 2 | 40 |
| 2005 | 0 | 0 | 0 | N/A |
| 2006 | 4 | 4 | 1 | 25 |
| 2007 | 0 | 0 | 0 | N/A |
| 2008 | 1 | 1 | 0 | 0 |
| 2009 | 0 | 0 | 0 | N/A |
| 2010 | 0 | 0 | 0 | N/A |
| 2011 | 0 | 0 | 0 | N/A |
| 2012 | 0 | 0 | 0 | N/A |
| 2013 | 1 | 1 | 0 | 0 |
| Total | 93 | 72 | 15 | 20.8 |

¹Some wolves disappeared prior to determining the success of the animal. Generally, these animals were pups that were too young to have a radio collar.

²Success was defined as wolves that bred and produced pups in the wild prior to removal from the wild or mortality. In some cases animals that were removed were translocated back into the wild.

³Calculated as the successful releases divided by the number of released animals with known outcomes.

1.2.2.1 Expanding the area available for the initial release of captive-born Mexican wolves

The regulatory constraints imposed by the designation of Primary and Secondary Recovery Zones within the BRWRA have impeded our ability to conduct initial releases of Mexican wolves. The availability of additional suitable, unoccupied wolf habitat is needed to increase the opportunities for, and the probability

of, successful initial releases. A greater number of successful initial releases would be expected to lead to an increase in the number of effective migrants per generation into the experimental population from the captive population. An increase in the number of effective migrants per generation is needed to improve and maintain adequate genetic variation in the experimental population. The initial release of wolves from the captive population may also be required for other management purposes.

Our implementation of the 1998 Final Rule, which limits the initial release of Mexican wolves to the PRZ, a comparatively small subunit (16 percent) of the BRWRA, has resulted in a lack of management flexibility to conduct initial releases. Release sites in approximately half of the PRZ are ranked among the lowest in overall suitability when compared to sites in the Gila and Aldo Leopold Wilderness Areas in the SRZ which are currently available only for translocations (IFT 2009). The southern half of the PRZ is situated below the Mogollon Rim where livestock are present year round and deer, rather than elk, are the primary native prey species (USFWS 2000). Although deer were expected to be the primary native prey species utilized by wolves when the Reintroduction Project began, observation of reintroduced Mexican wolves suggest that elk is their preferred prey species and constitute the majority of their diet (Paquet et al. 2001, AMOC and IFT 2005, Reed et al. 2006, Merkle et al. 2009). Wolves are territorial and defend large areas from other wolves (Mech and Boitani 2003). The experimental population of wolves has established home ranges within much of the PRZ where elk are present (USFWS 2013b). As a result, suitable sites for initial releases in the PRZ have become increasingly difficult to identify. The number of Mexican wolves released into the wild has significantly decreased from the early years of the Reintroduction Project when a large area of unoccupied suitable habitat was available in the PRZ. In the seven years from 1998 through 2004 we were able to release 87 wolves from captivity. In contrast, only two wolves were released from captivity in the seven year period from 2007 through 2013 (Table 1-1).

Experience in the Reintroduction Project has shown that initial releases are more likely to be successful when wolves are released at sites in areas that have a relatively abundant prey base of elk, limited or no livestock calving in the area, and clear separation from established wolf pack territories (AMOC and IFT 2005). Our experience indicates that wolves with no wild experience are more likely to be involved in nuisance behavior following initial release (AMOC and IFT 2005). Conducting initial releases at approved release sites in wilderness or other remote locations is intended to lessen the likelihood of wolf interaction with humans or livestock during their initial post-release acclimation period. This is supported by research identifying factors important for wolf reestablishment, including those that reduce the potential for wolf-human conflict and human-caused mortality, such as the absence of roads, low human population density and limited livestock grazing (Mladenoff et al. 1995, Carroll et al. 2003, Oakleaf et al. 2006). Release success is defined as a wolf that ultimately breeds and produces pups in the wild (Phillips et al. 2003, AMOC and IFT 2005).

Paquet et al. (2001) stated in the 3-Year Review that the small size of the PRZ was hindering rapid establishment of the experimental population and recommended that the 1998 Final Rule be modified to allow releases in the SRZ. AMOC/IFT concluded in the 5-Year Review that the provision governing release of wolves solely into the PRZ “restricts the pool of available release candidates, restricts release of wolves for management purposes such as genetic augmentation, and causes public perception issues between the states of Arizona and New Mexico, and thus is not sufficient to achieve the current population objective” (AMOC and IFT 2005). Opening the entire BRWRA to the initial release of wolves would allow us to select optimal release sites in remote locations such as the Gila and Aldo Leopold Wilderness Areas in the Gila National Forest. A proposal to allow initial releases throughout the BRWRA combined with an expansion of the BRWRA would increase the number of available potential release sites in remote locations, including additional wilderness areas. The availability of more potential release sites throughout the entire BRWRA would provide greater management flexibility in selecting optimal sites for initial releases with the goal to: (1) maximize the probability of release success; (2) increase the number of effective migrants per generation into the experimental population from the

captive population; (3) minimize the potential for wolf-human interaction; (4) reduce the potential for intraspecific (i.e. wolf against wolf) strife and mortality; and (4) minimize depredation opportunities for initial-released wolves. Without an increase in the number of initial releases and without a better release success rate, the number of effective migrants 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 contributing to the self-amplifying cycle discussed in Section 1.2.2. In such a scenario, high rates of mortality, combined with low rates of effective migration, would result 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.

Increasing the number of initial releases we conduct could also have beneficial effects on the captive breeding program. In absence of additional holding facilities, the captive breeding program is currently constrained by space limitations. Releasing captive animals to the wild would provide space for captive animals to be moved between facilities as necessary for pairing and for housing offspring subsequent to breeding (Siminski and Spevak 2012).

The ability to select the optimum release site from a greater number of suitable sites distributed over a larger area would give us the management flexibility necessary to improve the success rate of our initial releases. It would also benefit the captive breeding program by moving animals out of holding facilities into the wild thus freeing needed space within the facilities. An improved success rate for initial releases would increase the number of effective migrants per generation from the captive population into the experimental population resulting in an improvement in the genetic fitness of the experimental population. A larger experimental population with wider distribution and greater genetic variation as a result of more animals having been successfully recruited from the captive population will be more persistent and can be managed more effectively in response to wolf-livestock conflict, nuisance behaviors, and mortality factors. For these reasons we believe that allowing the initial release of Mexican wolves throughout the BRWRA, particularly if the BRWRA is expanded to include additional areas of national forest, would substantially contribute to our efforts to further the conservation of the Mexican wolf by improving the effectiveness of our Reintroduction Project in managing the experimental population of Mexican wolves.

1.2.2.2 Allow Mexican wolves to naturally disperse from the Blue Range Wolf Recovery Area (BRWRA) and to occupy and establish territories within the Mexican Wolf Experimental Population Area (MWEPA)

The area of Arizona and New Mexico south of I-40 contains approximately 32,244 mi² (83,512 km²) of suitable wolf habitat. Approximately 6,263 mi² (16,221 km²) (19.4 %) of this habitat is within the BRWRA. The FAIR has an additional 2,561 mi² (6,632 km²) (7.9%) of habitat. Together, the BRWRA and the FAIR encompass 27.3 percent of the total suitable wolf habitat in Arizona and New Mexico south of I-40 (Figure 1-21). Under the 1998 Final Rule, Mexican wolves are not allowed to disperse and establish territories wholly outside of the BRWRA. Wolves that do so are captured and translocated back into the BRWRA or taken to captivity regardless of whether they have been engaged in depredation or nuisance behavior. Allowing Mexican wolves to naturally disperse from the BRWRA and occupy and establish territories in areas of suitable habitat within the entire MWEPA would better support natural wolf biology and behavior and remove restrictions that have artificially constrained the natural growth of the experimental population. Natural dispersal and colonization of new areas would be expected to contribute to achieving the numerical growth and range expansion that is needed to improve the resilience and probability of persistence of the experimental population.

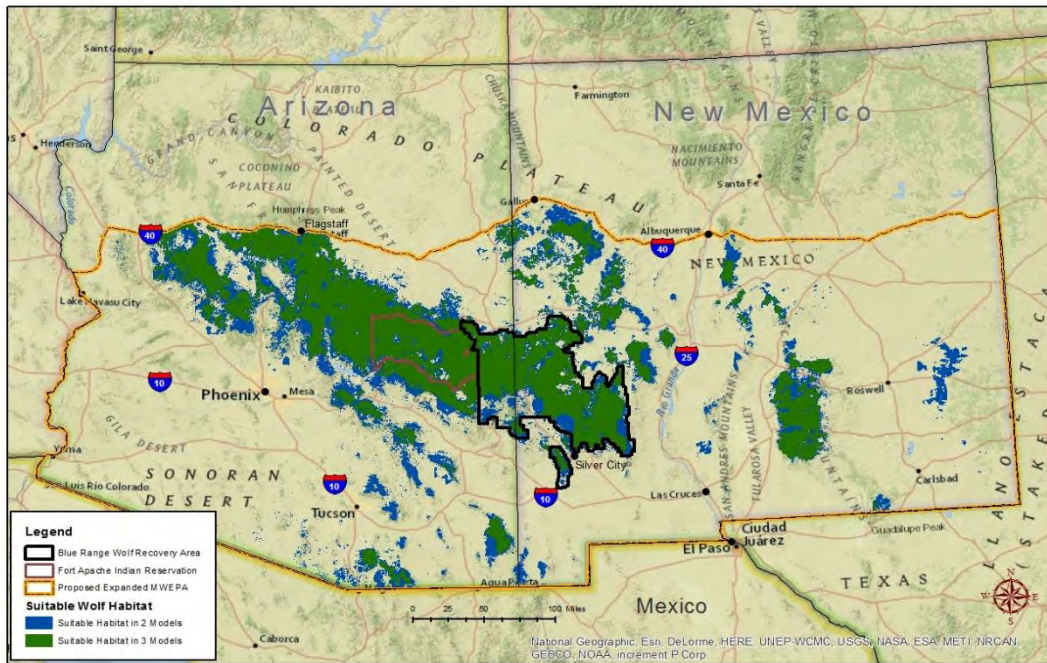


Figure 1-21. Areas of suitable wolf habitat in the proposed expanded Mexican Wolf Experimental Population Area south of I-40 in Arizona and New Mexico

Unless a wolf becomes a breeder within its natal pack, it will disperse (Mech and Boitani 2003). Wolves naturally disperse from their natal pack in response to a variety of factors including food competition, mating opportunities, environmental disruptions, social aggression and/or pressures associated with pack dominance hierarchy (Boyd and Pletscher 1999, Mech and Boitani 2003). Wolves of both sexes disperse, some as young as five months of age, while others may remain with the pack for up to three years or occasionally longer (Mech and Boitani 2003). The potential benefits of dispersal include increased reproductive success, decreased probability of inbreeding, release from intraspecific competition for resources and range expansion (Shields 1987, Jozwiak 1997, Boyd and Pletscher 1999). Successful dispersing wolves are those that find a mate and either usurp (take from another wolf), carve out (from an existing territorial mosaic), or find an unoccupied (by other wolves) area with adequate food resources to establish a territory (Mech and Boitani 2003). Wolves are highly territorial and dispersal from established packs drives the colonization or recolonization of areas unoccupied by breeding wolves (Fritts and Mech 1981, Boyd and Pletscher 1999, Mech and Boitani 2003). Dispersal and colonization/recolonization of unoccupied habitat expands the species’ range (Mech and Boitani 2003) and is vital to establishing long-term population viability (Boyd and Pletscher 1999). Neighboring wolf packs tend to be genetically related, as infrequent (once per generation) immigration of dispersers from another population can result in a degree of genetic mixing between unrelated wolves (Mech and Boitani 2003).

Both the 3-Year (Paquet et al. 2001) and 5-Year Review (AMOC and IFT 2005) agree that removal of wolves for no other reason than being outside of the BRWRA “increases the cost of the overall recovery program...(and) excludes habitat that could enhance recovery efforts and artificially restricts natural dispersal” (AMOC and IFT 2005). A Mexican wolf experimental population that is larger and more widely dispersed across a broader landscape would be more resilient to stochastic demographic and environmental events, as well as human-caused mortality. A management change to allow wolves to disperse from the BRWRA and occupy suitable habitat within the MWEPA would be expected to substantially improve the effectiveness of our Reintroduction Project in achieving the population growth

and distribution needed to improve the likelihood of persistence of the Mexican wolf experimental population.

1.2.2.3 Management actions on Federal and non-Federal land within the Mexican Wolf Experimental Population Area (MWEPA)

Allowing Mexican wolves to naturally disperse from the BRWRA and to occupy and establish territories in areas of suitable habitat within the MWEPA would create a need to manage wolves on both federal and non-federal land (see definition of *Federal* and *non-Federal land* in the List of Definitions) in a larger area than the national forests that make up the current BRWRA.

We would not remove wolves on Federal land or on non-Federal private or state land except in the case of depredation and nuisance behavior or unacceptable impacts to native ungulate herds that cannot be effectively managed through non-removal techniques. We would remove wolves from tribal land at the request of the tribal government. We would translocate wolves onto Federal land pursuant to an authorized management purpose. With the concurrence of the states of Arizona and New Mexico we would seek to enter into management agreements with willing landowners for the management of wolves on private land within the MWEPA. Although federal lands provide the majority of potential suitable habitat for wolves within the MWEPA there are also large tracts of private land that contain habitat that could support wolves. Service and state approved management agreements with private landowners would be important not only to benefit wolf reintroduction but to also establish protocols and procedures to minimize or preclude depredation incidents and nuisance behavior. Management agreements can specify pro-active management actions (i.e., livestock husbandry techniques, hazing, and provision of range riders) that may serve to preclude and/or minimize wolf depredation or nuisance behavior and benefit both the landowner and the Reintroduction Project. Agreements with landowners who have private landholdings containing suitable habitat adjacent to large tracts of federally controlled land would be expected to be particularly important.

The Service acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship with tribes in order to achieve the common goal of promoting and protecting the health of ecosystems, as defined by Secretarial Order 3206 *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities* (June 5, 1997). Pursuant to Secretarial Order 3206, we recognize, respect, and shall consider the value that tribal traditional knowledge provides to federal land management decision making processes. In accordance with this order we will continue to manage any Mexican wolf present within the MWEPA under the guidance contained in section (k)(10) the 1998 Final Rule so that; "If any wolves move onto tribal reservation land outside the designated recovery area(s), but within the Mexican Wolf Experimental Population Area, the Service, or an authorized agency, will develop management actions in cooperation with the tribal government including capture and removal of the wolf or wolves if requested by the tribal government." We would seek to continue the agreement entered into in 2000 with the White Mountain Apache Tribe to allow wolves to occupy the Fort Apache Indian Reservation and, because we now propose to allow wolves to naturally disperse from the BRWRA, we would seek to enter into agreements for the management of wolves with other tribes within the MWEPA. These agreements would be subject to successive renewal, in which the Tribe has the option of allowing or prohibiting wolf re-establishment, whether through natural dispersal, initial release, or translocation, on recognized tribal lands or reservations. These agreements can also specify pro-active management actions (e.g., livestock husbandry techniques, carcass removal, hazing, and provision of range riders) that may serve to preclude and/or minimize wolf depredation or nuisance behavior and benefit both the tribal government and the Service's wolf reintroduction efforts.

Service approved agreements made in voluntary cooperation with tribal governments as well as Service and state approved management agreements with private landowners can benefit Mexican wolf

PROPOSED REVISION TO THE REGULATIONS FOR THE NONESSENTIAL EXPERIMENTAL POPULATION OF THE MEXICAN WOLF (*CANIS LUPUS BAILEYI*)

FINAL ENVIRONMENTAL IMPACT STATEMENT

APPENDIX G: CONFERENCE/BIOLOGICAL OPINION FOR THE PROPOSED REVISION TO THE REGULATIONS FOR THE NONESSENTIAL EXPERIMENTAL POPULATION OF THE MEXICAN WOLF, THE ISSUANCE OF A NEW RESEARCH AND RECOVERY PERMIT FOR THE MEXICAN WOLF RECOVERY PROGRAM AND THE GRAY WOLF, AND FUNDING PROVIDED TO THE MEXICAN WOLF RECOVERY PROGRAM FOR THE PURPOSE OF IMPLEMENTING THE PROGRAM

FINAL CONFERENCE/BIOLOGICAL OPINION – November 17, 2014

CONSULTATION HISTORY

- February 24, 1995: Intra-Service consultation on the *Reintroduction of the Mexican Wolf within its Historic Range in the Southwestern United States*
- November 7, 2011: Intra-Service Biological and Concurrence Opinion on the Renewal of TE-091551-6, Research and Recovery Permit for the Mexican Wolf Recovery Program.
- June 9, 2014: Request for formal Intra-Service consultation on Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, the Issuance of a New Research and Recovery Permit for the Mexican Wolf Recovery Program and the Gray Wolf, and Funding provided to the Mexican Wolf Recovery Program for the Purpose of Implementing the Program

DESCRIPTION OF THE PROPOSED ACTION

The proposed actions addressed by this conference/biological opinion are the proposed revision to the regulations for the nonessential experimental population of the Mexican wolf (proposed revised rule); issuance of a section 10(a)(1)(A) research and recovery permit that authorizes activities for the management of the Mexican wolf within Arizona, New Mexico, and to a far lesser extent California, Colorado, Nevada, Texas, and Utah; issuance of a section 10(a)(1)(A) research and recovery permit that authorizes activities for the management of gray wolves in Arizona and New Mexico; and funding provided to the Mexican Wolf Recovery Program for the purpose of implementing the program.

The Service is proposing to revise the existing regulations (63 FR 1752, January 12, 1998) (1998 Final Rule), for the experimental population of the Mexican wolf (79 FR 43373, July 25, 2014) and to list the Mexican wolf as an endangered subspecies (78 FR 35664, June 13, 2013). The Service also published a draft environmental impact statement (DEIS) to analyze the impacts of the proposed revisions to the regulations for the nonessential experimental population of the Mexican wolf (79 FR 43373, July 25, 2014). In conjunction with the proposals, if finalized, the Service will issue or revise the Mexican Wolf Recovery Program's section 10(a)(1)(A) research and recovery permit (TE-091551-8) that authorizes take of the Mexican wolf during management activities consistent with a Service-approved management plan or special management measure adopted by the Service pursuant to the provisions of the proposed revised rule, as well as conduct activities related directly to the conservation, protection, and recovery of Mexican wolves and gray wolves within Arizona and New Mexico. In addition, areas

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of California, Colorado, Nevada, Texas, and Utah that are immediately adjacent to Arizona and New Mexico may on extremely rare instances have a Mexican wolf disperse to the area and thus require the Service to conduct activities in those areas as well. The Service has proposed to delist gray wolves in the lower 48 states with the exception of Mexican wolves (78 FR 35664, June 13, 2013). Within the context of this conference/biological opinion, we treat the Mexican wolf as endangered, except where designated as an experimental population. We also treat the gray wolf as a separate listed entity because proposed delisting does not impact the analyses until such time as the delisting becomes final. The action area between Mexican wolves and gray wolves differs because we only intend to manage gray wolves that are within the Southwestern Region (i.e. Arizona and New Mexico), while we intend to manage Mexican wolves wherever they occur. The Service's Wildlife and Sport Fish Restoration (WSFR) Program may provide funding for implementation of the Mexican Wolf Recovery Program under traditional and non-traditional section 6 grants to participating states, state wildlife grants, landowner incentive program grants, Tribal grants, traditional Federal assistance, or any other funding mechanisms. Other Service programs (e.g., Partners for Fish and Wildlife) may also provide funding that will contribute to the conservation of the Mexican wolf. Additionally, the Service's Mexican Wolf Recovery Program may provide funding to participating partners for the conservation of the Mexican wolf through Cooperative and Grant Agreements, as well as contracts.

The Mexican Wolf Recovery Program is, and has been guided by several statutes, regulations, policies, and authorities. The primary statute directing the Mexican Wolf Recovery Program is the Endangered Species Act of 1973 (ESA) the purpose of which is to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, and to provide a program for the conservation of such endangered species. The Mexican Wolf Recovery Program is currently based on the following documents: (1) the 1982 Mexican Wolf Recovery Plan; (2) 1996 Final Environmental Impact Statement (EIS) titled; *Reintroduction of the Mexican Gray Wolf within its Historic Range in the Southwestern United States* (1996 EIS); (3) January 12, 1998, Final Rule titled, *Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico* (Final Rule), which promulgated 50 CFR §17.84; (4) 1998 Mexican Wolf Interagency Management Plan; and (5) Federal Fish and Wildlife Permit number TE-091551-8. The Mexican Wolf Recovery Program is proposing to revise the 1998 Final Rule and has produced an EIS that analyzes the impact of the proposed revisions. However, the impacts to Mexican wolves and other endangered and threatened species will be based on the management activities, as we do not predict impacts to endangered or threatened species based on the presence of Mexican wolves. A general description of the discretionary management activities are stated in the five goals of the Mexican Wolf Recovery Program below for Mexican wolves within the Mexican Wolf Experimental Population Area (MWEPA), which are designated as a nonessential, experimental population, and Mexican wolves outside the Mexican Wolf Experimental Population Area that are fully protected as Endangered under the ESA.

Captures and Collaring – The Mexican Wolf Recovery Program generally maintains at least two collared Mexican wolves per pack. Mexican wolves of appropriate size are collared prior to initial release from captivity, but wild born Mexican wolves often have to be captured and collared for monitoring purposes. The Mexican Wolf Recovery Program uses several techniques to capture wolves, including leg-hold traps, darting from the ground or during aerial operations, and net-gunning during helicopter operations. All of these capture techniques could potentially cause minor to severe injury or death to the wolf being captured. The Mexican Wolf Recovery Program follows trapping and handling protocols, which require personnel to check traps at least once every 24 hours and to set traps in areas to minimize exposure to heat, cold/wet conditions, human disturbance, and other hazards that may be encountered in the wild. Once a wolf (or nontarget species) is removed from the trap, veterinary care is administered to minimize

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injuries and ensure the health of the animal (e.g., wound treatment, hypothermia, hyperthermia, and dehydration). All wolf captures are supervised by experienced Mexican Wolf Recovery Program personnel to ensure techniques are followed to minimize injuries and/or deaths. As a result of these efforts, serious injury or death as a result of capture by the project has been an extremely rare occurrence (five animals out of several hundreds of captures).

Non-lethal Techniques – The Mexican Wolf Recovery Program minimizes depredations and human nuisance occurrences by Mexican wolves, including the use of scare devices, taste aversion, and harassment by agency personnel within the MWEPA (e.g., use of rubber bullets, bean bag rounds, cracker shells, and paint-ball guns). Disturbing den or rendezvous sites is also utilized if they occur near an undesirable location (i.e., too close to human inhabitants). The desired outcome of den or rendezvous site disturbance is that wolves will move these sites to a more remote location. The goal of these harassment techniques is to prevent the need to capture and translocate Mexican wolves, or permanently remove and/or lethally control Mexican wolves (lethal control is limited to Mexican wolves within the experimental nonessential area in Arizona and New Mexico 50 CFR 17.84(k)).

Initial Release and Translocation Pen Procedures – The Mexican Wolf Recovery Program is working to increase the Mexican wolf population via translocation, initial releases, and natural recruitment. The Interagency Field Team and other agency personnel handle and temporarily confine Mexican wolves in initial release and translocation pens (hereafter pens). Mexican wolves are transported by helicopter, vehicle (including snowmobile and all-terrain vehicle (ATV)), and/or by mule to the pens. After an acceptable acclimation period, the Mexican wolves are released from the pens, which are constructed of either temporary nylon mesh or chain link panels. The pens are constructed in remote locations on U.S. Forest Service lands at approved initial release and translocation sites. A *Husbandry Manual* developed through the Mexican Wolf Species Survival Plan (see USFWS 1998a: Appendix 4) and the Service document titled *Pre-Release Facility Husbandry and Operations Protocol* are followed to minimize adverse effects to Mexican wolves while in captivity.

Biological Data Collection – The Mexican Wolf Recovery Program collects appropriate biological data using aerial and ground telemetry monitoring; visually observing Mexican wolves near den or rendezvous sites to count the number of pups; obtaining samples such as hair, scat, and blood; and howling surveys.

Mexican Wolves in Captivity – The Mexican Wolf Recovery Program continues to maintain and/or increase the number of Mexican wolves in captivity. These activities include, but are not limited to, breeding, handling, administering health care, and obtaining samples such as blood, tissue, semen, ova, and hair. The Mexican Wolf Recovery Program ensures that Mexican wolves remain healthy and that the highest quality of care exists while minimizing human contact with the captive Mexican wolves. Veterinarians may be present at captures within the captive facility and proper protocols, including those in the *Husbandry Manual*, are followed to minimize adverse effects to Mexican wolves in captivity.

The Mexican Wolf Recovery Program operates two pre-release facilities, the Ladder Ranch Wolf Management Facility and the Sevilleta Wolf Management Facility. Both facilities house Mexican wolves prior to release and after temporary or permanent removal from the wild. The *Husbandry Manual* and Service document *Pre-Release Facility Husbandry and Operations Protocol* are followed to minimize adverse effects to Mexican wolves in captivity.

Lethal Control – Lethal control of Mexican wolves is only proposed to be authorized within the Mexican Wolf Experimental Population Area in Arizona and New Mexico (50 CFR 17.84(k)). Lethal control is a management option for personnel authorized by the Service for management of wolves when reasonable attempts to capture wolves alive fail and when the Service determines that immediate removal of a

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particular wolf or wolves from the wild is necessary. Additional instances of authorized lethal control or take are detailed in the Proposed Revised Rule (50 CFR 17.84(k)).

Purposeful take associated with implementation of the Mexican Wolf Recovery Program – Since the purpose of the Mexican Wolf Recovery Program is to maintain a captive population and reestablish a wild population within the 10j boundaries, management of the species necessarily results in take. Purposeful take is expected to result from the activities described above, under the Service-approved management plan, or special management measures adopted by the Service pursuant to the provisions of the Proposed Revised Rule (50 CFR 17.84 (k)); as well as conducting activities related directly to the conservation, protection, and recovery of the experimental population of Mexican wolves within Arizona and New Mexico. Harassment from management activities may also extend to wolves outside the MWEPA when Mexican wolves disperse from the MWEPA boundaries and are captured and returned to the Mexican Wolf Experimental Population Area.

Any person may take (including injure or kill) a Mexican wolf in self-defense or defense of the lives of others, provided that the take is reported within 24 hours to the Service’s Mexican Wolf Recovery Coordinator or a designated representative of the Service. If the Service or an authorized agency determines that a wolf presents a threat to human life or safety, the Service or the authorized agency may kill it, capture and euthanize it, or place it in captivity (50 CFR 17.84(k)). In addition, a member of the Mexican Wolf Recovery Program may remove Mexican or gray wolves that constitute a demonstrable but non-immediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area (50 CFR 17.21(c)(3)(iv)). Given that the authority to take a wolf in the defense of human life is addressed in the ESA and regulations, it will not be discussed further in this opinion.

Mexican Wolf Experimental Population Area

Section 4(f)(1) of the ESA states that the Secretary of the Interior shall develop and implement recovery plans for the conservation and survival of endangered species. The 1982 Mexican Wolf Recovery Plan (USFWS 1982a), adopted under the authority of the ESA, has two prime objectives: (1) maintaining a captive population, and (2) re-establishing at least 100 wild Mexican wolves in a 5,000 square mile area within the sub-species’ historical range. The Recovery Plan did not however specify recovery criteria. The Service appointed a new Recovery Team to develop a revision to the 1982 Mexican Wolf Recovery Plan that will include recovery criteria. A revised Recovery Plan is expected to be completed following the issuance of a revised final rule and 10(a)(1)(A) permit.

The Service’s 1996 EIS (USFWS 1996a) analyzed the presence of Mexican wolves throughout the entire Blue Range Wolf Recovery Area, including the primary and secondary recovery zones, with all anticipated associated impacts. On January 12, 1998, the Service published a Final Rule that authorized Mexican wolf reintroduction and recovery efforts in the Apache National Forest in Arizona, and the Gila National Forest in New Mexico (63 FR 1752). The Final Rule designated Mexican wolf populations reestablished in the Experimental Population Area as one experimental nonessential population, which provides for administrative and management flexibility under the ESA by relaxing prohibitions on take (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)), and allows for active management of Mexican wolves. The Final Rule amended Federal Regulations at 50 CFR §17.84 by adding the special rule providing Mexican wolves reestablished in the Blue Range Wolf Recovery Area and in the White Sands Wolf Recovery Area, if used, with the status of nonessential, experimental. To date, wolves are not being released or occupying the White Sands Wolf Recovery Area.

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Mexican wolves were reintroduced to the wild in 1998 in Arizona and New Mexico as a nonessential experimental population pursuant to section 10(j) of the ESA. Since 2003, an interagency partnership of Federal, State, County, and Tribal entities has been managing the reintroduction program with the Service acting as the lead agency. The program has been governed by a Memorandum of Understanding (MOU), signed in 2003, between Arizona Game and Fish Department, New Mexico Department of Game and Fish, White Mountain Apache Tribe, U.S. Department of Agriculture-Animal and Plant Health Inspection Service Wildlife Services, U.S. Department of Agriculture Forest Service, and the Service. The New Mexico Department of Game and Fish withdrew from the partnership on June 30, 2011. The remaining lead agencies have primary regulatory jurisdiction and management authority of the Mexican wolf in Arizona and New Mexico. Graham, Greenlee, Gila, and Navajo counties, and the Eastern Arizona Counties Organization in Arizona are designated as cooperators to the reintroduction project with an interest in Mexican wolf management. The MOU, which expired in 2008, was revised and signed by the cooperators in and subsequent to 2010. The Service remains committed to involving partners in managing Mexican wolves to best support the biological processes of the population, while minimizing potential economic impacts of Mexican wolves. Management activities currently conform to the Service's 1998 Mexican Wolf Interagency Management Plan (USFWS 1998b).

The Service proposes to revise the regulations established in our 1998 Final Rule for the experimental population of the Mexican wolf. We also propose to extend the authority of the Mexican Wolf Recovery Program's Section 10(a)(1)(A) research and recovery permit to areas that are outside of the Mexican Wolf Experimental Population Area. In the EIS, we analyze the environmental consequences of a range of alternatives, including the Proposed Action and No Action alternative. The action would be implemented through a final nonessential experimental rule, a revised Section 10(a)(1)(A) research and recovery permit and the provision of federal funding. This BO analyzes the proposed action (e.g. proposed rule), the revised Section 10(a)(1)(A) research and recovery permit, and the provisions for federal funding and their impacts on Mexican wolves and other endangered and threatened species.

Consistent with section 10(a)(1)(A) of the ESA, the Secretary may permit, under such terms and conditions as he/she shall prescribe...acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j). We are proposing to revise and reissue the Mexican Wolf Recovery Program section 10(a)(1)(A) permit so that it applies to both the MWEPA and areas outside the MWEPA. Under the proposed rule we would expand the area in which initial releases of Mexican wolves from captivity could occur and extend the southern boundary of the MWEPA in Arizona and New Mexico to the United States-Mexico international border. Within the expanded MWEPA, we would designate three Mexican wolf management zones (Figure G-1) and we would conduct management actions within these zones intended to further the conservation of the Mexican wolf while being responsive to the needs of the local community in cases of depredation or nuisance behavior by Mexican wolves. Collectively these changes would represent: (1) geographic boundary changes that: (a) remove the designation of the White Sands Wolf Recovery Area (WSWRA), (b) remove from the MWEPA the small portion of Texas, (c) move the southern boundary of the MWEPA in Arizona and New Mexico from Interstate-10 to the United States-Mexico international border, and (d) designate three wolf management zones within the expanded MWEPA; (2) management changes that: (a) allow initial release, translocations, dispersal, and occupancy of Mexican wolves based on the three wolf management zones, and (3) revise the regulations for the take of Mexican wolves on Federal and non-Federal land within the entire MWEPA (Zones 1, 2 and 3).

Mexican Wolves Outside of Experimental Population Area

The area where Mexican wolves may be reintroduced by the Mexican government may extend to within 30 miles of the U.S. border at the Arizona/New Mexico state line. Dispersal and natural recolonization

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into areas within the revised MWEPA (south of Interstate Highway 10 (I-10)) are likely if the Mexican government succeeds in establishing a population of Mexican wolves in northern Mexico. Mexican wolves could also disperse from the revised MWEPA into areas to the north of Interstate Highway 40 (I-40) (in Arizona, New Mexico, Colorado, or Utah); west into Nevada or California; or east into Texas where they would be considered endangered. Mexican wolves will likely occupy mountainous/forested habitats in these areas should they become established. All Mexican wolves within the action area, but outside of the MWEPA, are fully protected as endangered under the ESA. The action area is the states of Arizona and New Mexico, the western portion of Texas, the southern portions of Colorado and Utah, the southeastern portion of California, and the southern portion of Nevada. Should a Mexican wolf establish a territory outside of the MWEPA, the Service or an authorized agent will attempt to promptly capture the wolf and translocate it within the MWEPA, put it into the captive population, or transfer it to Mexico, as authorized by a revised Mexican Wolf Recovery Program section 10(a)(1)(A) permit.

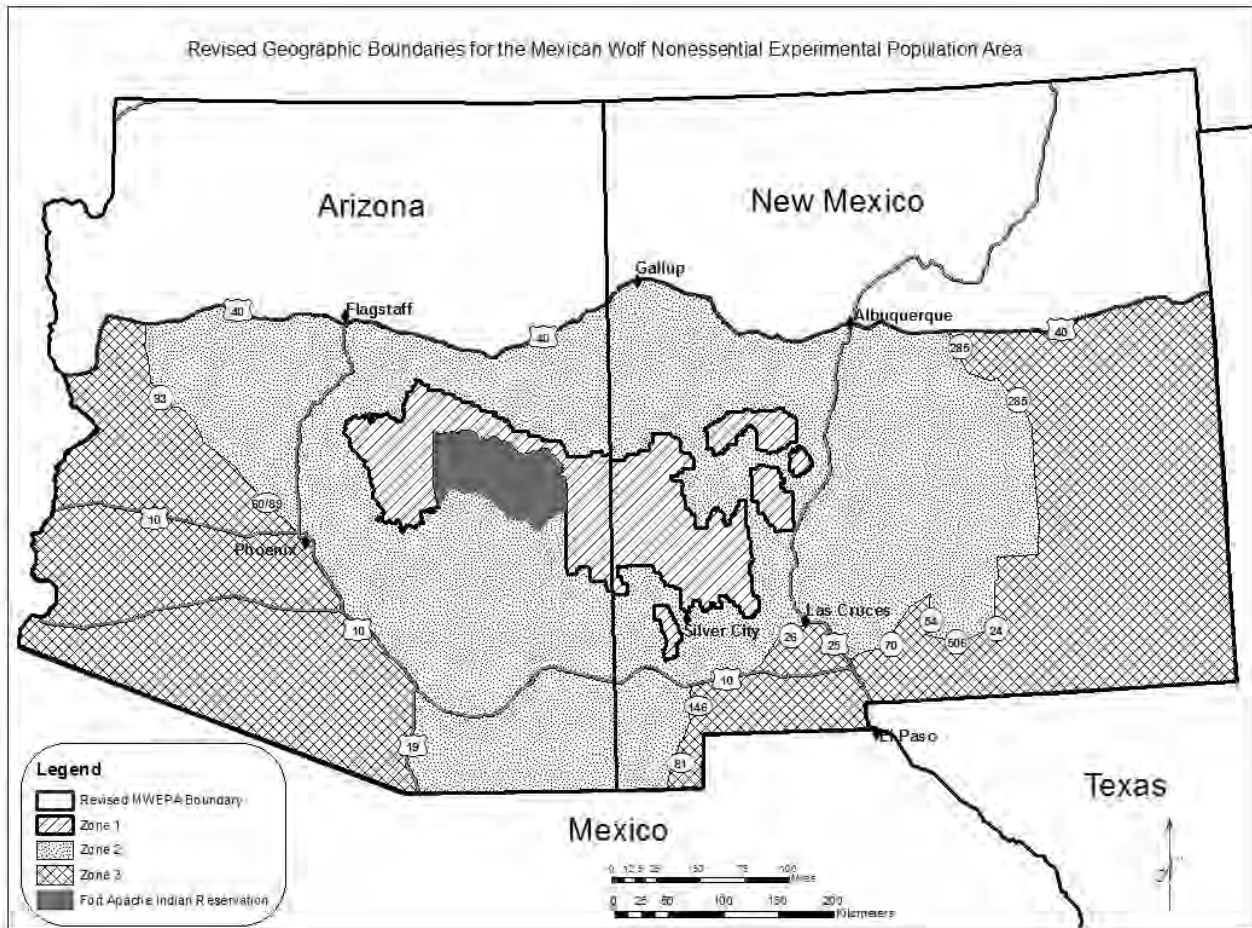


Figure G-1. Revised Mexican Wolf Experimental Population Area.

Specific Wolf Management Activities

Specific activities conducted under the Mexican Wolf Recovery Program within the MWEPA are described in the Proposed Rule. All management activities summarized below pursuant to the goals of

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the program are implemented for Mexican wolves designated as experimental, nonessential and, excluding lethal control, may be conducted for Mexican wolves outside the MWEPA (i.e., designated 10(j) area) in Arizona and New Mexico, and in California, Colorado, Nevada, Texas, and Utah in the unlikely event that a Mexican wolf disperses into these states.

Capture and maintain at least two collared Mexican wolves per pack:

a. These activities include, but are not limited to: trapping (leg-hold traps), darting (from ground or during aerial operations), net-gunning during helicopter operations, handling, possessing, administering health care, marking utilizing radio-collars or other appropriate monitoring systems, obtaining samples (blood, tissue, semen, ova, and hair), transporting, salvaging, and releasing Mexican wolves.

b. Adult Mexican wolves released from captivity or trapped in the wild within the U.S. are radio-collared (models 400 and 500, Telonics, Inc., Mesa, Arizona). Mexican wolves are then radio-tracked periodically from the ground (i.e., triangulation) and a minimum of once a week from the air, weather permitting (White and Garrot 1990). Location data (i.e., date, UTM location, Mexican wolf identification number, sex, age, number of wolves, behavior, and weather) are entered into the reintroduction project's database, along with reports for specific incidents (e.g., depredations (on domestic animals), Mexican wolf/human conflicts, aversive conditioning, captures, mortalities, translocations, initial releases, predation (on wildlife)).

Minimize depredation and human nuisance occurrence by Mexican wolves:

a. These activities include, but are not limited to: all activities listed in Goal 1.a., above, and non-lethal techniques (e.g., capture; radio collar and release on site; scare devices; guard animals; fladry; taste aversion; harassment by agency personnel using rubber bullets, bean bag rounds, cracker shells, paintball guns, and other human disturbance; den or rendezvous site disturbance; manipulation of movements via food caches; movement of livestock away from core use areas; and any other technique available) to resolve the conflict (see Coppinger et al. 1988, Cluff and Murray 1995, Fritts et al. 2003, Shivik et al. 2003, Bangs et al. 2005, Shivik 2006 for description of techniques and application results).

b. If the problem persists or becomes chronic, then the Mexican wolves may be translocated, permanently removed, and/or lethally controlled (lethal control is limited to Mexican wolves within the MWEPA (10(j)) in Arizona and New Mexico) in accordance with approved management plans, protocols, and the authorization of the Service's Mexican Wolf Recovery Coordinator.

Increase the wild Mexican wolf population and improve the genetic composition via translocation, initial releases, and natural recruitment:

a. These activities include, but are not limited to: all activities listed in Goal 1.a., above, and building temporary mesh and chain link paneled pens at sites that are (1) previously approved by the U.S. Forest Service (USFS), (2) include appropriate level of NEPA analysis and scoping in accordance with USFS policy guidance on building pens, and (3) include consultation on possible effects to other endangered and threatened species based on site specific characteristics and modifications at the individual release area. The pens include some minor disturbance to the ground, which for chain link pens can require archeological clearance from the USFS. Mexican wolves are transported by vehicle, mule, or helicopter to release areas. Food caches are maintained until the Mexican wolves discontinue utilizing the food caches or start killing native prey, and personnel often camp near the release areas to consistently monitor the Mexican wolves. In addition, Mexican wolves are sometimes initially released or translocated via hard release methodology. During hard releases, animals are released from crates directly into the wild. Hard released animals rarely stay in the release area and do not require camping of personnel or building of pens. As such, these actions do not require NEPA analysis or consultation outside of that which is

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contained within this document. Another method of improving the genetic composition of the Mexican wolf population in the MWEPA is through cross-fostering. Cross-fostering is a management tool that we began using in 2014. Cross-fostering occurs when offspring are removed from their biological parents and placed with surrogate parents. Therefore, we could potentially improve the genetic composition of the experimental population by placing genetically appropriate Mexican wolf pups from captivity with adult Mexican wolves in the MWEPA. However, as this is a new technique for our program, we are uncertain of how successful these cross-fostering actions will be in terms of the cross-fostered animals surviving, breeding, and producing pups, and therefore becoming effective migrants.

Collect appropriate biological data:

a. These activities include, but are not limited to: aerial and ground telemetry monitoring, viewing Mexican wolves near potentially sensitive areas to obtain visual counts on the number of pups and adults in a pack, determining whether Mexican wolves were responsible for depredations and/or native ungulate kills that are discovered, howling surveys for documentation of unknown packs and counts of known packs, collecting samples (blood, tissue, semen, ova, and hair), and collaborating with researchers for data collection and analysis of approved projects.

Continue to maintain and/or increase the number of Mexican wolves in captivity:

a. These activities include, but are not limited to: breeding, handling, possessing, administering health care, obtaining samples (blood, tissue, semen, ova, and hair), transport, salvage, collaborating with researchers for data collection and analysis of approved projects. With prior authorization from the Service's Mexican Wolf Recovery Coordinator, permittees are authorized to transport wild-captured or captive-reared Mexican wolves to various approved sites for research, reintroductions, rehabilitation, breeding, administering health care or treatment of sick or injured animals (including euthanasia in extreme circumstances).

In summary, the Service's Mexican Wolf Recovery Program has pursued a two-pronged strategy consisting of the maintenance of a captive breeding population of Mexican wolves and reintroduction to the wild. The establishment of a Mexican wolf captive breeding program prevented the impending extinction of the Mexican wolf. The 1998 Final Rule set the regulations to successfully establish a population of Mexican wolves in the wild. The purpose of our proposed revisions to the regulations for the experimental population of the Mexican wolf and the Mexican Wolf Recovery Program's section 10(a)(1)(A) research and recovery permit is to further the conservation of the Mexican wolf by improving the effectiveness of the Reintroduction Project in managing the experimental population.

Conservation Measures – The following conservation measures consist of activities and measures established by the Service's Mexican Wolf Recovery Coordinator to minimize take of listed, proposed, and candidate species and will be implemented by all Mexican Wolf Recovery Program participants in the course of carrying out the covered activities described above.

Wolf management activities will not occur in wetlands or marshes, but the Service's Mexican Wolf Recovery Coordinator will direct Recovery Program participants to avoid streams and river banks, lake sides, wetlands, and marshes during the specific Mexican wolf management activities described above. This avoidance is taken to prevent disturbance or destruction of sensitive areas and to prevent the inadvertent movement of pathogens, parasites, and invasive non-native species in aquatic systems; as well as for the safety and well-being of Mexican wolves. The Service's Mexican Wolf Recovery Coordinator will prohibit the use of off-highway-vehicles (OHV) in streams and river banks, lake sides, wetlands, and marshes, except on road crossings open for public and administrative purposes.

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Mexican Wolf Recovery Program participants conducting work in the area covered by this Conference/Biological Opinion will be educated in the identification of listed, proposed, and candidate plant species and their habitats in order to avoid inadvertent trampling or removal during surveys or the other specific wolf management activities described above. In addition, when activities described above may occur in an area inhabited by listed, proposed, and candidate plant species, the Service's Mexican Wolf Recovery Coordinator will restrict the use of OHVs in such areas.

Mexican Wolf Recovery Program activities will not be conducted in areas that pose a risk to the health and safety of wolves or permittees, such as mines or caves (typical roost sites for bats). Activities conducted in low desert environments would be rare. Without water or prey species, wolves may pass through low desert environments, but are unlikely to stay long enough to need management actions by Permittees.

Mexican Wolf Recovery Program participants conducting work in the area covered by this Conference/Biological Opinion will be trained annually, through the annual immobilization training, in the capture and handling protocol for large predators, to ensure that any jaguar (*Panthera onca*), Canada lynx (*Lynx Canadensis*), ocelot (*Leopardus pardalis*), or gray wolf (*Canis lupus*) captured in a leg-hold trap will be safely sedated, examined, and released. If appropriate, blood will be drawn, and a radio collar may be affixed to the animal.

Mexican Wolf Recovery Program participants will not camp near Mexican spotted owl nests or roosts during the breeding season and follow Recreational Disturbance Guidelines as outlined on page 294 of the Mexican spotted owl recovery plan, first revision. Flying low over a Mexican spotted owl nest or roost in an aircraft will be avoided during the MSO breeding season.

Mexican Wolf Recovery Program participants conducting work in the area covered by this Conference/Biological Opinion will be educated regarding designated Critical Habitat, primary constituent elements, and how to avoid any potential impacts for listed species within the action area.

Mexican wolves are unlikely to disperse to California, Colorado, Nevada, Texas, and Utah based on habitat connectivity, desert environments, and/or juxtaposition with the MWEPA. These states are included in the action area based on the remote possibility that personnel may need to capture Mexican wolves that have dispersed from the MWEPA into these areas. Before Mexican Wolf Recovery program participants initiate the capture of Mexican wolves in these states, the participants will contact the U.S. Fish and Wildlife Ecological Services office in the state where operations are planned to determine any potential concerns with species not evaluated in this Biological Opinion.

STATUS OF THE SPECIES AND CRITICAL HABITAT (rangewide and/or recovery unit)

Mexican Wolf

The Mexican wolf was listed as an endangered subspecies in 1976 due to near extinction resulting from predator extermination programs in the late 1800s and early to mid-1900s. In 1978, the Service subsumed this and several other gray wolf subspecies listings into a species-level listing for the gray wolf in order to protect the species throughout its range in the coterminous United States and Mexico (USFWS 1978). The 1978 reclassification was undertaken to "most conveniently" handle a listing that needed to be revised because of changes in our understanding of gray wolf taxonomy, and in recognition of the fact that individual wolves sometimes cross subspecific boundaries. In addition, we sought to clarify that the gray wolf was only listed south of the Canadian border. However, the 1978 rule also stipulated that "biological subspecies would continue to be maintained and dealt with as separate entities" (USFWS 1978), and offered "the firmest assurance that [the Service] will continue to recognize valid biological subspecies for purposes of its research and conservation programs" (USFWS 1978). Accordingly, we

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implemented three gray wolf recovery programs in the following regions of the country: the Western Great Lakes (Minnesota, Michigan, and Wisconsin, administered by the Service's Great Lakes, Big Rivers Region), the Northern Rocky Mountains (Idaho, Montana, and Wyoming, administered by the Service's Mountain-Prairie Region and Pacific Region), and the Southwest (see Mexican wolves status above: Arizona, New Mexico, Texas, Oklahoma, Mexico, administered by the Service's Southwest Region). Recovery plans were developed in each of these areas (the northern Rocky Mountains in 1980, revised in 1987; the Great Lakes in 1978, revised in 1992; and the Southwest in 1982, the revision of which is now underway) to establish and prioritize recovery criteria and actions appropriate to the unique local circumstances of the gray wolf. A separate recovery effort for gray wolves formerly listed as *C. l. monstabilis* was not undertaken because this subspecies was subsumed with *C. l. baileyi* and thus addressed as part of the recovery plan for the Southwest. No critical habitat has been designated for the Mexican wolf.

Mexican wolves tend to be patchy black, brown to cinnamon, and cream in color. The Mexican wolf is somewhat smaller than other gray wolves with adults weighing 23-41 kilograms (50-90 pounds) and height at the shoulder approximately 0.6-0.8 meters (2-2.5 feet). Mexican wolves have been found to be genetically distinct from other North American gray wolf taxa (Wayne and Vilá 2003).

This subspecies of gray wolf historically inhabited the southwestern United States and Mexico. Mexican wolves were associated with montane woodlands characterized by sparsely- to densely- forested mountainous terrain and adjacent grasslands at elevations of 4000-5000 feet where ungulate prey were numerous. Today, elk (*Cervus elaphus*) are the preferred prey of Mexican wolves in the experimental population (Paquet et al. 2001, AMOC and IFT 2005, Reed et al. 2006). Other prey species include deer (*Odocoileus virginianus* and *Odocoileus hemionus*), small mammals, and occasionally birds. Livestock are another source of prey for the Mexican wolf; between 1998 and 2013, 237 confirmed wolf-caused livestock kills (213 cattle, 13 sheep, 5 horses, and 1 mule) were documented in the Blue Range Wolf Recovery Area and Fort Apache Indian Reservation (AMOC and IFT 2005, USFWS 2004, USFWS 2005, USFWS 2006, USFWS 2008; USFWS 2009, USFWS 2010a). However, this should only be considered a minimum count, as some depredations may go undetected (Bangs et al. 1998, Oakleaf et al. 2003, Breck et al. 2011).

Mexican wolves typically live four to five years in the wild, reaching sexual maturity at two years of age. Offspring remain with their family until they disperse to establish a new territory. These hierarchical family units are referred to as packs. Female wolves may produce a litter of several pups each spring. Litter sizes of Mexican wolves in the experimental population documented during opportunistic pup counts are smaller than other gray wolf populations or captive Mexican wolves. Inbreeding depression may be partially responsible for small litter sizes (Fredrickson et al. 2007). In addition, several ecological hypotheses have also been suggested, but data have not been collected to support or refute them. Early pup mortality may also explain the small number of pups observed.

As of the December 31, 2013, annual minimum population count, the experimental population is a minimum of 83 Mexican wolves. Projections had estimated that the population would have reached 100 by 2006. The biological progress of the reintroduction was evaluated in two analyses at three (see Paquet et al. 2001) and five years (see Interagency Field Team 2005) after the inception of the reintroduction effort. Both analyses identified regulatory mechanisms that were slowing the progress of the population, including the internal and external boundaries (and associated regulations limiting release of captive-raised Mexican wolves to a small subset of the recovery area and requiring capture of Mexican wolves that establish territories outside of the recovery area) of the Blue Range Wolf Recovery Area, and provided a number of recommendations to improve the progress of the reintroduction. Many of these recommendations are incorporated into our proposed revisions to the regulations for the Mexican wolf

experimental population and the Mexican Wolf Recovery Program's section 10(a)(1)(A) research and recovery permit.

The three fundamental ecological conditions necessary for wolf habitat include large area, adequate prey, and security from human-caused mortality. Threats related to the destruction, modification, or curtailment of habitat do not likely threaten the Mexican wolf at the current time: the area occupied by the current population has remained stable since 2002; additional tribal lands are now available to support reintroduction efforts; and there is no indication that Mexican wolves are food-limited. Future habitat suitability for Mexican wolves in the Southwest and Mexico may decrease over time due to human population growth and resultant development on public and private lands.

In the current population, causes of mortality have been largely human-related (primarily illegal shooting and secondarily vehicular collision). The Service has not identified any individual threats that are so severe as to put the population at immediate risk of extinction. However, the population does not experience a single threat in absence of the others, but rather all threats simultaneously or at least within spatial or temporal proximity to one another (USFWS 2010a). Therefore, management and regulatory mechanisms, illegal shooting, and inbreeding are identified as threats that are hindering the growth and fitness of the population. Although Mexican wolf deaths related to vehicles do occur each year, the incidence of mortality from vehicles can be accommodated by the Mexican wolf population without a significant impact (<http://www.fws.gov/southwest/es/mexicanwolf>).

Given the wide-range of this species, several Federal actions affect this species every year. Because the current population is designated as nonessential (10(j)), there are several Conference Opinions on release pens; limiting impacts to other species; and avoidance of Mexican Spotted owl designated critical habitat. A complete list of consultations affecting this species in Arizona and New Mexico can be found on our websites: <http://www.fws.gov/southwest/es/arizona> by clicking on the "Document Library" tab and then on the "Section 7 Biological Opinions" tab; or <http://www.fws.gov/southwest/es/Library> by clicking on "Biological Opinions" and entering "wolf" under "search by species." Survey work and recovery projects also occur periodically, and are summarized in our files.

Gray Wolf

Gray wolves were originally listed as subspecies or as regional populations of subspecies in the contiguous United States and Mexico. In 1978, gray wolves were reclassified as an endangered population at the species level (*C. lupus*) throughout the contiguous United States and Mexico, except for the Minnesota gray wolf population, which was classified as threatened (43 FR 9607, March 9, 1978). Although a broad range of rules and delisting actions have occurred with the gray wolf (see 78 FR 35664, June 13, 2013 for a full description), for the action area in Arizona and New Mexico, the gray wolf has been considered endangered since 1978. No critical habitat has been designated for the gray wolf in Arizona or New Mexico.

Gray wolf biology is similar to the Mexican wolf and the population has varied by region (see 78 FR 35664, June 13, 2013 for a full description). With the exception of Mexican wolves reintroduced in the experimental zone, gray wolves are not known to persist in Arizona and New Mexico, although two instances have resulted in trapping attempts to confirm lone animals.

With the exception of biological/conference opinions associated with Mexican wolves, consultations on gray wolves have not been conducted in the action area (see above for consultations associated with Mexican wolves).



DEPARTMENT OF THE INTERIOR
 U.S. FISH & WILDLIFE SERVICE
 Endangered Species Permit Office
 500 Gold Avenue S.W.
 P.O.Box 1306
 Albuquerque, NM 87103-1306

FEDERAL FISH AND WILDLIFE PERMIT

1. PERMITTEE

U.S. FISH AND WILDLIFE SERVICE, REGION 2
 MEXICAN WOLF RECOVERY PROGRAM
 NM ECOLOGICAL SERVICES FIELD OFFICE
 2105 OSUNA NE
 ALBUQUERQUE, NM 87113
 U.S.A.

2. AUTHORITY-STATUTES
 16 USC 1533(d)

REGULATIONS
 50 CFR 17.32

50 CFR 13

3. NUMBER
TE091551-0

4. RENEWABLE
 YES
 NO

5. MAY COPY
 YES
 NO

6. EFFECTIVE
 05/06/2015

7. EXPIRES
 05/31/2020

8. NAME AND TITLE OF PRINCIPAL OFFICER *(If #1 is a business)*
 SHERRY BARRETT
 MEXICAN WOLF RECOVERY COORDINATOR

9. TYPE OF PERMIT
 NATIVE THREATENED SP. RECOVERY - T WILDLIFE

10. LOCATION WHERE AUTHORIZED ACTIVITY MAY BE CONDUCTED
 On lands specified within the terms and conditions of the permit

11. CONDITIONS AND AUTHORIZATIONS:

A. GENERAL CONDITIONS SET OUT IN SUBPART D OF 50 CFR 13, AND SPECIFIC CONDITIONS CONTAINED IN FEDERAL REGULATIONS CITED IN BLOCK #2 ABOVE, ARE HEREBY MADE A PART OF THIS PERMIT. ALL ACTIVITIES AUTHORIZED HEREIN MUST BE CARRIED OUT IN ACCORD WITH AND FOR THE PURPOSES DESCRIBED IN THE APPLICATION SUBMITTED. CONTINUED VALIDITY, OR RENEWAL, OF THIS PERMIT IS SUBJECT TO COMPLETE AND TIMELY COMPLIANCE WITH ALL APPLICABLE CONDITIONS, INCLUDING THE FILING OF ALL REQUIRED INFORMATION AND REPORTS.

B. THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, LOCAL, TRIBAL, OR OTHER FEDERAL LAW.

C. VALID FOR USE BY PERMITTEE NAMED ABOVE.

D. Your permit has been renewed as follows. The terms and conditions set forth in the most recent permit, dated February 10, 2014, and any previous amendments or renewals are hereby superseded by this document.

E. Acceptance of this permit serves as evidence that the Permittees agree to abide by the "General Conditions for Native Endangered and Threatened Wildlife Species Permits" (copy attached).

F. Acceptance of this permit serves as evidence that the Permittees agree to abide by all conditions stated. **Some terms and conditions within this permit may have changed, either to reflect the most current language available or in response to requests by applicants or requirements by species' lead biologist(s).** Terms and conditions of this permit are inclusive. Any activity not specifically permitted is prohibited. Please read through these conditions carefully as violations of permit terms and conditions could result in your permit being revoked or denial of a new permit when the current one expires. Violations of your permit terms and conditions which contribute to a violation of the Endangered Species Act (ESA or Act) could also subject the Permittee to criminal or civil penalties.

ADDITIONAL CONDITIONS AND AUTHORIZATIONS ALSO APPLY

12. REPORTING REQUIREMENTS
 Annual reports due May 31

| | | |
|------------------------------------|--|--------------------|
| ISSUED BY <i>Susan Jacobson</i> | TITLE CHIEF, DIVISION OF CLASSIFICATION AND RESTORATION | DATE 05/06/2015 |
|------------------------------------|--|--------------------|

G. Disposal, transplant, or release of live wildlife/plants or plant parts taken or held under the terms of this permit, unless specifically authorized, requires prior written approval by the species' lead U.S. Fish and Wildlife Service (USFWS) office. You must dispose of dead wildlife/plants or plant parts as specified by the terms of this permit. If terms are not specified, specimens can be destroyed or transferred to a public institution. A copy of this permit and a cover letter referencing your permit number, must accompany each shipment and must be retained with the specimens. The cover letter must specify who will receive the specimens and the numbers involved. A copy of the letter must be furnished to the following addresses:

U.S. Fish and Wildlife Service
Regional Office
Division of Endangered Species - Recovery Permits
P.O. Box 1306
Albuquerque, New Mexico 87103
505/248-6665 or 505/248-6920

U.S. Fish and Wildlife Service
Mexican Wolf Recovery Program
New Mexico Ecological Services Field Office
2105 Osuna NE
Albuquerque, New Mexico 87113
505/346-2525

A copy should also be retained in your files. Transfers deviating from the above conditions require prior written approval by the USFWS.

H. *Unless otherwise instructed within the species-specific language below, an annual report* based on each species and activity conducted under the authority of this permit (including where activities took place, number and location of species collected/captured, and field data forms, if appropriate) must be submitted to the respective **Ecological Services Field Office (ESFO)** listed above, including negative data (i.e., negative survey findings or lack of breeding success). If no activities were conducted under this permit, for one or more species during the calendar year, a report stating such will satisfy the annual reporting requirements. The annual report should also include recovery permit number, species' common and scientific name, date of survey, observer, observer contact information (in case of questions), location (provide GPS or UTM coordinates, or Township and Range and at least quarter Section), number of individuals observed, their sex, age class, and breeding condition, if known or determined in recovery permit report for all surveys conducted. If habitat quality/condition was noted at the time of surveys, please include that information. Annual reports may also be submitted on a CD. Failure to submit a report, or failure to submit an adequate report, is a violation of the permit and is cause for suspension or revocation of the permit. A violation may disqualify a person from receiving or exercising the privileges of a permit as long as the deficiency exists.

Data collected in lat/long, NAD 83 is preferred. If collected in an alternate coordinate system, please report the coordinate system and datum the information was collected in. Optional information that can be included to help further define the precision of the locational information includes: 1) Positional Dilution of Precision (PDOP) level at time of acquisition, and 2) whether the Wide Area Augmentation System (WAAS) was enabled.

For all surveys conducted within New Mexico, you must submit your annual report in the University of New Mexico's Natural Heritage Program **USFWS Permit Data Template** available at http://nhnm.unm.edu/data/fws_permit_template. Completed annual reports must be submitted to nhnm@unm.edu as well as the appropriate ESFO listed above in section G. If your annual report is too large to send via e-mail, you may submit required copies on a CD. To send a CD to the Natural Heritage Program by mail or courier, please use the following addresses:

Mail To:
Natural Heritage New Mexico
UNM Biology Dept.
MSC03 2020
1 University of New Mexico
Albuquerque, NM 87131-0001
505/277-3822
Email: nhnm@unm.edu

Courier Delivery:
Natural Heritage New Mexico
University of New Mexico Main Campus
Casterter Hall - Room 167
Albuquerque, NM 87131

I. An annual report transmittal letter is the only document to be submitted to the **Regional Office**, Division of Endangered Species - Recovery Permits, Albuquerque, NM at the above address (or to the following electronic mailing address: FW2_TE_Permits@fws.gov on or before December 15 of each year (unless date is otherwise stated). The transmittal letter should state the following information: name of field office(s) and name of species where data was forwarded; date report(s) sent to field office; and list of species for which no activities were conducted, if applicable.

*If an amendment or renewal request is also needed at the time that the annual report is submitted, please make sure the annual report transmittal letter and request(s) are submitted under separate cover. **Do not include permit requests along with annual reports.***

J. Copies of any unpublished or published reports generated by the studies or projects covered by this permit and other data that would be useful for the conservation or recovery of the species should also be submitted to the ESFO(s). Reports should include one copy of USGS 7.5 minute quad sheets or larger scale maps, depicting sites where listed species covered by this permit were found or not found. These reports may be disclosed pursuant to the Freedom of Information Act.

K. Should any mortality or physical injury occur to an individual of the species during permitted activities (above the amount that may be specified below for a specific species) all operations must immediately cease and you are required to contact the ESFO(s) above within 24 hours.

L. Please note that this permit is limited to the activities and species described below, and is functional only when used in combination with a valid state permit.

M. Activities involving migratory birds and their parts (see 50 CFR 10, Migratory Bird Treaty Act (16 USC 703 et seq.) and implementing Regulations at 50 CFR 21) or bald and golden eagles (see Bald and Golden Eagle Protection Act (16 USC 668a) and 50 CFR 22), may require additional permits or authorizations. Please contact the respective Regional Migratory Bird Permit Office, <http://www.fws.gov/permits/contacts/contacts.shtml>, for additional information.

N. This permit does not, either directly or by implication, allow or grant right of trespass. Permission to enter lands must be obtained in writing from the landowner or land managing agency.

O. If conducting research on a National Wildlife Refuge, you must obtain a refuge special use permit. The refuge permit will need to be used in conjunction with this permit and a valid state permit in order to meet all applicable laws.

P. You must furnish the USFWS, Division of Endangered Species - Recovery Permits (address above) with a copy of the permit issued to you by the Indian Tribal Government(s) prior to conducting research and recovery activities on Tribal lands.

Q. You must have a copy of this permit and any other pertinent information in your possession while conducting the authorized activities.

R. A request for **renewal**, if appropriate, must be submitted to the USFWS Division of Endangered Species - Recovery Permits (at the above address) prior to the expiration date of the current permit. Any person holding a valid, renewable permit who submits a written request (application form 3-200-55) for renewal at least 30 days prior to the expiration date, may continue to conduct those activities under the expired permit while the USFWS takes action on such person's request for renewal.

If a request for permit renewal is received in the Regional Office **less than 30 days prior to permit expiration**, ***all activities authorized by the permit must cease upon permit expiration.***

All requests to renew, amend, or obtain a new permit will require submittal of an application. The application may be obtained by going to the following website: <http://forms.fws.gov/3-200-55.pdf>. Please submit this application and a cover letter describing your request to the attention of the Recovery Permits Coordinator located in the Regional Office. The address is listed under condition G above. If you wish to confirm your application request was received, please send your application via certified mail or Federal Express, or provide an e-mail address for electronic notification.

MEXICAN GRAY WOLF

S. Subject to Condition S.3 below, this programmatic permit is being issued under 50 CFR 17.22 and 50 CFR 17.32, as well as in accordance with the revised Mexican wolf nonessential experimental population rule (10(j) rule) under 50 CFR 17.84(k). Should a conflict arise between the language found in this permit and the language found in the final 10(j) rule, the language found in the 10(j) rule shall prevail. Authorized Permittees may take any Mexican gray wolf (*Canis lupus baileyi*) in the Mexican Wolf Experimental Population Area (MWEPA) in a manner consistent with a USFWS-approved management plan, special management measure, biological opinion pursuant to section 7(a)(2) of the Act, conference opinion pursuant to section 7(a)(4) of the Act, section 6 of the Act as authorized pursuant to § 17.31 for State game and fish agencies with authority to manage Mexican wolves, or this permit. Authorized Permittees may conduct activities related directly to the conservation, protection, and recovery of the nonessential experimental population of Mexican wolves within Arizona, New Mexico, Texas, Colorado, Utah, Nevada, and California.

Authorized Permittees will capture and at the direction of the USFWS Mexican Wolf Recovery Coordinator, return to the MWEPA, or transfer to captivity or Mexico, any Mexican wolves that have dispersed from the experimental population and that establish wholly outside of the MWEPA in Arizona, New Mexico, Texas, Colorado, Utah, Nevada, or California, according to the terms and conditions below. Purposeful lethal take outside of the MWEPA is not authorized under this permit.

1. The USFWS Mexican Wolf Recovery Coordinator; U.S. and Mexico Mexican Wolf Recovery Program staff including staff associated with captive facilities; Federal, State, and Tribal staff; and other associated persons under the direct supervision of, direction of, or in coordination with the USFWS's Mexican Wolf Recovery Coordinator, are authorized for scientific research and recovery purposes to conduct activities related directly to the propagation, management, and recovery of captive and free-ranging Mexican wolves in a manner consistent with a USFWS-approved management plan, special management measure, biological opinion pursuant to section 7(a)(2) of the Act, conference opinion pursuant to section 7(a)(4) of the Act, section 6 of the Act as authorized pursuant to § 17.31 for State game and fish agencies with authority to manage Mexican wolves, the final 10j rule (80 FR 2512-2567, January 16, 2015), or this permit. Specifically, authorization includes all actions related to: capture including, but not limited to, leg-hold traps, helicopter or ground darting and net-gunning, and captive capture methods; handling; possessing; administering health care; propagating; radio collaring, or other marking techniques; releasing, translocating, and cross-fostering; obtaining and preserving blood, tissue, fur, semen, ova, and other samples that are considered parts of Mexican wolves (scat is not

considered a part of a Mexican wolf and can be collected without a permit); transporting between approved Mexican wolf captive management facilities in the United States and Mexico, to and from Veterinarian care facilities, and to approved release sites; purposeful lethal take (purposeful lethal take is limited to Mexican wolves within the MWEPA in Arizona and New Mexico); hazing via less-than-lethal projectiles; injurious harassment; research; and carrying out any other USFWS-approved husbandry practice, law enforcement, or management action for Mexican wolves. Furthermore, with prior coordination with the USFWS Mexican Wolf Recovery Coordinator, these activities may be carried out in other States where captive Mexican wolves are held.

2. Permittees authorized by this 10(a)(1)(A) permit have met the qualification of this permit and are experienced in the handling and care of gray wolves or similar species. All are either: (1) employees of the USFWS or other individuals with expertise in wolf monitoring, management, care, and handling; (2) are trained, experienced, and licensed veterinarians; (3) are individuals with specific skills (e.g. horse packing or riding, and helicopter flying) that are necessary to achieve gray wolf management objectives or (4) conducting scientific studies and research approved by the USFWS or a designated agency. Permittees, and other personnel under their direct supervision or direction, are authorized to conduct activities listed in this permit. The Permittees are/will be approved by the USFWS Mexican Wolf Recovery Coordinator and must have their names on file with the USFWS Mexican Wolf Recovery Program office prior to being considered Permittees under this permit or conducting any permitted activities. The file will include each Permittee's name and a list of authorized activities. The most current list of Permittees held by the USFWS Mexican Wolf Recovery Coordinator will be updated as appropriate to include names of individuals who meet the permit requirements or delete those who no longer meet the permit requirements or are no longer involved in the program. A copy of the USFWS's list of Permittees may be obtained from the USFWS Mexican Wolf Recovery Coordinator. A copy of the list will be available to USFWS Law Enforcement upon request.

In the case of an emergency situation involving a Mexican wolf or wolves, notification of the action taken and the employees involved who were not currently considered a Permittee, or under a Permittee's direct, on-site supervision, must be provided to the USFWS Mexican Wolf Recovery Program Office within 2 working days. Direct, on-site supervision is defined as physical presence of a Permittee during a permitted activity.

- a. Designated employees of the White Mountain Apache Tribe are authorized to conduct management activities on White Mountain Apache Tribal lands in accordance with the 2000 White Mountain Apache Tribe Mexican Wolf Management Plan, and any amendments, pursuant to 50 CFR 17.84(k)(9)(ii).
- b. Under this permit, permitted employees of the White Mountain Apache Tribe are authorized to conduct permitted activities off of White Mountain Apache Tribal lands if requested by other authorized Permittees.

3. Recovery Permit and State Authorities: This programmatic permit covers management activities for Mexican wolves within Arizona and New Mexico, Texas, Colorado, Utah, Nevada, and California, including Mexican wolves within and outside of the MWEPA (50 CFR 17.84(k)). It is intended to supplement any authorities that the States (as Permittees under other permits) may have for management of threatened and endangered species that are granted through implementing regulations for section 6 of the Endangered Species Act (50 CFR parts 17.21 and 17.31), existing Section 6 Cooperative Agreements and associated work plans, the Mexican wolf nonessential experimental population (50 CFR 17.84(k)), and State Research and Recovery permits.

4. Permittees whose duties include leading capture or handling events, including handling chemical immobilization agents purchased by the USFWS, will be given approval to conduct these events by Peter Alcumbrac, DVM, Susan Dicks, DVM, Anne Justice-Allen, DVM, or another individual with relevant qualification and experience approved by the Mexican Wolf Recovery Coordinator. All individuals whose duties include leading capture or handling events will be required to attend wolf handling and chemical immobilization training by Peter Alcumbrac, DVM, or other veterinarian approved by the Mexican Wolf

Recovery Coordinator, annually. The USFWS Mexican Wolf Recovery Coordinator maintains the list of Permittees approved to lead such events (see condition S.2. above).

5. Biological samples, such as blood, pelts, skulls, or other tissue, will be stored at the University of New Mexico's Museum of Southwest Biology, under the direction of Dr. Joseph Cook, unless otherwise directed. Requests for access to such samples will be submitted to Dr. Cook, who will review the request and make recommendations to the Mexican Wolf Recovery Coordinator who may authorize release of such samples. UNM will also track the use of these samples. Before samples are shipped for storage at UNM, please contact Dr. Cook at 505/277-1358 for instructions on correct shipping. If Dr. Cook is not available, please contact the museum's main office at 505/277-1360. Additional biological samples, such as blood or tissue, will be stored at the USFWS Ashland Forensics Laboratory and at the University of Idaho, under the direction of Dr. Lisette Waits. The University of Idaho has entered into an agreement with the USFWS to conduct genetic analyses for the USFWS's Mexican Wolf Recovery Program.

6. Mexican wolf captive holding facilities must meet the standards of the Mexican wolf captive breeding program. Only facilities approved by the American Zoo and Aquarium Association (AZA) and the Mexican Wolf Species Survival Plan (SSP) program will be authorized by the USFWS to hold Mexican wolves. Collectively, these facilities will be referred to as SSP facilities throughout the remainder of the permit.

7. It is understood that all Mexican wolves and subsequent offspring at the SSP facilities are on loan and part of the U.S./Mexico Mexican Wolf Captive Breeding Program. A copy of the USFWS's loan agreement letter for the Mexican wolf captive breeding facilities may be obtained from the USFWS Mexican Wolf Recovery Coordinator.

8. The Mexican wolves and subsequent offspring at the SSP facilities are and will remain the property of the USFWS and/or the Mexican government and may be recalled by the USFWS or the Mexican government, as needed.

9. Animals in captivity are to be maintained in accordance with the Mexican Wolf Husbandry Manual and other guidance provided by the Mexican Wolf SSP Management Group or the USFWS.

10. Health, medical, and dietary records for each Mexican wolf, and records on reproductive success and mortalities must be reported to the Mexican Wolf Studbook keeper, Peter Siminski, Living Desert, 47900 Portola Avenue, Palm Desert, California 92260-6156, each year prior to the annual meeting of the SSP, for inclusion in the minutes.

11. SSP facilities are required to promptly report any captive Mexican wolf mortalities to Peter Siminski at 760/346-5694 ext 305 and to the USFWS Mexican Wolf Recovery Coordinator or designee at 505/761-4748. Animals must be disposed of in strict accordance with established procedures by the Mexican Wolf SSP Management Group. Animals may not be euthanized without prior consent of the USFWS Mexican Wolf Recovery Coordinator, or designee. In urgent humane or public health emergencies, the captive institutional representative and veterinarian may together decide to euthanize a Mexican wolf and notify the USFWS Mexican Wolf Recovery Coordinator at their earliest convenience.

12. With prior authorization from the USFWS Mexican Wolf Recovery Coordinator, or a designated USFWS employee, SSP facilities and Permittees are authorized to transport wild-captured or captive-reared Mexican wolves to various approved sites for research, reintroductions, rehabilitation, breeding, or treatment of sick or injured individuals.

13. With prior authorization from the USFWS Mexican Wolf Recovery Coordinator, or a designated USFWS employee, SSP facilities and Permittees are authorized to conduct appropriate research on Mexican wolves in

captivity. Examples include, but are not limited to, conditioned taste aversion, aversion training to humans and human stimuli, reproductive studies, and radio-collaring methods for pups.

14. Live captive Mexican wolves will remain under the care of SSP facilities authorized to hold Mexican wolves by the USFWS. Remains of dead Mexican wolves will typically be held by the University of New Mexico's Museum of Southwestern Biology under agreement with the USFWS. On occasion, but only with written permission from the USFWS Mexican Wolf Recovery Coordinator, remains of Mexican wolves may be used to create Mexican wolf mounts for educational purposes or will be used as pelts, skulls, and/or skeletons for educational purposes and may be loaned to organizations or institutions in support of the species' recovery.

15. The annual report for all activities authorized under this permit will be combined with the annual Mexican Wolf Recovery Program Report and will be due on or by May 31 of each year.

LETHAL TAKE SUB-PERMITS (ONLY WITHIN MWEPA)

T. Take on Federal land: Within the MWEPA, based on the Service's or a designated agency's discretion and in conjunction with a removal action authorized by the Service, the Service may issue permits to livestock owners or their agents (e.g., employees, land manager, local officials) to take (including intentional harassment or killing) any Mexican wolf that is in the act of biting, killing, or wounding livestock on Federal land where specified in the permit. Permits issued under this provision will specify the number of days for which the permit is valid and the maximum number of Mexican wolves for which take is allowed. Take by Permittees under this provision will assist the USFWS or designated agency in completing control actions. Livestock owners or their agents must report this take as specified in accordance with paragraph K of this permit. After the take of a Mexican wolf, the USFWS must be provided evidence that the wolf was in the act of biting, killing, or wounding livestock at the time of take, such as evidence of freshly wounded or killed livestock. The take of any Mexican wolf without evidence of biting, killing, or wounding livestock may be referred to the appropriate authorities for investigation.

U. Take on Non-federal land: Within the MWEPA, based on the USFWS's or a designated agency's discretion and in conjunction with a removal action authorized by the USFWS, the USFWS or designated agency may issue permits to domestic animal owners or their agents (e.g., employees, land manager, local officials) to take (including intentional harassment or killing) any Mexican wolf that is present on non-Federal land where specified in the permit. Permits issued under this provision will specify the number of days for which the permit is valid and the maximum number of Mexican wolves for which take is allowed. Take by Permittees under this provision will assist the USFWS or designated agency in completing control actions. Domestic animal owners or their agents must report this take as specified in accordance with paragraph K of this permit.

V. Take for research purposes: Within the MWEPA, the Service may issue permits under 50 CFR 17.32, and its designated agencies may issue permits under State and Federal laws and regulations, for individuals to take Mexican wolves pursuant to scientific study proposals approved by the agency or agencies with jurisdiction for Mexican wolves and for the area in which the study will occur. Such take should lead to management recommendations for, and thus provide for the conservation of, the Mexican wolf.

W. Take in response to unacceptable impacts to a wild ungulate herd. If an Arizona or New Mexico game and fish agency determines that Mexican wolf predation is having an unacceptable impact to a wild ungulate herd, the respective State game and fish agency may request approval from the USFWS that Mexican wolves be removed from the area of the impacted wild ungulate herd. Upon written approval from the Service, the State (Arizona or New Mexico) or any designated agency may be authorized to remove (capture and translocate in the MWEPA, move to captivity, transfer to Mexico, or lethally take) Mexican wolves. These management actions must occur in accordance with the following provisions:

1. Arizona or New Mexico game and fish agency must prepare a science-based document that:

- a. Describes what data indicate that the wild ungulate herd is below management objectives, what data indicate that the impact on the wild ungulate herd is influenced by Mexican wolf predation, why Mexican wolf removal is a warranted solution to help restore the wild ungulate herd to State game and fish agency management objectives, the type (level and duration) of Mexican wolf removal management action being proposed, and how wild ungulate herd response to Mexican wolf removal will be measured and control actions adjusted for effectiveness;
- b. Demonstrates that attempts were and are being made to identify other causes of wild ungulate herd declines and possible remedies or conservation measures in addition to wolf removal;
- c. If appropriate, identifies areas of suitable habitat for Mexican wolf translocation; and
- d. Has been subjected to peer review and public comment prior to its submittal to the USFWS for written concurrence. In order to comply with this requirement, the State game and fish agency must:
 - i. Conduct the peer review process in conformance with the Office of Management and Budget's most recent Final Information and Quality Bulletin for Peer Review and include in their proposal an explanation of how the bulletin's standards were considered and satisfied; and
 - ii. Obtain at least three independent peer reviews from individuals with relevant expertise other than staff employed by the State (Arizona or New Mexico) requesting approval from the USFWS that Mexican wolves be removed from the area of the impacted wild ungulate herd.

2. Before the Service will allow Mexican wolf removal in response to impacts to wild ungulates, the USFWS will evaluate the information provided by the requesting State (Arizona or New Mexico) and provide a written determination to the requesting State game and fish agency on whether such actions are scientifically based and warranted.

3. If all of the provisions above are met, the USFWS will, to the maximum extent allowable under the Act, make a determination providing for Mexican wolf removal. If the request is approved, the USFWS will include in the written determination which management action (capture and translocate in MWEPA, move to captivity, transfer to Mexico, lethally take, or no action) is most appropriate for the conservation of the Mexican wolf subspecies.

LESS-THAN-LETHAL PROJECTILE USAGE

X. After the USFWS or its designated agency has confirmed Mexican wolf presence on any land within the MWEPA, the USFWS or its designated agency may issue permits valid for not longer than 1 year, with appropriate stipulations or conditions, to allow intentional harassment (as defined in 50 CFR 17.84(k)(3)) of Mexican wolves. The harassment must occur in the area and under the conditions specifically identified in the permit. Permittees must report this take to the USFWS's Mexican Wolf Recovery Coordinator or a designated agency of the USFWS within 24 hours.

The Mexican Wolf Recovery Program and Arizona Game and Fish Department are authorized for research and recovery purposes to designate as Permittees, certain residents, ranchers, and/or private landowners with a demonstrated history (one or more instances in the last 365 days as documented by a designated agency) of interactions with problem Mexican wolves within the MWEPA. Permittees will be authorized to use approved less-than-lethal projectiles (e.g., paint balls, bean bag rounds, and rubber bullets) to harass problem Mexican wolves.

The authorization to designate Permittees (and the authorization for Permittees to use less-than-lethal projectiles) will be reviewed annually as part of the annual reporting requirements of this permit to determine the effectiveness of less-than-lethal projectile use on Mexican wolf behavior. Results of the annual review will be used to evaluate whether the program will be continued, revised, or discontinued. The evaluation shall be conducted within the Mexican Wolf Annual Report. The following conditions also apply:

1. Authorization for use of approved less-than-lethal projectiles will only be granted to individuals following training and certification in their proper use by an employee designated by the USFWS Mexican Wolf Recovery Coordinator or by the Director of a state or tribal game and fish agency that has designated agency status) as a Permit Administrator. Authorization as Permittee is non-transferable to any other party (including family members or employees).
2. Administration and designation of private individuals as Permittees of the USFWS or State, for use of less-than-lethal projectiles, shall be by an employee designated by the USFWS Mexican Wolf Recovery Coordinator and/or Director of a state or tribal game and fish agency that has designated agency status as a Permit Administrator(s).
3. When Permit Administrators from the USFWS or state or tribal game and fish agency that have designated agency status are satisfied that training criteria of issuance have been met, the USFWS or state or tribal game and fish agency will issue a signed, dated permit-letter with appropriate stipulations for specific authorized uses. Less-than-lethal projectile permit letters will be valid for 90 days from date of issuance, and may be renewed up to three times for periods of 90 days, if warranted by problem Mexican wolf activities and by the agent's compliance with permit terms. The respective Permit Administrator shall provide the original permit letter (or renewal permit letter) to the authorized agent, provide a copy to other agencies in the Mexican Wolf Recovery Program, and retain a copy in their project files.
4. Mexican wolves cannot be purposely attracted and then harassed.
5. Notwithstanding this Permit's terms regarding harassment or rules regarding harassment found in the revised Mexican wolf nonessential experimental population rule-10(j) management rule under 50 CFR 17.84(k), Mexican wolves shall not be harassed at or within 500 yards of a known den or rendezvous site. USFWS or Permit Administrator will communicate the location of known sites to Permittees.
6. The USFWS and Permit Administrators shall submit a report regarding all less-than-lethal projectile usage contained with the Mexican Wolf Recovery Program Annual Report, which is due May 31. The report will contain:
 - a. the number of Permittees authorized,
 - b. the number of projectiles used,
 - c. the number of incidents where contact was made,
 - d. any resulting injuries,
 - e. whether an animal that was "hit" was seen again or not in the 30 days following an incident where contact was made.
7. All information regarding less-than-lethal projectile usage shall be summarized in the permit annual report described in Condition S.15, above.
8. Unintended mortality or injury that interferes with normal behavior patterns of a Mexican wolf that occurs as a consequence of less-than-lethal activities conducted by agents is authorized under this permit, provided all actions are implemented as described in the Less-Than-Lethal-Projectile Guidance (current version: 12/11/2012). If such mortality occurs, Permit Administrators will immediately suspend all activity under permits of all Permittees conducting less-than-lethal activities and notify the USFWS Law Enforcement Office

and Mexican Wolf Recovery Coordinator. USFWS Law Enforcement will investigate the mortality to ensure that such a mortality was unintended and within the actions authorized in the Less-Than-Lethal Guidance. Permit Administrators will complete a review of the specific incident after the Law Enforcement investigation is concluded and may modify the Less-Than-Lethal-Projectile Guidance to limit the probability of future mortalities. Once completed, the Permit Administrators will determine whether reauthorization is appropriate, including appropriate modifications, and may reauthorize activities under the permits of some or all the Permittees.

9. Designated agents can choose the appropriate tool to utilize in accordance with this permit or other regulations in CFR 17.84(k), including provisions for take in defense of human life, and for take on non-Federal lands inside the MWEPA, or permits issued under paragraph T or U above.

GRAY WOLF

Y. Subject to Condition Y.3. below, this 10(a)(1)(A) programmatic permit is being issued under 50 CFR 17.22 and 50 CFR 17.32,

1. The USFWS Mexican Wolf Recovery Coordinator; U.S. and Mexico Mexican Wolf Recovery Program staff; Federal, State, and Tribal staff; and other associated persons under the direct supervision of, direction of, or in coordination with the USFWS's Mexican Wolf Recovery Coordinator, are authorized for scientific research and recovery purposes to conduct activities related directly to the management and recovery of free-ranging gray wolves in a manner consistent with a USFWS-approved management plan, special management measure, biological opinion pursuant to section 7(a)(2) of the Act, section 6 of the Act as authorized pursuant to § 17.21 for State game and fish agencies with authority to manage gray wolves, or this permit. Specifically, authorization includes all actions related to: capture including, but not limited to, leg-hold traps, helicopter or ground darting and net-gunning; handling; possessing; administering health care; radio collaring, or other marking techniques; translocating; obtaining and preserving blood, tissue, fur, semen, ova, and other samples that are considered parts of gray wolves (scat is not considered a part of a gray wolf and can be collected without a permit); transporting to and from veterinarian care facilities; hazing via less-than-lethal projectiles; injurious harassment; law enforcement; and research. Purposeful lethal take of gray wolves is not authorized under this permit.

2. Permittees authorized by this 10(a)(1)(A) permit have met the qualification of this permit and are experienced in the handling and care of gray wolves or similar species. All are either: (1) employees of the USFWS or other individuals with expertise in wolf monitoring, management, care, and handling; (2) are trained, experienced, and licensed veterinarians; (3) are individuals with specific skills (e.g. horse packing or riding, and helicopter flying) that are necessary to achieve gray wolf management objectives or (4) conducting scientific studies and research approved by the USFWS or a designated agency. Permittees, and other personnel under their direct supervision or direction, are authorized to conduct activities listed in this permit. The Permittees are/will be approved by the USFWS Mexican Wolf Recovery Coordinator and must have their names on file with the USFWS Mexican Wolf Recovery Program office prior to being considered Permittees under this permit or conducting any permitted activities. The file will include each Permittee's name and a list of authorized activities. The most current list of Permittees held by the USFWS Mexican Wolf Recovery Coordinator will be updated as appropriate to include names of individuals who meet the permit requirements or delete those who no longer meet the permit requirements or are no longer involved in the program. A copy of the USFWS's list of Permittees may be obtained from the USFWS Mexican Wolf Recovery Coordinator. A copy of the list will be available to USFWS Law Enforcement upon request.

In the case of an emergency situation involving a gray wolf or wolves, notification of the action taken and the employees involved who were not currently considered a Permittee, or under a Permittee's direct, on-site supervision, must be provided to the USFWS Mexican Wolf Recovery Program Office within 2 working days. Direct, on-site supervision is defined as physical presence of a Permittee during a permitted activity.

3. Recovery Permit and State Authorities: This programmatic permit covers management activities for gray wolves within Arizona, New Mexico, and Texas, where listed as endangered or threatened. It is intended to supplement any authorities that the States (as Permittees under other permits) may have for management of threatened and endangered species that are granted through implementing regulations for Section 6 of the Endangered Species Act (50 CFR parts 17.21 and 17.31), existing Section 6 Cooperative Agreements and associated work plans, the Mexican wolf nonessential experimental population (50 CFR 17.84(k)), and State Research and Recovery permits.
4. Permittees whose duties include leading capture or handling events, including handling chemical immobilization agents purchased by the USFWS, will be given approval to conduct these events by Peter Alcumbrac, DVM, Susan Dicks, DVM, Anne Justice-Allen, DVM, or other individual with relevant qualification and experience approved by the Mexican Wolf Recovery Coordinator. All individuals whose duties include leading capture or handling events will be required to attend wolf handling and chemical immobilization training by Peter Alcumbrac, DVM, or other veterinarian approved by the Mexican Wolf Recovery Coordinator, annually. The USFWS Mexican Wolf Recovery Coordinator maintains the list of Permittees approved to lead such events (see condition 2. above).
5. Biological samples, such as blood, pelts, skulls, or other tissue, will be stored at the University of New Mexico's Museum of Southwest Biology, under the direction of Dr. Joseph Cook, unless otherwise directed. Requests for access to such samples will be submitted to Dr. Cook, who will review the request and make recommendations to the Mexican Wolf Recovery Coordinator who may authorize release of such samples. UNM will also track the use of these samples. Before samples are shipped for storage at UNM, please contact Dr. Cook at 505/277-1358 for instructions on correct shipping. If Dr. Cook is not available, please contact the museum's main office at 505/277-1360. Additional biological samples, such as blood or tissue, will be stored at the USFWS Ashland Forensics Laboratory and at the University of Idaho, under the direction of Dr. Lisette Waits. The University of Idaho has entered into an agreement with the Service to conduct genetic analyses for the Service's Mexican Wolf Recovery Program.
6. The annual report for all activities authorized under this permit will be combined with the annual Mexican Wolf Recovery Program Report and will be due on or by May 31 of each year.

End Permit TE-091551-8

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

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

v.

No. CV 16-00462 WJ/KBM

UNITED STATES DEPARTMENT OF
THE INTERIOR, *et al.*,

Respondents.

MEMORANDUM OPINION AND ORDER GRANTING
PETITIONER’S MOTION FOR PRELIMINARY INJUNCTION
AND ORDER FOR PROPOSED ORDER OF INJUNCTION

THIS MATTER comes before the Court upon Petitioner New Mexico Department of Game and Fish’s Motion for Preliminary Injunction and Temporary Restraining Order (**Doc. 3**), filed May 20, 2016. Having reviewed and considered the parties’ written and oral arguments and the applicable law, the Court finds that Petitioner’s Motion for Preliminary Injunction is well-taken, and therefore **GRANTED**, as herein described.

BACKGROUND

Petitioner New Mexico Department of Game and Fish (“Petitioner” or “Department”) alleges that beginning in 1998, Respondent United States Fish and Wildlife Service (“Service”) and the collective Respondents (“Respondents”) began to introduce the Mexican gray wolf into Arizona and New Mexico. Over the intervening period, the Service has introduced dozens of wolves in Arizona and New Mexico. Petitioner alleges that until now, Respondents obtained approval from the Department prior to every importation and release of a wolf within New

Mexico borders. On April 1, 2015 and May 6, 2015, the Service filed two separate applications with the Department to release wolves in New Mexico. The Director of the Department denied both applications on June 2, 2015 on the grounds that the Service did not submit a federal species management plan along with the application. On June 22, 2015, the Service appealed the Director's decision to the New Mexico Game Commission, and the New Mexico Game Commission upheld the Director's decision on September 29, 2015. On October 14, 2015, the Service, by letter to the Department, indicated that it no longer intended to comply with New Mexico's permitting requirements and would move forward with the reintroduction of Mexican wolves in New Mexico. The Department sent a 60-day notice of intent to sue letter to the Service on April 20, 2016. Petitioner alleges that around April 23, 2016, Respondents released two wolves in New Mexico without obtaining Department approval. Petitioner further alleges that Respondents are poised to soon release additional wolves within New Mexico.

New Mexico law prohibits the importation and release of non-domesticated animals, including Mexican wolves, without a permit from the Department. *See* NMAC §§ 19.35.7.8, 19.35.7.19, 19.31.10.11. Petitioner also alleges that federal law requires Respondents "carrying out research programs involving the taking or possession of fish and wildlife or programs involving reintroduction of fish and wildlife" to "consult with the States and comply with State permit requirements . . . except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibility." 43 C.F.R. § 24.4(i)(5)(i).

Petitioner filed a Motion for Preliminary Injunction and Motion for Temporary Restraining Order (**Doc. 3**) on May 20, 2016, requesting this Court to issue a temporary restraining order halting further releases of wolves by the Service within New Mexico for

fourteen (14) days, pursuant to Federal Rule of Civil Procedure 65, and to set argument with respect to the Department's request for a preliminary injunction prior to the expiration of the temporary restraining order. On May 23, 2016, the Court filed a Notice of Hearing on Petitioner's Motion to be set for May 26, 2016. As the Court noted at the Hearing, given that Respondents had an opportunity to respond to Petitioner's Motion both through written briefs and at oral argument, Petitioner's request for a temporary restraining order instead became a request for a preliminary injunction. Respondents filed a Memorandum in Opposition (**Doc. 9**) on May 24, 2016, and Petitioner filed a Reply (**Doc. 13**) on May 25, 2016. At the May 26, 2016 hearing, the Court heard oral argument from both parties regarding whether or not the Court should grant Petitioner's Motion for Preliminary Injunction.

LEGAL STANDARD

A preliminary injunction may not be issued unless the movant shows that: (1) the movant has a substantial likelihood of prevailing on the merits; (2) the movant will suffer irreparable injury unless the injunction or restraining order is issued; (3) the threatened injury outweighs the harm the injunction or restraining order might cause the adverse party; and (4) the injunction or restraining order, if issued, would not be adverse to the public interest. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001); *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1253 (D.N.M. 2003). A movant is not able to show the existence of an irreparable injury if he has an adequate remedy at law to address the alleged harm. *See Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1353 (10th Cir. 1989). Because a preliminary injunction is an extraordinary remedy, any right to relief must be clear and unequivocal. *See Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (quoting *Greater Yellowstone Coal v.*

Flowers, 321 F.3d 1250, 1256 (10th Cir. 2003)). Whether to grant a preliminary injunction rests within the sound discretion of the trial court. *See United States v. Power Eng'g Co.*, 191 F.3d 1224, 1230 (10th Cir. 1999).

Petitioner must satisfy the “statutory standing” requirements of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, which require establishing that Respondents took “final agency action for which there is no other adequate remedy in court.” 5 U.S.C. § 704; *Colorado Farm Bureau Fed'n v. U.S. Forest Service*, 220 F.3d 1171, 1173 (10th Cir. 2000) (citations omitted). In order to determine if an agency action is final, the court looks to whether the action marks the consummation of the agency’s decision-making process, and whether the action is one by which rights or obligations have been determined or from which legal consequences will flow. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997).

DISCUSSION

I. Standing and Judicial Review

Before turning to the merits of whether or not the Court should grant Petitioner’s Motion for Preliminary Injunction, the Court first addresses the arguments raised by Respondents regarding whether Petitioner has standing to bring the Motion for Preliminary Injunction and whether this Court may review 43 C.F.R. § 24.4(i)(5)(i).

A. Article III Standing

Respondents argue that Petitioner has only vaguely alleged how the 2016 planned wolf releases will disrupt its comprehensive management efforts of wildlife and therefore has failed to show an injury-in-fact that is concrete and particularized as well as actual and imminent. *See Wyo. ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Respondents note that Petitioner has not

explained how the release of two to six additional wolf pups, and one adult pair with pups, leaves the status quo significantly different as to the impact on ungulate¹ herds. Respondents additionally note that Petitioner briefly mentions that the unregulated release of non-domesticated animals, such as wolves, constitutes a public nuisance. Respondents argue that Petitioner does not have standing as a *parens patriae* to bring an action on behalf of its citizens against the federal government because the federal government is presumed to represent the State's citizens. *See Wyo. ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992).

Petitioner counters that it specifically alleged that Respondents' decision to adopt an *ad hoc* approach to wolf releases impacts Petitioner's ability to actively manage wildlife across the State. Such harms have already occurred and will continue to occur as Respondents release additional wolves into New Mexico. Thus, Petitioner argues that it has sufficiently established injury-in-fact. Petitioner additionally argues that it has standing as a *parens patriae* to bring a nuisance action based upon the distinction between the federal government's "[a]ctivities commanded or authorized by statute," in which public interest is presumed, and those that reflect "an agency's choice of a particular course of action," which may or may not be consistent with the underlying statute. *Michigan v. U.S. Army Corps of Engineers*, 758 F.3d 892, 894 (7th Cir. 2014). The latter may give rise to public nuisance liability. *See id.* Petitioner argues that the Endangered Species Act ("ESA") does not require the release of wolves into New Mexico, but rather, Respondents have chosen that particular course of action, thus giving Petitioner standing as a *parens patriae*.

As the Court ruled orally at the hearing, the Court finds that Petitioner has sufficiently alleged an injury-in-fact that is concrete and particularized as well as actual and imminent, and

¹ A hoofed, typically herbivorous quadruped mammal. *See ungulate*, Merriam-Webster Dictionary (11th ed. 2009). Here, the term is largely used to describe elk, deer, and antelope.

thus, Petitioner has standing to bring suit. Though not argued at length at the hearing, the Court additionally finds that Petitioner has standing to bring suit as a *parens patriae* given that Respondents' decision to release wolves into New Mexico without a State permit represents an agency's choice of a particular course of action that may or may not be authorized by statute or regulation.

B. Final Agency Action

Respondents next argue that Petitioner has failed to identify a final agency action taken by the Service that is in violation of 43 C.F.R. § 24.4(i)(5)(i).² The APA defines agency action as “includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). The action must “mark the consummation of the agency's decisionmaking process” and also “must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Respondents argue that Petitioner challenges only the Service's day-to-day management of the experimental wolf population through the release of individual wolves. Respondents liken their release of wolves to an “operational” activity that is not a “rule, order, license, sanction, relief, or the equivalent denial thereof” within the ambit of the APA, and alternatively, is not a “final disposition” by the agency, but rather, the implementation of a final disposition already made. *See Chemical Weapons Working Group v. U.S. Dep't of the Army*, 111 F.3d 1485, 1495–96 (10th Cir. 1997). Respondents also cite to *Wild Fish Conservancy v. Jewell*, in which the Ninth Circuit found that

² As previously stated, the regulation at issue states, in relevant part: “(i) Federal agencies of the Department of the Interior shall: (5) Consult with the States and comply with State permit requirements in connection with the activities listed below, except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities: (i) In carrying out research programs involving the taking or possession of fish and wildlife or programs involving reintroduction of fish and wildlife.” 43 C.F.R. § 24.4(i)(5)(i).

an agency's occasional closure of a gate supplying water to fish passages did not implicate a final agency action as it merely constituted day-to-day operations. *See* 730 F.3d 791, 800–01 (9th Cir. 2013).

In this case, Respondents argue that the final agency action is the Service's issuance of the Revised 10(j) Rule. *See* 80 Fed. Reg. 2512 (Jan. 16, 2015). The Revised 10(j) Rule was published after multiple public comment periods and preparation of an Environmental Impact Statement. The Rule expanded the area that Mexican wolves may occupy, clarified the provisions regulating the take of wolves, and increased the population objective in the population area. The 2016 releases within New Mexico are therefore not the consummation of a separate decision-making process but rather the day-to-day implementation of the Revised 10(j) Rule. Respondents argue that to the degree Petitioner does challenge the Revised 10(j) Rule, this case should be transferred to the U.S. District Court for the District of Arizona which is currently presiding over four lawsuits challenging those actions pursuant to the ESA and the National Environmental Policy Act.

Respondents next address the 2016 Release Plan. Petitioner argues that the Service's publication of the 2016 Release Plan is a final agency action as it reflects the Service's decision to release and translocate Mexican wolves in New Mexico and Arizona. Respondents counter that the 2016 Release Plan simply implements the decision made in the Revised 10(j) Rule. Additionally, the 2016 Release Plan is merely tentative and cannot be characterized as a final decision on where and how many wolves will be released in New Mexico.

Petitioner argues that they have challenged three separate final agency actions: first, the Revised 10(j) Rule, which sets the framework for the reintroduction of the wolf population; second, the October 14, 2015 letter sent to the Department in which the Service noted that they

would no longer comply with New Mexico’s permitting requirements; third, the 2016 Release Plan, which reflects the Service’s consummated decision to release wolves in New Mexico in 2016. The Release Plan states that the Executive Committee approved four discrete actions: “(1) to initial release a pack (male and female with pups) within New Mexico, (2) to cross-foster pups into a maximum of five packs (a maximum of six pups are authorized in the Arizona portion of the MWEPA), (3) to translocate a single wolf (M1336) in Arizona or New Mexico, and (4) to translocate wolves that may be moved for management purposes during 2016” (**Doc. 3-9**). Petitioner argues that such a plan is the clear result of the Service’s decisionmaking process and the releases are actions from which legal consequences will flow as they directly impact the rights and obligations of the Department insofar as its ability to control, monitor, and manage the release of wolves in New Mexico.

In a Notice of Supplemental Authority (**Doc. 17**), filed on June 1, 2016, Petitioner calls to the Court’s attention the decision by the U.S. Supreme Court in *U.S. Army Corps of Engineers v. Hawkes*, 578 U.S. ____ (2016). *Hawkes* concerned the Clean Water Act and the practice of the U.S. Army Corps of Engineers to issue to individual property owners an “approved jurisdictional determination” as to whether a particular piece of property contains “the waters of the United States.” 33 U.S.C. §§ 1311(a), 1362(7), (12). In determining whether the Corps’ approved jurisdictional determination is a final agency action reviewable under the APA, the Court found, and the Corps did not dispute, that the determination satisfied the first condition of *Bennett v. Spear*, namely, that the action marked the consummation of the agency’s decisionmaking process. *See Hawkes* at *5. As to the second *Bennett* condition that the action must be one by which rights or obligations have been determined, or from which legal consequences flow, the Court found that both a negative and affirmative jurisdictional determination gave rise to direct

and appreciable legal consequences. *See id.* at *6. A negative jurisdictional determination created a five-year safe harbor limiting potential liability for Clean Water Act violations, while an affirmative jurisdictional determination deprived property owners of the five-year safe harbor that the negative jurisdictional determination afforded. *See id.* at *6–*7. Respondents filed a Response (**Doc. 19**) on June 3, 2016, arguing that the 2016 Release Plan differs from the determination in *Hawkes*, as it merely implements the January 2015 Endangered Species Act Section 10(j) rule for the reintroduced population of wolves, and therefore, is not final agency action.

The Court finds that the 2016 Release Plan constitutes final agency action subject to judicial review, and thus, Petitioner has challenged a final agency action. The 2016 Release Plan “outlines the plan for initial release(s) and translocation(s) of Mexican wolves into the Mexican Wolf Experimental Population Area (MWEPA) in Arizona and New Mexico in 2016” and describes an initial release of a pack of wolves within New Mexico, cross-fostering pups into a maximum of five packs in Arizona, translocation of a single wolf in New Mexico or Arizona, and translocation of wolves for management purposes.

The Court finds that the 2016 Release Plan marks the “consummation of the agency’s decisionmaking process,” satisfying the first condition of *Bennett v. Spear*. 520 U.S. 154, 178 (1997). The Plan sets forth specific wolf releases to occur in 2016 and is not of a merely tentative or interlocutory nature, as it reflects a settled agency position to release a specific pack of wolves within New Mexico, cross-foster pups in Arizona, and translocate a single wolf. Respondents argue that the 2016 Release Plan simply implements the decision already made in the Revised 10(j) Rule, and further, is tentative in many respects and cannot be characterized as a final decision. However, the Court finds that while the 2016 Release Plan may implement the overall

decision already made in the Revised 10(j) Rule, the 2016 Release Plan addresses specific releases and translocations of specific wolves and packs which are not mentioned in the Revised 10(j) Rule. Thus, while the Revised 10(j) Rule explains and rules upon topics such as the need for additional releases of wolves, zones where cross-fostered pups may be released, and phases in which wolves will be released or translocated, the 2016 Release Plan more accurately details the specific releases for 2016, and thus reflects a settled agency action. While Respondents argue that the 2016 Release Plan is tentative, the Court finds statements such as “[t]his action involves the initial release of a single pair of wolves . . . into a release site in the Gila or Aldo Leopold Wilderness” and “[t]he IFT would hard release M1336 [a particular wolf] onto Federal land inside the MEWPA in Arizona or New Mexico” to indicate that while releases may be contingent upon pack behavior or litter size, the overall plan definitively outlines releases of specific wolves. The Court additionally finds Respondents’ argument that Petitioner only challenges the Service’s day-to-day management of the experimental population to be unpersuasive. The nine-page 2016 Release Plan, complete with multiple maps, far differs from the occasional closure of a gate supplying water such as in *Wild Fish Conservancy v. Jewell*, 730 F.3d 791 (9th Cir. 2013).

The Court also finds that Petitioner has satisfied the second condition of *Bennett v. Spear*, as the 2016 Release Plan is an action by which rights or obligations have been determined or from which legal consequences will flow. *See* 520 U.S. at 178. By foregoing compliance with the State’s permitting requirements, Respondents directly impact the obligations of the Department to monitor, manage, and otherwise regulate New Mexico’s comprehensive wildlife management effort.

The Court additionally finds that Petitioner has challenged the Revised 10(j) Rule, as

Petitioner's Complaint asserts that the Rule established a new and different recovery objective in an arbitrary and capricious manner. Petitioner argues that Respondents have subsequently taken steps to implement that new recovery objective through the 2016 Release Plan. As Respondents concede that the Revised 10(j) Rule is final agency action, Petitioner has challenged a second final agency action subject to judicial review under the APA.

C. Judicial Review of 43 C.F.R. § 24.4(i)(5)(i)

Respondents next argue that 43 C.F.R. § 24.4(i)(5)(i) is not reviewable because it is “committed to agency discretion by law,” as the broad language lacks any meaningful standard against which to judge the Director's determination that compliance with New Mexico's permit requirements prevents the Service from carrying out the agency's statutory responsibilities. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Respondents note that cases involving similar statutory or regulatory language have found that judicial review of such determinations is unavailable. *See, e.g., Turner v. Schultz*, 187 F. Supp. 2d 1288, 1296 (D. Colo. 2002) (declining to review a regulation that provided that “[i]t is otherwise determined *by the Department* that it is not in the interest of the United States to provide representation”) (emphasis in original).

Petitioner counters that review is inappropriate only “in those rare circumstances where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.’” *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Webster v. Doe*, 486 U.S. 592, 599–600 (1988)). Petitioner argues that 43 C.F.R. § 24.4(i)(5)(i) provides a meaningful standard of review because Respondents are not carrying out a specific statutory directive but rather are acting pursuant to a statutory grant of authority. 16 U.S.C. § 1539(j)(2)(A) states that “[t]he Secretary *may* authorize the release (and the related

transportation) of any population . . . of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species” (emphasis added), while the C.F.R. provision at issue uses the language “[f]ederal agencies of the Department of the Interior *shall* . . . [c]onsult with the States and comply with State permit requirements” 43 C.F.R. § 24.4(i)(5)(i) (emphasis added). Petitioner thus argues that the standard to be applied is whether compliance with New Mexico’s permitting requirements “prevent” Respondents from “carrying out” their mandatory “statutory responsibilities” under the ESA with respect to nonessential experimental populations. 43 C.F.R. § 24.4(i)(5).

The Court finds that 43 C.F.R. § 24.4(i)(5)(i) provides a meaningful standard of review and is not “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). The regulation provides a clear standard by which to evaluate the Service’s compliance. As the regulation states, the Service shall comply with State permit requirements unless the Secretary determines that compliance would prevent him from carrying out his statutory responsibilities. The Secretary’s statutory responsibilities are expressly stated in the ESA. Thus, the provisions of the ESA that the Secretary is instructed to carry out provide a meaningful standard against which to review the Service’s compliance with 43 C.F.R. § 24.4(i)(5)(i).

Respondents cite to *Turner v. Schultz* in arguing that judicial review of similar statutory language has been found unreviewable. *See* 187 F. Supp. 2d 1288 (D. Colo. 2002). *Turner* involved the review of a regulation that permitted the withdrawal of attorney representation to a federal employee whenever “[i]t is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.” 28 C.F.R. § 50.15(b)(2). As the district court noted, short of cross-examining the Attorney General on his views of the

interests of the United States, no basis existed for a court to assess the decision. *See Turner*, 187 F. Supp. 2d at 1296. The Court finds a significant difference between the abstract nature of reviewing a Department's determination of the "interest[s] of the United States" in *Turner* and the tangible nature of reviewing the Secretary's statutory responsibilities in this case. The Court therefore concludes that 43 C.F.R. § 24.4(i)(5)(i) is not committed to agency discretion by law and may be reviewed.

II. Preliminary Injunction

Given that the Court finds that Petitioner has Article III standing, has sufficiently challenged a final agency action, and that 43 C.F.R. § 24.4(i)(5)(i) provides a meaningful standard of review, the Court turns to the merits of the preliminary injunction.

In order for the Court to grant Petitioner's Motion for Preliminary Injunction, Petitioner must show that: (1) Petitioner has a substantial likelihood of prevailing on the merits; (2) Petitioner will suffer irreparable injury unless the injunction or restraining order is issued; (3) the threatened injury outweighs the harm the injunction or restraining order might cause the adverse party; and (4) the injunction, if issued, would not be adverse to the public interest. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). The Court addresses each of these elements in turn.

The Court notes that the Tenth Circuit has identified three types of particularly disfavored preliminary injunctions, concluding that a movant must make a heightened showing to demonstrate entitlement to relief with respect to such injunctions. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 977 (10th Cir. 2004). These three types are: a preliminary injunction that alters the status quo, a mandatory preliminary injunction, or a preliminary injunction that affords the movant all the relief that it could recover at the

conclusion of a full trial on the merits. *See id.* A movant seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *See id.* at 976. Neither party addressed in their briefs or at oral argument whether or not Petitioner seeks a disfavored preliminary injunction. While the Court therefore finds that an exhaustive determination of whether or not Petitioner seeks a disfavored preliminary injunction is unnecessary, the Court additionally finds that Petitioner has satisfied the heightened burden and made a strong showing both with regard to likelihood of success on the merits and with regard to the balance of harms.

A. Likelihood of Success

Petitioner argues that they are likely to succeed on the merits of both their state law and federal law claims. Petitioner argues that the Service violated New Mexico State law requiring all persons who import and release non-domesticated animals to obtain a permit before doing so. Rather than address the concerns of the Department and submit revised applications, Petitioner argues that the Service instead decided to proceed in violation of State law. Petitioner also argues that Department of the Interior regulations require the Service in carrying out “programs involving reintroduction of fish and wildlife” to “consult with the States and comply with State permit requirements . . . except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibility.” 43 C.F.R. § 24.4(i)(5)(i). In the Service’s October 14, 2015 letter, the Service writes: “The Service . . . applied for the subject permits. At this point, the Service has complied with the Department of the Interior regulations (43 C.F.R. § 24.4(i)(5)(i)) that direct the Service to comply with State permit requirements.” Petitioner argues that applying for a permit is not the equivalent of securing a permit.

Petitioner notes that in the same letter, the Service argues that it intended to proceed in violation of State law because complying with State law would prevent the Service from carrying out its statutory responsibilities. However, Petitioner argues that the fact that the State has denied a permit for the release of two wolves in New Mexico does not prevent the Secretary from carrying out his statutory responsibility. Petitioner notes that the statutory language regarding experimental populations is not a specific statutory directive but rather is a statutory grant of authority. 16 U.S.C. § 1539(j)(2)(A) states that the “Secretary *may* authorize the release (and the related transportation) of any population . . . of an endangered species.” (emphasis added). By contrast, the language requiring the Service to comply with State permitting processes is mandatory: “Federal agencies of the Department of the Interior *shall*: . . . Consult with the States and comply with State permit requirements” (emphasis added). Petitioner therefore argues that the denial of two State permits does not prevent the Secretary from carrying out his statutory responsibilities involving the reintroduction of fish and wildlife.

Respondents raise several arguments regarding Petitioner’s likelihood of success on the merits of both the state law and federal law claims.

1. The Service is in Compliance with the Federal Regulation

Respondents argue that Petitioner cannot show a likelihood of success on the federal law claims as Respondents have acted in compliance with 43 C.F.R. § 24.4(i)(5)(i). The Service has determined that reintroduction of wolves is necessary to further the conservation of the species and additional releases in New Mexico and Arizona are critical to improve the genetic make-up of the Mexican wolf population. Therefore, Petitioner’s attempted veto through denial of State permits conflicts with the Service’s ESA conservation duties and justifies the Service’s determination that obtaining the permits “would prevent [the Service] from carrying out [its]

statutory responsibilities.” 43 C.F.R. § 24.4(i)(5). Respondents also take issue with Petitioner’s suggestion that, without a revised recovery plan, the Director of the Service could not reasonably determine that the Service’s statutory responsibilities included releasing additional wolves. Respondents argue that the Service is not precluded from taking action to further the recovery of the wolf until the revised recovery plan is complete, and regardless, such recovery plans are non-binding.

2. Petitioner’s Denial of Permits Violates the Intergovernmental Immunity Doctrine

Respondents additionally argue that Petitioner’s state law claims violate the intergovernmental immunity doctrine, which prohibits states from regulating or otherwise impeding constitutionally-provided activities of the federal government, except to the extent clearly and specifically authorized by Congress. *See Hancock v. Train*, 426 U.S. 167, 178–81 (1976). Respondents contend that Petitioner’s application of New Mexico State law to prohibit the Service from releasing wolves it has deemed necessary therefore violates the intergovernmental immunity doctrine.

3. Application of State Law is Preempted by the ESA

Similarly, Respondents argue that the New Mexico permit requirements relied upon by Petitioner are preempted by the ESA, which Congress intended to be far-reaching and afford endangered species “the highest of priorities.” *Tenn. Valley Authority v. Hill*, 437 U.S. 163, 174 (1978). Respondents also argue that Petitioner can claim no reservation of power under the Tenth Amendment because it is “apparent that the Tenth Amendment does not reserve to the [State] the right to manage wildlife on [federal land], regardless of the circumstances.” *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002). Similarly, Respondents conclude that Petitioner cannot claim that the Service’s release of wolves on federal land violates state law requirements.

4. The Court's Finding

The Court finds that Petitioner has shown a substantial likelihood of prevailing on the merits. First, under a plain reading of 43 C.F.R. § 24.4(i)(5), Respondents must comply with State permit requirements except in instances where the Secretary determines that such compliance would prevent him from carrying out his statutory duties. While Respondents have previously indicated that they may comply with State permit requirements by simply applying for a State permit, even if it is denied, the Court does not credit this argument and finds that the clear meaning of compliance with State permit requirements requires actually receiving a permit and not merely applying for one.

The crux of Respondents' argument is that New Mexico's denial of two permits to release wolves in New Mexico prevents the Secretary from carrying out his statutory duties, and thus they may decline to comply with the State permitting process. Examining the statutory language regarding experimental populations, the language states that "[t]he Secretary *may* authorize the release (and related transportation) of any population . . . of an endangered species or a threatened 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) (emphasis added). The Court finds a significant difference between a statutory grant of authority, such as stating that the Secretary *may* take an action, and a specific statutory directive requiring the Secretary to take an action. The Court reads 16 U.S.C. § 1539(j)(2)(A) to permit, or allow, the Secretary to authorize the release of a threatened or endangered species, but not to require, or obligate, the Secretary do so. The Court thus finds that the permissive language contained in the statute does not constitute a statutory responsibility of the Secretary. Therefore, compliance with State permit requirements and 43 C.F.R. § 24.4(i)(5)(i) does not prevent the Secretary from

carrying out his statutory responsibilities within the context of the ESA. Respondents argue at length regarding the importance of the reintroduction of the Mexican wolf population. However, it is Respondents' own regulation that places the burden on them to comply with State permit requirements.

Similarly, Respondents argue that New Mexico's permit requirements are preempted by the ESA and Petitioner can claim no reservation of power under the Tenth Amendment, citing to *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002). In *Wyoming*, the State sued on the basis of impingement on state sovereignty and Tenth Amendment infringement. *See id.* at 1223. While Petitioner has raised state law claims regarding state sovereignty, Petitioner has additionally raised federal law claims, which the Court finds compelling. Unlike in *Wyoming*, based entirely on powers reserved to the state, it is Respondents' own federal regulation that curtails their power and requires them to release wolves in compliance with State permit requirements.

Respondents arguments concerning the intergovernmental immunity doctrine fare no better. Respondents cite to *Hancock v. Train*, 426 U.S. 167 (1976) for the proposition that even where the Clean Air Act obligated federal installations to comply with certain State air pollution requirements, a State may not forbid a federal facility from operating without a State permit on the basis of the intergovernmental immunity doctrine. *See id.* at 180. However, the Court reads *Hancock* to represent a more limited holding. The Supreme Court read the relevant provision of the Clean Air Act to mean that "Congress has fashioned a compromise which, while requiring federal installations to abate their pollution . . . under standards which the States have prescribed, stopped short of subjecting federal installations to state control." *Id.* at 198–199. Thus, while the federal installations were to abate their pollution under State standards, the EPA, not the State,

maintained the authority to ensure conformity with the standards. By contrast, in this case, 43 C.F.R. § 24.4(i)(5) makes clear that the regulation requires federal agencies to “comply with State permit requirements,” which necessarily subjects the Service to New Mexico’s permit process. Therefore, the Court finds that Petitioner’s denial of permits does not violate the intergovernmental immunity doctrine.

B. Irreparable Injury

To satisfy the irreparable injury requirement, Petitioner must show “a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (citation omitted). The standard requires that the injury be “both certain and great,” not “merely serious or substantial.” *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008). Furthermore, Petitioner must demonstrate that the harm “is likely to occur before the district court rules on the merits.” *RoDa Drilling Co.*, 552 F.3d at 1210 (citation omitted).

Petitioner argues that the injury is imminent because the Service has already released captive-bred wolves in the State and plans to continue to do so. Petitioner further argues that the Service’s introduction of an apex predator in numbers, at locations, and at times not known to the Department will cause irreparable harm by disrupting the State’s comprehensive management effort of wildlife in New Mexico. Further, once released, there exist practical and legal obstacles in tracking and recapturing the wolves using non-lethal means.

Respondents argue that Petitioner cannot show that the introduction of two to six cross-fostered pups, the release of one pack, and the possible translocations are likely to result in a concrete and actual injury to its interests in managing wild ungulate herds. Additionally, Respondents note that Petitioner’s argument that each single wolf release infringes on the State’s

sovereign interests can be rejected given the supremacy of the ESA. Further, Respondents argue that if Petitioner truly believed that it would suffer imminent irreparable harm from the release of additional wolves in New Mexico, it could have filed suit as early as January 2015 after issuance of the Revised 10(j) Rule. Respondents conclude that Petitioner's own delay militates against a finding of irreparable harm.

The Court finds that Petitioner has sufficiently alleged a significant risk of harm likely to occur before the district court rules on the merits. The key factor is whether the imminent injury will not be able to be compensated after the fact by monetary damages. *Compare RoDa Drilling Co.*, 552 F.3d at 1210 (finding that deprivation of control of real property constituted irreparable harm) *with Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) (finding that a loss of income was purely economic in nature and thus compensable in monetary damages). In this case, the release of wolves in violation of the State permitting process, which has already occurred, cannot be compensated after the fact by monetary damages. Similarly, disruption to the State's comprehensive wildlife management effort cannot be remedied through monetary compensation.

Respondents argue that the number of wolves planned for release will not have a significant impact on the State's management of wild ungulate herds, and thus, Petitioner cannot show an irreparable injury. However, the Court finds that Petitioner has sufficiently shown a significant risk that the release of an apex predator, without Petitioner's knowledge of the time, location, or number of releases, presents a serious enough risk of harm to the State's comprehensive wildlife management effort to satisfy the irreparable injury requirement. Finally, the Court finds that Petitioner did not unnecessarily delay filing this Motion for Preliminary Injunction. Rather, it appears that Petitioner filed a 60-day notice of suit letter several months after receiving Respondents' letter stating that they intended to release wolves in New Mexico

without following the State's permitting process.

C. Balance of Equities

Petitioner argues that the balance of equities weighs in favor of issuance of the preliminary injunction. Whereas a relatively short-term delay in the release of captive wolves will result in little harm to Respondents, release of wolves in violation of the State permitting process will result in irreparable injury. Petitioner further argues that the captive-bred wolves are designated as a "nonessential experimental population" which by definition is not essential to the continued existence of the species. *See* 80 Fed. Reg. 2512 (Jan. 16, 2015).

Respondents argue that Petitioner's request to enjoin actions necessary for the conservation of the Mexican wolf is contrary to the high priority that Congress has placed on the protection and recovery of endangered species. Without continued releases, the genetic health of the Mexican wolf population in the wild will stagnate and possibly deteriorate. Because Congress has tipped the equities heavily by affording the protection of endangered species the highest of priorities, the balance weighs in Respondents' favor.

The Court finds that the balance of equities weighs in favor of issuance of the preliminary injunction. Respondents make much of the high priority Congress has placed on the protection of endangered species. However, issuance of the preliminary injunction, while disrupting Respondents' plans to release wolves in violation of the State permitting process, does not necessarily prevent continued releases or any alteration to Respondents' release of wolves. Respondents must simply comply with their own federal regulation and comply with State permitting requirements before they import and release wolves in New Mexico.

D. Public Interest

Petitioner argues that departure from the Service's precedent to secure Department

approval before releasing captive-bred wolves in New Mexico threatens the Department's duty to fulfill its obligation to the citizens of New Mexico to comprehensively manage wildlife. Petitioner argues that wolves must be closely managed due to the predator-prey dynamics that have the potential for ripple effects within ecosystems. Additionally, Petitioner argues that wolves have the potential to amount to a public nuisance, and the power to abate a public nuisance through equity is well established.

Respondents conclude that the public interest in conserving the Mexican wolf weighs against injunctive relief given the importance of the protection of endangered species and the fragile genetic health of the current Mexican wolf population.

The Court finds that issuance of the injunction would not be adverse to the public interest. As stated earlier, issuance of the injunction will not necessarily result in the Service from being precluded from any further wolf releases. By seeking and receiving a State permit for releases, which Respondents previously have done, Respondents will comply with federal regulations governing the reintroduction of wildlife, and, upon State approval, continue to release wolves.

CONCLUSION

Accordingly, the Court finds that Petitioner has established each of the required factors necessary to obtain a Preliminary Injunction and that in addition, Petitioner is entitled to requested declaratory relief.

In Petitioner's Complaint for Declaratory Judgment and Injunctive Relief (**Doc. 1**), filed May 20, 2016, Petitioner's Prayer for Relief seeks declaratory relief. The Court grants Petitioner's request and finds and declares as follows:

- That Defendants have violated State law by failing to obtain the requisite importation and release permits from the Department prior to importing and releasing Mexican wolves into the State;
- That Defendants cannot import or release any Mexican wolves into the State without first obtaining the requisite importation and release permits from the Department;
- That Defendants have violated State law by importing and releasing Mexican wolf offspring in violation of prior Department permits;
- That Defendants cannot import and release any Mexican wolf offspring in violation of prior Department permits;
- That Defendants have violated the APA by failing to comply with State permit requirements.

The Court finds that Petitioner is entitled to a preliminary injunction in which Respondents are enjoined from importing or releasing any Mexican wolves into the State without first obtaining the requisite importation and release permits from the Department, and are enjoined from importing and releasing any Mexican wolf offspring in violation of prior Department permits. However, Petitioner seeks additional injunctive relief that the Court declines to grant.

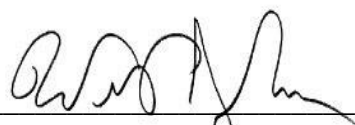
First, Petitioner seeks an injunction requiring Respondents to capture and remove from the State any and all Mexican wolves that were imported and/or released in violation of State law. The Court has determined that including within the Preliminary Injunction a requirement that Respondents find, capture, and remove the two cross-fostered pups allegedly released around April 23, 2016 would alter Petitioner's ability to show that an injunction should be issued. First, removal of the wolves released in violation of State law would reduce Petitioner's showing of irreparable injury. Petitioner's argument that introduction of the wolves in unknown numbers, times, and locations will cause irreparable harm to the State's comprehensive management plan is diminished if the wolves released in violation of the State permitting process

are removed. Additionally, requiring Respondents to find, capture, and remove the April 23, 2016 released wolves will shift the balance of equities to favor Respondents. Accordingly, the injunction shall apply only to the Service's proposed future release of wolves.

Second, Petitioner seeks three types of relief³ that were not raised or addressed in Petitioner's Motion for Preliminary Injunction, subsequent briefing, or at oral argument.

Therefore, the Court will not grant relief for these requests.

SO ORDERED


UNITED STATES DISTRICT JUDGE

³ See **Doc. 1**, at 13. “9. Adjudge and declare that Defendants have violated the APA by finalizing and implementing the *Initial Release and Translocation Plan for 2016*; 10. Order the Service to vacate the *Initial Release and Translocation Plan for 2016*; 11. Issue an injunction enjoining the Service from issuing an experimental population rule that is inconsistent with the operative recovery plan for the Mexican wolf.”

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

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

v.

No. CV 16-00462 WJ/KBM

UNITED STATES DEPARTMENT OF
THE INTERIOR, *et al.*,

Respondents.

ORDER OF PRELIMINARY INJUNCTION

The Court, pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order (**Doc. 32**), hereby ORDERS that Respondents United States Department of the Interior; Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior; United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as Director of the United States Fish and Wildlife Service; and Dr. Benjamin N. Tuggle, in his official capacity as Southwest Regional Director for the United States Fish and Wildlife Service (“Respondents”) are hereby:

(1) ENJOINED from importing or releasing any Mexican wolves into the State of New Mexico without first obtaining the requisite importation and release permits from the New Mexico Department of Game and Fish (“Department”), *see* 43 C.F.R. § 24.4(i)(5)(i);

(2) ENJOINED from importing and releasing any Mexican wolf offspring in violation of prior Department permits.

In its request for injunctive relief, Petitioner has also asked that Respondents be required


to capture and remove from the State any and all Mexican wolves that were imported and/or released in violation of State law. However, as the Court has noted in the accompanying Memorandum Opinion and Order, Petitioner is not granted injunctive relief as to this request.

The Court shall retain jurisdiction of this matter until the Respondents have fulfilled their legal and Court-ordered obligations as set forth in this Order of Preliminary Injunction.

This Preliminary Injunction Order shall apply to the parties until the final disposition of this case on the merits.

This Preliminary Injunction Order shall be effective immediately and shall remain in full force and effect unless modified or dissolved by order of this Court or by order of the United States Court of Appeals for the Tenth Circuit.

SO ORDERED


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, I electronically filed the foregoing DEFENDANT-INTERVENOR-APPELLANTS OPENING BRIEF using the court's CM/ECF system which will send notification of such filing to all counsel of record.

s/McCrystie Adams