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' REPLY BRIEF

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GLOSSARY

ESA: Endangered Species Act

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

APA: Administrative Procedure Act

INTRODUCTION

The district court's preliminary injunction ruling impermissibly subordinates the U.S. Fish and Wildlife Service's ("FWS") decision-making authority over the implementation of the Endangered Species Act ("ESA") to the New Mexico Department of Game and Fish ("New Mexico"). To be sure, the ESA requires FWS to cooperate with states "to the maximum extent practicable." However, New Mexico is demanding far more. New Mexico is asserting, and has obtained via the injunction, an effective veto over FWS's decision-making. This veto is preventing FWS from taking critical steps toward meeting its statutory mandate to recover Mexican wolves.

New Mexico's federal law claim cannot succeed because FWS's decision to go forward with wolf releases despite the lack of a state permit fully complied with 43 C.F.R. § 24.4(i)(5)(i). New Mexico's state law claims cannot succeed because the district court did not have jurisdiction over these claims. Alternatively, to the extent there is jurisdiction, they are preempted by the ESA. The court's ruling to the contrary defies the purpose and plain language of the ESA and long-settled Constitutional principles. New Mexico's response brief reiterates those same mistakes. The district court's preliminary injunction ruling constitutes legal error and should be reversed.

ARGUMENT

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

FWS's compliance with 43 C.F.R. § 24.4(i)(5)(i) is straightforward. This Department of Interior policy generally requires FWS to comply with state permit requirements in connection with reintroduction actions, except where compliance would "prevent" FWS from "carrying out" its "statutory responsibilities." Here, New Mexico's permit requirements make it impossible for FWS to carry out the actions it has determined are necessary to fulfill its statutory mandate to recover Mexican wolves. Defenders of Wildlife et al. (collectively, "Defenders") Br. at 9-11, 16-18; FWS Br. at 8-11, 14-15. FWS's decision to release wolves without a permit fits squarely within the exception in 43 C.F.R. § 24.4(i)(5)(i).[1]

A. New Mexico's Permit Denial Prevents FWS From Carrying Out Its Statutory Responsibility to Recover Mexican Wolves

As New Mexico acknowledges, FWS has a statutory mandate to recover Mexican wolves. NM Br. at 47; see FWS Br. at 6, 34; Defenders Br. at 1-3, 16-17.

[1] New Mexico relies on Davis v. Mineta, 302 F.3d 1104, 1110-11 (10th Cir. 2002) to assert that the standard for demonstrating a likelihood of success on the merits is relaxed where the equitable prongs of the preliminary injunction test weigh in favor of the moving party. NM Br. at 24-25. Davis is no longer good law on this point. This Court recently held that any relaxed standard is inconsistent with Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008). Dine Citizens Against Ruining Our Env't v. Jewell, – F.3d –, 2016 WL 6301136, *3 (10th Cir. 2016) ("Under Winter's rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.").

Nonetheless, New Mexico argues that FWS's decision to employ a particular statutory tool to achieve that mandate is discretionary, and therefore does not qualify as a "statutory responsibility" pursuant to 43 C.F.R. § 24.4(i)(5)(i). NM Br. at 42-51; see Aplts. App. at 161-62 (court ruling on federal claim). According to this reading, while FWS has a statutory responsibility to recover wolves, it does not have a responsibility – or even the ultimate decision-making authority – to take the actions it determines are necessary to fulfill its responsibility. This interpretation is illogical and contrary to the plain language and purpose of the ESA.

As an initial matter, New Mexico ignores the role of section 10(j), 16 U.S.C. § 1539(j), within the ESA's framework. See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1231 (10th Cir. 2000) (courts "must consider the language of the relevant statutory scheme as illuminated by the provisions of the whole law, and … its object and policy") (internal quotation omitted). As Defenders previously described, Congress enacted the ESA to recover endangered species and mandated that FWS take affirmative actions to fulfill that purpose. Defenders Br. at 1-3 (citing 16 U.S.C. §§ 1536(a)(1), 1531(c)(1), 1531(b), 1532(3)). Section 10(j) reintroductions are one tool available to FWS to accomplish this mandate. Id. at 3; FWS Br. at 5-6. In the context of this statutory scheme, if FWS cannot take affirmative actions to

achieve recovery, FWS cannot meet its responsibility to recover wolves. Thus, adhering to New Mexico's permit requirements would "prevent" FWS from "carrying out" its "statutory responsibilities" pursuant to 43 C.F.R. § 24.4(i)(5)(i).[2]

Nonetheless, New Mexico argues that FWS's interpretation "runs afoul of the collaborative system intended by Congress with respect to nonessential experimental populations." NM Br. at 48 (citing Wyo. Farm Bureau, 199 F.3d at 1231-32). In fact, the district court's interpretation defeats Congress's intent in adding section 10(j) to the ESA. In adding section 10(j), Congress intended to increase FWS's flexibility in order to improve its ability to achieve recovery. Wyo. Farm Bureau, 199 F.3d at 1234 (section 10(j) provided FWS with greater management flexibility to "better conserve and recover endangered species") (quoting United States v. McKittrick, 142 F.3d 1170, 1174 (9th Cir. 1998)); Forest Guardians v. FWS, 611 F.3d 692, 705 (10th Cir. 2010) (citing Wyo. Farm Bureau, 199 F.3d at 1231-32, and explaining that ESA section 10(j) was intended to "broaden the FWS's discretion" to reintroduce listed species); Defenders Br. at 4, 16-17. The district court's ruling has the opposite effect.

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[2] This is true under any of the various formulations of "statutory responsibilities" used previously by this Court and other circuit courts. See FWS Br. at 32-33 (citing Vill. of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1485 n.7 (10th Cir. 1990)); NM Br. at 44-46 (citing Lawrence v. City of Philadelphia, 527 F.3d 299, 316-17 (3d Cir. 2008); American Family Mut. Ins. Co v. Williams, 832 F.3d 645, 648 (7th Cir. 2016)). Indeed, FWS is subject to liability if a 10(j) rule does not comply with the ESA. See Defenders Br. at xii-xiii (citing challenges to Revised 10(j) Rule); Red Wolf Coalition v. U.S. Fish and Wildlife Serv., -- F. Supp. 3d --, 2016 WL 5720660, at *5-6 (E.D.N.C. 2016) (granting preliminary injunction to plaintiffs alleging that FWS's implementation of 10(j) rule for red wolves violates the ESA).

The ruling not only constrains FWS's discretion, it impairs FWS's ability to recover species. An interpretation that so thoroughly defeats the purpose of the section 10(j) amendments – and the overall purpose of the statute – should be rejected. See WildEarth Guardians v. FWS, 784 F.3d 677, 685 (10th Cir. 2015) (rejecting interpretation that "clearly thwarts" the statute's purpose).

Further, the 1982 section 10(j) amendments did not change the already-existing collaborative directive in section 6(a), 16 U.S.C. § 1535(a). Enacted in 1973, section 6(a) requires FWS to cooperate with states "to the maximum extent practicable" – not to subordinate its decision-making to the states'. Defenders Br. at 19-21; infra at 7-9. Nothing in section 10(j) suggests Congress intended any change to that directive. Indeed, FWS's section 10(j) regulations adopted the same language to describe states' roles in the development of 10(j) rules. 50 C.F.R. § 17.81(d) (10(j) rules "shall, to the maximum extent practicable, represent an agreement between [FWS], the affected State and Federal agencies" and affected landowners).

To the extent New Mexico suggests that FWS's authority is affected by the wild wolf population's status as experimental nonessential, it is mistaken. See NM Br. at 48-51. When FWS first designated this population "nonessential" in the 1998 10(j) rule, the agency reasoned that the species would not go extinct if the wild population died out because the captive population could be used for a new reintroduction effort. See 80 Fed. Reg. 2512, 2550 (Jan. 16, 2015) (explaining rationale from 1998 10(j) rule and decision not to change the designation); 50 C.F.R. § 17.80(b) (defining

"nonessential"). This designation does not undermine FWS's statutory mandate to recover the species. Indeed, the ESA requires that FWS's 10(j) rules "provide for" and "further" recovery of all experimental populations, whether designated essential or nonessential. Defenders Br. at 4; 80 Fed. Reg. at 2550 (recognizing that the "nonessential" designation does not reflect the importance of the population to recovery). Here, FWS determined it must release captive wolves into New Mexico to achieve recovery.

Finally, New Mexico argues that FWS's interpretation of 43 C.F.R. § 24.4(i)(5)(i) would render its requirements meaningless because FWS would never have to obtain New Mexico's approval to release wolves in the state. NM Br. at 47-48. While FWS need not obtain New Mexico's approval to go forward with the wolf releases, Interior's policy is not meaningless. New Mexico may impose reasonable permit requirements, so long as those requirements do not prevent FWS from meeting its statutory recovery mandate. See, e.g., NM Add. at 204-227 (Wyoming permits setting conditions for transport, holding, and release of black-footed ferrets, including quarantine rules and transport options).

In short, FWS's decision to release wolves in New Mexico complies with 43 C.F.R. § 24.4(i)(5)(i). The district court's contrary conclusion constitutes legal error.

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

The district court's ruling should also be reversed because it impermissibly subordinates FWS's implementation of the ESA to New Mexico in contravention of

the express terms of ESA section 6(a), 16 U.S.C. § 1535(a).[3] Section 6(a) requires FWS to cooperate with states only "to the maximum extent practicable." Defenders Br. at 19-21. Because this requirement is limited, FWS retains ultimate decision-making authority. See Wyoming v. United States, 279 F.3d 1214, 1232-35 (10th Cir. 2002) (relying in part on statutory language requiring FWS to cooperate with state "to the extent practicable" to conclude that FWS has preeminent authority over National Wildlife Refuge System lands and wildlife).

New Mexico does not dispute Defenders' characterization of ESA section 6(a). NM Br. at 54-55. Instead, New Mexico argues that the court's ruling is consistent with section 6(a) because FWS obtained permits in the past and it would be "feasible" for FWS to obtain permits in the future. Id. at 55 (citing Aplts. App. at 166). This

[3] New Mexico asserts that this argument and two of Defenders' other arguments should not be considered by this Court because they were not briefed in the district court. NM Br. at 54–55 (argument concerning ESA section 6(a)); 55–56 (argument concerning 50 C.F.R. § 17.81(d)); 61–62 (argument concerning ESA section 6(f)). New Mexico relies on the general rule that parties must present issues to the trial court in order to raise them on appeal, but ignores the fact that Defenders had no opportunity to raise any issues below. See id. at 54 (citing Tele-Communications, Inc. v. Comm'r of Internal Revenue, 104 F.3d 1229, 1232–33 (10th Cir. 1997)); Defenders Br. at 11-13 (explaining Defenders was not granted intervention until after the preliminary injunction was entered). Thus, unlike the situation in Tele-Comm., Defenders is not taking a "second shot" at anything. See 104 F.3d at 1233. Further, the ordinary rule notwithstanding, appellate courts have the discretion to decide cases based on any argument. Singleton v. Wulff, 428 U.S. 106, 121 (1976). Here, the rationales supporting the general rule are not applicable because Defenders' arguments involve purely legal issues, the resolution of which does not require the development of factual issues below. Defenders Br. at 26 n.7 (citing cases).

argument appears related to the state's suggestion elsewhere that the state does not have veto authority because FWS could potentially obtain permits in the future. Id. at 56-57. This argument is wrong on the facts and the law.

If a state permit is a prerequisite for FWS to release wolves, New Mexico has veto authority. See G.H. Daniels III & Assocs., Inc. v. Perez, 626 Fed. Appx. 205, 209 (10th Cir. 2015) (unpublished) (Department of Labor had an "unsupervised veto" over Department of Homeland Security's decision-making where Labor certification was necessary for approval of visa applications); Columbia Basin Land Prot. Ass'n v. Schlesinger, 643 F.2d 585, 605 (9th Cir. 1981) ("Moreover, to require the [agency] to receive a state certificate would imply that the state could deny the application, which would give them a veto over the federal project."). An effective veto far exceeds ESA section 6(a)'s express limitation on a state's influence. [4]

Further, because ESA section 6(a) requires cooperation only "to the maximum extent practicable," New Mexico is barred from enforcing its state permit requirements (through its federal or state law claims) by the intergovernmental immunity doctrine. Defenders Br. at 21 n.6; FWS Br. at 36–37. New Mexico argues that Hancock v. Train, 426 U.S. 167 (1976), precludes enforcement only of state

[4] To the extent New Mexico's claim that FWS could obtain permits in the future is relevant, it is not supported by the record. New Mexico reserved the right to deny future permit applications if FWS's (not yet released) recovery plan conflicts with the state's "current conservation management." Aplts. App. at 65-70; NM Br. at 17 (citing Aplts. App. at 67). Thus, there is no basis to assume that New Mexico will grant permits in the future.

permit requirements that interfere with the operation of "federal installations" absent clear congressional direction. NM Br. at 58–61. Hancock is not so limited. Rather, Hancock recognized generally that "the activities of the Federal Government are free from regulation by the States" absent "clear and unambiguous" Congressional authorization. 426 U.S. at 179 (citation omitted) (emphasis added). Indeed, this Court recently relied on Hancock in a case that had nothing to do with a "federal installation," but rather held that the state could not regulate the conduct of federal prosecutors. United States v. Supreme Court of New Mexico, -- F.3d --, 2016 WL 5946021, *29 (10th Cir. June 7, 2016) (quoting Hancock to support "'the fundamental importance of the principles shielding federal installations and activities from regulation by the States'"). Section 6(a) contains no language affirmatively declaring that FWS is subject to state regulation in implementing conservation activities under the ESA, and New Mexico does not argue otherwise.[5]

C. The District Court's Ruling Renders FWS's Section 10(j) Regulations Meaningless

By granting New Mexico veto authority over the implementation of the Revised 10(j) Rule, the district court's ruling also renders the cooperative provisions in

[5] Had FWS granted New Mexico the effective veto the district court's ruling provides, it would have been an unlawful subdelegation of its authority. Defenders Br. at 21 n.6. As this Court has held, "subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization." G.H. Daniels, 626 Fed. Appx. at 212 (quoting U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004)). Section 6(a) does not demonstrate any such "affirmative showing." New Mexico did not address this implication of the court's ruling.

FWS's 10(j) regulations meaningless. Defenders Br. at 21-22 (citing 50 C.F.R. § 17.81(d)). In response, the state argues that FWS "ignored" its concerns during development of the Revised 10(j) Rule. NM Br. at 55-57. But FWS was not required to adopt all of New Mexico's suggestions. To the extent New Mexico believes the Revised 10(j) Rule is unlawful, the state may challenge the legality of the Rule, as numerous parties (including Defenders) have done in the U.S. District Court in Arizona. Defenders Br. at xii-xiii. Further, although New Mexico argues that requiring FWS to obtain a state permit does not give New Mexico veto authority (NM Br. at 56), that contention is meritless, as explained above. See supra at 8.

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

The district court's ruling would also render the exception in 43 C.F.R. § 24.4(i)(5)(i) meaningless because, under the district court's rationale, there are no specific "statutory directives" in the ESA that are related to reintroductions and research programs – the only two activities covered by that subsection. In response, New Mexico cites 16 U.S.C. § 1333(b)(2). NM Br. at 48-49. This provision is not in the ESA and appears to be governed by 43 C.F.R. § 24.4(i)(5)(ii) – not (i)(5)(i). For both reasons it is irrelevant to Defenders' argument.

II. 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 the State Law Claims

As FWS and Defenders explained in their opening briefs, the majority of authority holds that the Administrative Procedure Act ("APA") does not waive the United States' sovereign immunity for claims arising under state law. FWS Br. at 36; Defenders Br. at 23-25. New Mexico attempts to rebut FWS's argument by citing the only case to the contrary (NM Br. at 57-58), but largely ignores Defenders' cited cases. See Defenders Br. at 23-25.[6] Wild Fish Conservancy v. Salazar is particularly instructive because the court found that the APA waived sovereign immunity for a claim premised on the violation of state laws only because the state laws had been incorporated into the relevant federal statute. 688 F. Supp. 2d at 1231-32. The federal statute at issue expressly stated that "in carrying out the provisions of this Act, [the Secretary of the Interior] shall proceed in conformity with [relevant state] laws." Wild Fish, 688 F. Supp. 2d at 1231 (quoting 43 U.S.C. § 383). This mandate to

[6] Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 775 (7th Cir. 2011) (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") (emphasis 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 … relief against the United States"); Wild Fish Conservancy v. Salazar, 688 F. Supp. 2d 1225, 1231-32 (E.D. Wash. 2010).

proceed in "conformity" with state law sharply contrasts with ESA section 6(a)'s direction to "cooperate" with the states only to the "maximum extent practicable."

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, they are preempted. Defenders Br. at 25-29; FWS Br. at 37-39; see Wyoming, 279 F.3d at 1226-27 (noting that state authority over wildlife is subject to preemption).

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

ESA section 6(f), 16 U.S.C. § 1535(f), expressly preempts New Mexico's application of its state permit requirements to prohibit imports of wolves because there is a federal permit allowing those same imports. Defenders Br. at 26-27.[7]

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[7] New Mexico objects to Defenders' request the Court take judicial notice of two documents: the Final Environmental Impact Statement on the Revised 10(j) Rule and Permit TE 09155-0. NM Br. at 11-12; n. 2, 27-28; 61, n. 18 (objections); Defenders Br. at 6, n. 2; p. 27, n. 8 (requests). Although New Mexico asserts that these documents were not part of the record below, Fed. R. Evid. 201(d) explicitly allows judicial notice "at any stage of the proceedings." Indeed, New Mexico acknowledges elsewhere that this Court has taken judicial notice of documents not contained in the record below. NM Br. at 20, n. 5 (citing Pueblo of Sandia v. U.S., 50 F.3d 856, 861 n. 6 (10th Cir. 1995) for the proposition it is appropriate to take judicial notice of government reports and documents not contained in the record below); see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 702 n. 22 (10th Cir. 2009) (taking judicial notice of information on government websites not presented below). New Mexico further argues the Court may take judicial notice only

New Mexico argues that ESA section 6(f) only applies to endangered or threatened species and "the experimental population of Mexican wolves that New Mexico seeks to regulate is not an endangered or threatened species." NM Br. at 62 (emphasis in original); see also id. at 6. New Mexico is mistaken. Mexican wolves are listed as an "endangered" species, and have been since 1976. 80 Fed. Reg. 2488, 2488-89 (Jan. 16, 2015) (revising listing to designate Mexican wolves as an endangered subspecies and describing listing history). Indeed, FWS can only use its 10(j) authority to reintroduce a species if that species is listed as endangered or threatened. See 16 U.S.C. § 1539(j)(2)(A) (defining experimental populations as populations of "endangered and threatened species"); Forest Guardians, 611 F.3d at 705 (section 10(j) "authorize[s] the FWS to designate certain reintroduced populations of endangered and threatened species as 'experimental populations.'"); 80 Fed. Reg. at 2512 (noting that Revised 10(j) Rule will be associated with listing of Mexican wolves as an endangered subspecies); id. at 2539 ("The Mexican wolf remains an endangered species under the Act.").

New Mexico also argues that express preemption cannot apply because FWS bound itself to follow state law in the relevant permit. NM Br. at 63-64 (citing

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of the existence of these documents and not of the truth of the matters asserted therein. NM Br. at 11-12, n. 2; 27-28; 61, n. 18 (citing Tal v. Hogan, 453 F.3d 1244, 1265 n. 24 (10th Cir. 2006)). However, in both Pueblo of Sandia and Richardson, this Court accepted the information in documents subject to judicial notice as true and relied upon it in reaching its holdings.

Defenders Add. at 112). The Ninth Circuit rejected a similar argument in Man Hing Ivory and Imports, Inc. v. Deukmejian, 702 F.2d 760, 765 (9th Cir. 1983). The court held that a similarly worded provision in a federal permit for endangered African elephant ivory trade – a provision that is identical to condition 11(B) in the Mexican wolf permit but not cited by New Mexico (Defenders Add. at 110) – refers to compliance with state health, quarantine, customs, and agricultural laws, but does not change the preemptive effect of ESA section 6(f). Id. (citing 50 C.F.R. § 10.3). As the court explained, "[t]o read the condition more broadly, as appellants would have us do, would open the way for states to impose regulation to supersede federal regulation of trade in imported endangered species or their export or interstate commerce, a form of state preemption clearly contrary to the intent of Congress in passing" the ESA. Id. at 765; see also Wyoming, 279 F.3d at 1231-35 (savings clause in statute reserving authority to states to manage wildlife on national wildlife refuges did not undermine FWS's ultimate decision-making authority).

Further, New Mexico's interpretation of this language would mean that FWS has unlawfully subdelegated its authority to the state to determine when and where FWS may import, release, or even remove Mexican wolves pursuant to the Revised 10(j) Rule. See supra at 9 n.5; Defenders Br. at 21 n.6. This result is impermissible.

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

New Mexico's application of its permit requirements for both releases and imports is also preempted under conflict preemption principles. New Mexico argues that there is no "actual conflict" between state and federal law because FWS obtained state permits in the past, and because New Mexico has not attempted to impose a complete ban on releasing wolves. NM Br. at 66. However, because FWS cannot currently comply with its ESA recovery mandate and with state permit requirements, there is an actual conflict. FWS Br. at 37-38; Defenders Br. at 28-29; 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"). New Mexico's refusal to permit the releases also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985). For both reasons, New Mexico's state permit requirements as applied here are preempted. The cases New Mexico cites are not to the contrary.

CONCLUSION

The district court's decision granting New Mexico's Motion for Preliminary Injunction should be reversed and the preliminary injunction lifted.

DATED: November 10, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the page limitation set by the Court's August 24, 2016 Order providing that Federal Appellants and Defenders may file separate reply briefs, not to exceed a total of 35 pages. By agreement with Federal Appellants, this brief contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and FWS's brief will not exceed 20 pages.

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: November 10, 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 9.0.13.58, updated November 10, 2016, and according to the program the brief is free of viruses.

Date: November 10, 2016 s/ McCrystie Adams
McCrystie Adams

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I electronically filed the foregoing DEFENDANT-INTERVENOR-APPELLANTS' REPLY BRIEF using the court's CM/ECF system which will send notification of such filing to all counsel of record.

s/McCrystie Adams