No. 16-2202 (consolidated with 16-2189)
ORAL ARGUMENT SCHEDULED - JAN. 18, 2017

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.*,

Defendants-Appellants,

and

DEFENDERS OF WILDLIFE, *et al.*,

Intervenor-Defendants-Appellants.

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

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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INTRODUCTION

The Supreme Court has repeatedly stated that a preliminary injunction is an extraordinary remedy. The issue before this Court is whether the district court abused its discretion when it granted such extraordinary relief given New Mexico's failure to carry its burden on *any* of the four injunction requirements. In its answering brief, New Mexico fails to demonstrate how the evidence presented below could establish that it is likely to suffer irreparable injury while litigation is pending; indeed, the state fails even to address deficiencies that Interior identified in the declaration on which the state relied. The state's failure to explain how, on the record before the district court, it carried its burden on irreparable injury—or on the balance of harms, or on the weighing of the public interest—is reason enough for this Court to lift the preliminary injunction. To the extent this Court reaches the final injunction factor, it should find that New Mexico is unlikely to succeed on any of the claims it presented.

ARGUMENT

A. New Mexico fails to show that the record supports the district court's finding of likely irreparable injury.

In its answering brief, New Mexico fails to marshal evidence in the record on appeal that supports the district court's finding that the state demonstrated that the limited number of wolf releases Interior planned to conduct during the pendency of trial-court proceedings is likely to irreparably injure the state's ability to manage its elk population. The state also fails to present a legal basis for finding irreparable injury to

state sovereignty. Because neither the district court nor New Mexico have offered any other possible basis for irreparable injury, and because a sufficient showing of irreparable injury is necessary to obtain a preliminary injunction, reversal is proper on this ground alone. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008).

1. New Mexico has still not shown how planned releases would irreparably injure its ability to manage its elk herds.

New Mexico argued below that Interior's planned releases would irreparably injure the state's "comprehensive management" of wildlife, particularly elk herds. Aplt. App. at 35. But the declaration New Mexico offered below does not make out even a *prima facie* case of such injury. *See* Fed. Op. Br. 25–26; *see also* Aplt. App. at 44 (asserting that "[i]ncreasing the population of wolves" by an unspecified amount "*has the potential* to *affect* predator-prey dynamics" (emphasis added)). New Mexico's answering brief never attempts to explain how its declarant's assertion of a *potential effect* on predator-prey dynamics could, by itself, be sufficient evidence of a *likely irreparable injury* to the ability to manage that population. *See* Resp. Br. 26–30. Nor does it point to additional evidence before the district court indicating that the magnitude of the potential effect on its management efforts could be expected to give rise to irreparable injury. Instead, New Mexico attempts to introduce for the first time on appeal documents which the state asserts show that adding "dozens" of wolves to the wild would "reduce ungulate populations by hundreds or thousands." Resp. Br. 29.

New Mexico's reliance on extra-record materials to save the district court's decision fails for multiple reasons. Most fundamentally, in order to obtain a preliminary injunction, New Mexico was required to put before the district court sufficient facts to demonstrate it was likely to suffer irreparable injury before the court could reach a final judgment. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). The state cannot cure its failure to do so by adding to the evidentiary record on appeal. *See* Fed. R. App. P. 10; *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n.11 (10th Cir. 2010) (warning that parties do not have "a license to build a new record" on appeal).[1]

New Mexico recognizes that this Court "will not consider material outside the record before the district court." Resp. Br. 11 n.2 (quoting *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000)). The state nevertheless asks the Court to consider the new documents, on the ground that, in the state's view, Interior also cited to 'new' material on appeal—specifically, passages from the 2014 Final Environmental Impact Statement ("EIS") on the experimental Mexican wolf population. *Id.* 11 n.2, 27. New

[1] For the same reason, extra-record evidence presented by *amici* is not a basis for affirming the district court. *See, e.g.*, Br. of N.M. Farm & Livestock Bureau at 4–9. Moreover, to the extent *amici* point to possible harms to, for example, individual ranchers, they ignore that New Mexico cannot assert nuisance-style injuries to its citizens' property as *parens patriae* in a suit against the federal government. Fed. Op. Br. 18 n.7. New Mexico is incorrect that it can assert such injuries under *Massachusetts v. EPA*. *See* Resp. Br. 32 n.8. That case addressed a state's ability to assert injuries to the state's own quasi-sovereign interests. 549 U.S. 497, 520 n.17 (2007). This Circuit has noted, post-*Massachusetts*, that a state may not assert injuries to its citizens' *personal* interests. *Wyoming v. U.S. Dep't of the Interior*, 674 F.3d 1220, 1231 (10th Cir. 2012).

Mexico is mistaken, both in characterizing the EIS passages that Interior highlights as new information, and in insinuating that its purpose in introducing its new documents is merely to rebut Interior's arguments on appeal. In its irreparable-injury argument, Interior directed this Court's attention to exactly one passage from the EIS, which concludes that even tripling the Mexican wolf population would have no significant impact on the elk population. *See* Fed. Op. Br. 25. New Mexico ignores that the declaration Interior put in evidence below—which Interior's opening brief cited along with the EIS, *see id.*—made the very same points as the Final EIS, and in fact explicitly cited to the Final EIS. Aplt. App. at 129–31; *see also* Aplt. App. at 113–14. Thus, while the EIS pages themselves were not in the record below, the agency findings they contain plainly were. New Mexico had every incentive to rebut these findings below, but failed to do so. Moreover, it had the obligation to present sufficient evidence to establish an irreparable impact on its ability to manage elk herds below, regardless of whether Interior offered *any* evidence to the contrary.[2]

To the extent this Court nevertheless considers New Mexico's extra-record documents, it should still find that New Mexico has not carried its burden. The state's assumed reduction of "hundreds or thousands" of ungulates relies on at least two

[2] Given that New Mexico has claimed irreparable injury based not on the loss of individual elk but on a threat to its ability to manage the overall elk population, *see* Aplt. App. at 35–36, disproving Interior's no-significant-impact finding *was* necessary—but not sufficient—to discharge this burden. *Contra* Br. of N.M. Farm & Livestock Bureau at 9–11.

faulty premises. Resp. Br. 29. First, to reach this figure, New Mexico assumes that Interior will release "dozens" of wolves while litigation is pending. *Id.* But in fact, Interior only planned to release up to three adult wolves and ten pups in 2016. Fed. Op. Br. 1. The district court's injunction prevented the agency from releasing all but two pups. *Id.* 20. Interior now hopes to release about the same number of wolves in 2017 that it had planned for 2016—well below the dozens that New Mexico suggests.[3] Second, New Mexico's projection erroneously assumes that increasing wolf predation of individual elk will necessarily result in a decline in the total elk population. But not every death of an individual member of a population causes an appreciable population decline—as illustrated by Interior's finding that even the increased predation caused by *two hundred* additional wolves would not have a significant effect on New Mexico's elk population. *See* Aplt. App. at 130–31. New Mexico traces its alleged irreparable injury to its ability to manage wild populations. *See* Aplt. App. at 35. Asserting the loss of individual elk does not suffice: To the contrary, "equating 'the death of a small

[3] While New Mexico speculates that Interior has provided no "assurance whatsoever regarding the total number of wolves it intends to release," Resp. Br. 28, Interior has in fact explained in the 2015 10(j) rule that it plans to release two pairs of adult wolves along with their pups between 2015 and 2019. 80 Fed. Reg. 2512, 2524 (Jan. 12, 2016); *see also* Fed. Op. Br. 11. True, Interior contemplates that it may release some additional wolves in that time period, as needed to improve the wild population's genetic diversity. 80 Fed. Reg. at 2524. But nothing in the 2016 release plan nor Interior's representations to this Court support the supposition that Interior plans to conduct a dramatic number of additional releases. *See* Aplt. App. at 83–85, 124–27.

percentage of a reasonably abundant game species with irreparable injury without any attempt to show that the well-being of that species may be jeopardized is to ignore the plain meaning of the word.'" *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003) (quoting *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1976));[4] *contra* Br. of N.M. Cattle Growers at 5.

2. The cases New Mexico cites in its answering brief do not establish injury to the state's sovereignty.

New Mexico's argument that the district court's decision can be upheld based on an alleged injury to state sovereignty, *see* Resp. Br. 30–33, also fails. As Interior has explained, while states play an important role in regulating wildlife within their borders, that role is not a license to frustrate the federal government's own historic role in protecting rare species for the good of the nation as a whole. *See* Fed. Op. Br. 3, 37–39. Moreover, this Court, relying on the Supreme Court's decision in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), has expressly rejected the notion that states have a sovereign right to disrupt the federal government's exercise of plenary authority over wildlife on federal lands. *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002); *see also* Fed. Op. Br. 38–39.

New Mexico completely ignores this Court's decision in *Wyoming* and the Supreme Court's decision in *Kleppe*, and instead relies on readily distinguishable cases

[4] *Flowers* distinguished *Frizzell* in a case involving a threat to the "primary breeding area" of a vulnerable species. 321 F.3d at 1256. This case is not likewise distinguishable: New Mexico has not argued that elk are other than abundant.

holding that a state is injured when it is either barred from implementing, or forced to change, one of its own statutes. *See* Resp. Br. 30–32 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (holding that a judicial decision prohibiting a state from implementing its DNA-collection statute irreparably injured the state); *Texas v. United States*, 787 F.3d 733, 752 (5th Cir. 2015) (holding that a state's interest in not being forced to change its law was a sufficient injury to confer standing)); *see also* Br. of State *Amici* at 30–31 (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013)). Here, by contrast, Interior is not seeking to enjoin or rewrite New Mexico's importation-and-release regulations; Interior simply maintains that those regulations do not apply to the federal government in this particular factual setting.[5] Moreover, New Mexico presents no authority holding that the inability to enforce a state law against the federal government is a proper basis for an irreparable-injury finding. The district court therefore erred in finding that the state demonstrated irreparable harm.

B. New Mexico fails to justify the district court's unsupported finding on the balance of equities.

New Mexico attempts to defend the district court's balancing of the equities by downplaying both the seriousness of the preliminary injunction's effects on Mexican

[5] *Wyoming v. U.S. Dep't of the Interior*, 136 F. Supp.3d 1317 (D. Wyo. 2015), is likewise distinguishable: It found that federal regulation in an area of state concern, without Congressional authorization, was irreparable injury. *Id.* at 1346–47. Here, New Mexico seeks to enjoin not federal *regulation*, but federal freedom from a particular state regulation. *See* Br. of State *Amici* at 29–30.

wolves, and the unlikelihood that Interior could prevail upon New Mexico to issue release permits while this case is pending. Neither effort is availing.

1. New Mexico's efforts to minimize the preliminary injunction's impact on Mexican wolves are flawed.

New Mexico argues at length in its brief that Interior has overstated the risk that the preliminary injunction poses to the Mexican wolf. Resp. Br. 33–37. Its arguments are unpersuasive, for three main reasons.

First, while New Mexico needed to demonstrate irreparable injury in order to obtain a preliminary injunction, Interior does *not* need to show that the preliminary injunction will cause it irreparable injury in order to prevail on its argument that the injunction is unlawful. To the contrary, Interior need not even prove that the balance of equities tips in the federal agency's favor. It need only show that New Mexico failed to carry its burden of showing that the balance tipped in the *state*'s favor. Interior could have cleared this hurdle simply by showing the weaknesses in New Mexico's claims of injury. But Interior has done more, showing that the preliminary injunction places the nation's sole wild population of Mexican wolves at heightened risk of extinction by preventing needed infusions of genetic diversity. *See* Aplt. App. at 127–29. To the extent New Mexico assumes that Interior must go a step farther and prove that extinction of the wild population is imminent in order to prevail on this factor, *see* Resp. Br. 33, 35; Br. of N.M. Farm & Livestock Bureau at 15–16, it assigns

to Interior a burden contrary to settled law.[6] For this reason, New Mexico's reliance on a study purporting to show no effects on litter sizes in the experimental population is misplaced. Even if this Court were to credit that study, which was never presented to the district court, it could conclude only that the wild population's lack of genetic diversity is not *yet* affecting litter sizes. The study does not erase the copious evidence showing that the population's genetic diversity is sufficiently low to be at risk for various inbreeding-related defects—which are not limited to depressed litter sizes, but also include reduced survival and disease resistance. *See* Aplt. App. at 128–29; 78 Fed. Reg. 35,664, 35,704 (June 13, 2013). Interior need not prove more for this Court to reverse the district court.

Second, New Mexico relies on population figures taken out of context to suggest that, despite the demonstrated lack of genetic diversity, the experimental population is in robust health. For example, the state points out that, at the end of 2015, the experimental population consisted of 97 wolves, which is close to the 100-wolf goal that Interior set in 1982. Resp. Br. 34; *see also* Br. of Spur Ranch Cattle Co. at

[6] New Mexico incorrectly maintains that Interior itself argued in its opening brief that the wild population "will" decline into extinction if Interior cannot release captive-bred wolves while this litigation is pending. Resp. Br. 33, 35. Interior did not do so, and for the reasons explained above, did not need to do so. Instead, Interior explained that being prohibited from releasing wolves "would exacerbate the already-problematic lack of genetic diversity in the experimental population," would "increase the risk of inbreeding and extinction," and would "make future efforts to improve the population's genetic health harder." Fed. Op. Br. 28. Each of these representations is supported by the declaration Interior submitted below. *See* Aplt. App. at 127–29.

10 n.8. It fails to note, however, that the population *decreased* from 110 wolves the year before; that the 100-wolf objective was expressly an interim goal; and that Interior has since determined in the 2015 10(j) rule that a wild population of *300 to 325* wolves is needed. Aplt. App. at 53, 95; 80 Fed. Reg. at 2517.

Third, New Mexico maintains that even a total loss of the nation's sole wild population of Mexican wolves would have little effect on the species as a whole. To do so, New Mexico makes much—indeed, *too* much—of Interior's designation of the experimental population as "nonessential." *See* Resp. Br. 33–34. As explained in Interior's opening brief, a nonessential designation under the Endangered Species Act ("ESA") means only that the population is not necessary to the species' continued existence—or, that losing the population would not significantly reduce the species' likelihood of *survival* in the wild. 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.80(b). It does *not* imply that the population is not critical to *conserving* the species. To the contrary, Section 10(j) of the ESA authorizes Interior to establish experimental populations only when such a population will contribute to a species' conservation. 16 U.S.C. § 1539(j)(2)(A).

As Interior has explained, the experimental population is not necessary to the Mexican wolf's bare survival because the captive population provides a backstop: Even in the event of a total loss of the wild population, Interior could attempt to create a new wild population by releasing members of the captive population. Fed. Op. Br. 12 n.6; 63 Fed. Reg. 1752, 1756–57 (Jan. 12, 1998). But it does not follow that

the loss would not be a devastating blow to efforts to recover the species in the wild—especially given how long it has taken Interior to grow the wild population to its current level. *See* Fed. Op. Br. 8–10. Discounting the significance of such a loss, simply because it would not be fatal to Interior's ability to preserve the species in the wild, is inconsistent with the ESA's priority on moving listed species toward recovery, rather than merely preventing their extinction. *See* 16 U.S.C. §§ 1531(c), 1532(3).

2. New Mexico's suggestion that Interior has the power to avoid these hardships is mistaken.

New Mexico's argument that Interior could avoid the hardships described above simply by seeking the requisite permits from the state is unpersuasive. *See* Resp. Br. 37–39. The record shows that New Mexico would not be willing to grant Interior release permits before Interior has completed a recovery plan for the species, and Interior will not have such a plan ready until November 2017. Fed. Op. Br. 28–29. New Mexico now argues that the state does not require a recovery plan *per se*, but only a "'management plan' [that] actually contain[s] real as opposed to placeholder and interim management objectives." Resp. Br. 37–38. The title of the plan that New Mexico requires before it will issue permits is beside the point. The substance of the plan New Mexico seeks must, in the words of its own permit decision, include an explanation of Interior's goals for the "larger recovery effort" for the Mexican wolf, "of which the proposed releases are a part." Aplt. App. at 66, 68. Interior sets such goals through the recovery-planning process, which, by statute, requires Interior to

take various procedural steps, including providing opportunity for public notice and comment. *See* 16 U.S.C. § 1533(f). Interior may not devise and publicly commit to recovery goals without going through this process. Thus, nothing in New Mexico's answering brief provides support for the district court's unfounded assumption that Interior is at liberty to avoid the harms the preliminary injunction will impose.[7]

C. New Mexico cannot harmonize the district court's public-interest finding with Congress's priorities in enacting the ESA.

New Mexico tries to harmonize the district court's public-interest finding with the ESA's policy of conservation by suggesting that the statute's priority on conservation does not apply to experimental populations. Resp. Br. 40–41. In so doing, it ignores that, while individual members of an experimental population are managed more flexibly than other members of an endangered species, *see* 16 U.S.C. § 1539(j)(2)(C), preserving the experimental population as a whole is an important part of the ESA's conservation mission. *See id.* § 1539(j)(2)(A). By leaving the experimental population at increased risk of extinction, the preliminary injunction puts the entire Mexican wolf species at heightened risk of a serious setback in its long-fought progress toward recovery. *See supra* Point B.1. Elevating the risk of such serious repercussions to an endangered species over the state's unsubstantiated assertions of harm to an abundant game species is not, as New Mexico insists,

[7] For the same reason, the harm to Interior's management of the population may not be dismissed as "self-inflicted." *See* Br. of N.M. Farm & Livestock Bureau at 16–17.

"myopic." Resp. Br. 41. It instead appropriately recognizes that Interior's decisions regarding management of non-essential experimental populations effectuate the national policies set forth by the ESA and are valid even in the face of contrary state regulation. *See Gibbs v. Babbitt*, 214 F.3d 483, 487–89 (4th Cir. 2000).[8]

D. New Mexico has not shown it is likely to succeed on the merits.

To the extent this Court reaches the question of whether New Mexico is likely to succeed on the merits, it should find that the district court committed legal error in finding the state was likely to prevail. On appeal, New Mexico voices its displeasure with various aspects of the 10(j) rule and with Interior's management of the Mexican wolf experimental population generally, while various *amici* brief challenges to the 10(j) rule that no party has raised, despite the rule that, except in exceptional circumstances not present here, this Court will not "reach out to decide issues" advanced only by *amici*. *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997). The issues that New Mexico *has* raised are whether Interior policy stated at 43 C.F.R. § 24.4(i)(5) prevented the agency from releasing wolves without state consent, and, if not, whether state law prohibited the federal agency's actions. *See* Fed. Op. Br. 30–39;

[8] The district court's public-interest finding cannot be upheld based on new evidence regarding alleged risks to humans, which was never presented below. *See* Br. of N.M. Farm & Livestock Bureau at 5–6, 19–20. Moreover, Interior has found that additional releases will not significantly impact human health and safety. *See* Final EIS at 4-60 to 4-75.

Aplt. App. at 38–40.[9] To prevail on appeal, New Mexico must show that it is likely to prevail on the merits of one of these claims. It would *not*, as New Mexico and several *amici* incorrectly state, be sufficient for the state to show substantial questions on the merits, even if the first three factors tilted in New Mexico's favor. *Dine Citizens Against Ruining our Environment v. Jewell*, -- F.3d --, 2016 WL 6301136, at *3 (10th Cir. Oct. 27, 2016) (holding that "any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard [injunction] test is impermissible"). New Mexico cannot meet its burden, for the reasons below.

1. The district court erred in not deferring to Interior's reasonable interpretation of 43 C.F.R. § 24.4(i)(5).

New Mexico attempts to defend the district court's failure to defer to Interior's reasonable interpretation of 43 C.F.R. § 24.4(i)(5) but to no avail.

a. New Mexico cannot justify the district court's failure to even consider whether deference was appropriate.

New Mexico argues that Interior's interpretation of its own policy does not warrant deference because "there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question."

[9] As explained in Interior's opening brief, New Mexico's preliminary-injunction motion waived any reliance on the state's pleaded claim that Interior's decision to release wolves to satisfy the 10(j) rule's requirements was arbitrary and capricious in the absence of an amended recovery plan. Fed. Op. Br. 39–40. New Mexico does not contend otherwise in its answering brief. To the extent the state and *amici* nevertheless fault Interior for amending the 10(j) rule without promulgating a new recovery plan, they are incorrect, for the reasons stated in Interior's opening brief. *See id.*

Resp. Br. 51–52 (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)). But each of its attempts to cast suspicion on the agency's interpretation fail.

First, the agency's interpretation of 43 C.F.R. § 24.4(i)(5) is plainly not *ad hoc* or a litigation position, given that the Director of the Fish & Wildlife Service sent a letter to New Mexico announcing his conclusion that 43 C.F.R. § 24.4(i)(5) permitted Interior to move forward with releases without state permission in October 2015, before Interior began conducting 2016 releases and certainly before litigation began. Fed. Op. Br. 31–32; *see also* Aplt. App. at 78–79.

Second, the agency's interpretation is consistent with the agency's past practice. Interior reads 43 C.F.R. § 24.4(i)(5) as requiring the agency to comply with state permit regimes *except* where doing so would prevent the agency from carrying out its statutory responsibilities, and considers the duty to manage experimental populations in a way that enhances species conservation to be such responsibility. *See* Fed. Op. Br. 31–32; Aplt. App. at 78–79. To show that this reading is inconsistent with agency practice, New Mexico would need to identify some past instance in which Interior determined that it could not release members into an experimental population over a state's denial of permission. New Mexico has not done so. Instead, it suggests that Interior's practice of *seeking* state permits before conducting releases is at odds with the agency's interpretation of 43 C.F.R. § 24.4(i)(5). Resp. Br. 52–53. But there is nothing inconsistent about seeking states' input in the first instance, even though the agency is prepared to proceed over the state's objection if circumstances so require.

New Mexico also suggests that Interior's interpretation is inconsistent with the terms of the federal permit covering Interior's management of the Mexican wolf program. New Mexico reads too much into the federal permit. The federal permit does not direct Interior to obtain state permits for any particular actions; it simply informs the holder, in boilerplate language, that the permit is "functional" only when used "in combination with a valid state permit." *See* Intervenor Op. Br. Add. 112. But this is obviously true only for actions that *require* a valid state permit. Many of the actions allowed by the federal permit do not require a state importation or release permit—for example, attaching radio collars to wolves, obtaining tissue samples, etc. *Id.* It would be absurd to read the federal permit as requiring the holder to seek state permission for such activities. Likewise, nothing in the federal permit suggests that the permit would require its holder to obtain state permission before conducting releases that are exempt from state control by superseding federal law.

Finally, New Mexico errs in suggesting that deference is inappropriate because the state had inadequate notice. Resp. Br. 53. Interior's policy contains an express exception to the policy of compliance with state permit law. New Mexico had every reason to expect that Interior would utilize that exception.

b. New Mexico has not shown that Interior's reading of its own policy is unreasonable.

Because, for the reasons above, Interior's interpretation of 43 C.F.R. § 24.4(i)(5) is entitled to deference, it should govern unless plainly erroneous or

inconsistent with the regulatory text. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The state's attempts to portray Interior's interpretation as unreasonable flow from its unsupported assumption that 43 C.F.R. § 24.4(i)(5) *must* be read to stop Interior from releasing animals into a 10(j) population without state permission. But it cannot show any reason why 43 C.F.R. § 24.4(i)(5) must be so read.

Despite the concerns lodged by various *amici*, Interior's interpretation of 43 C.F.R. § 24.4(i)(5) respects the proper bounds of federalism. As explained in Interior's opening brief, there is an important national interest in managing scarce wildlife. *See* Fed. Op. Br. 3 (citing *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (Holmes, J.)). Federal action to protect the subset of wild species listed under the ESA—including, as the Fourth Circuit has expressly recognized, federal decisions on how to manage non-essential experimental populations—does not offend the rights of states, even when state law is directly contradictory. *Gibbs*, 214 F.3d at 504–06.

The text of the ESA also does not require New Mexico's preferred reading of 43 C.F.R. § 24.4(i)(5). The ESA instructs Interior to "cooperate to the maximum extent practicable" with states, 16 U.S.C. § 1535(a), *not* to obtain state sign-off in all instances—which Congress certainly knows how to command when it so intends. *See, e.g.*, Br. of Assoc. of Fish & Wildlife Agencies at 11–12 (citing the Reclamation Act of 1902, which requires the federal government to "proceed in conformity" with state laws). Nor does Section 10(j) itself require the agency to obtain state approval before releasing animals into an experimental population. *See* 16 U.S.C. § 1539(j). Section

10(j)'s legislative history is of a piece: While recognizing the importance of state "involvement" in reintroduction efforts, it does not indicate that states will be the final arbiters of whether a release may proceed.[10] *See* H. Rep. No. 97-567 at 34 (1982); S. Rep. No. 97-418 at 9 (1982). Thus, because the ESA gives Interior, not the states, final authority over whether to release animals into an experimental population, it is doubtful that Interior would even have the authority—let alone be required—to delegate that responsibility to the states. *See* Fed. Op. Br. 35.

The text of 43 C.F.R. § 24.4(i)(5) does not compel New Mexico's reading, either. New Mexico takes for granted that 43 C.F.R. § 24.4(i)(5)'s reference to statutory "responsibilities" can only refer to mandatory statutory duties, citing numerous out-of-circuit decisions for the proposition that courts sometimes treat "responsibility" as synonymous with mandatory duty. *See* Resp. Br. 43–47. But, as Interior explained, this very Court has recognized that the word can be read more broadly to refer to "something within one's power or control." *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1485 n.7 (10th Cir. 1990) (quoting *Random House College Dictionary*, 1125 (1980)); Fed. Op. Br. 32. New Mexico's suggestion that this definition was intended only to set the minimum requirements of responsibility is not persuasive: Neither the opinion nor the dictionary definition to which it cites

[10] *Amici* similarly over-read 43 C.F.R., Part 24 and its 1983 Federal Register notice. *See, e.g.*, Br. of State *Amici* at 17–18; Br. of Spur Ranch Cattle Co. at 16. Neither dictates that states get the final say on when releases may proceed.

gives any such caveat. Moreover, New Mexico ignores that Interior does not merely have control over experimental populations, but in fact has a statutory duty to manage them in a way that promotes conservation. *See* 16 U.S.C. § 1531(c)(1); Fed. Op. Br. 32. That Interior has discretion over whether and when to release animals into an experimental population, *see* Resp. Br. 49–51, does not mean that it does not have a responsibility to take actions that, in the agency's judgment, promote conservation.

New Mexico also argues, echoing an error made by the district court, that by allowing Interior to release wolves into an experimental population when conservation requires, Interior's interpretation of the word responsibility renders 43 C.F.R. § 24.4(i)(5) meaningless. *See* Resp. Br. 47–49. Not so. To invoke 43 C.F.R. § 24.4(i)(5)'s exception on the ground that it has a statutory responsibility to release a given species into the wild, Interior must be able to demonstrate that the action it wishes to take will, in fact, further conservation of a species, *see* 16 U.S.C. § 1531(c)(1)—as Interior has done here. *See* Fed. Op. Br. 33. The same would be true for the numerous actions other than release into the wild under ESA Section 10(j) that the policy covers—including Interior's possession of wild animals for research purposes and the removal of harmful or surplus animals. *See* 43 C.F.R. § 24.4(i)(5)(i)–(iii). Moreover, even where Interior can make a showing that it has a responsibility to take a certain action, the policy still serves an important function: It requires the agency to comply with any state laws or permit conditions that stop short of

"prevent[ing]" Interior from taking that action. *See* 43 C.F.R. § 24.4(i)(5). Interior's interpretation therefore does not render the provision nugatory.

2. New Mexico has not shown that it may compel Interior to adhere to state permit law, absent a federal requirement.

Finally, New Mexico is incorrect that it could prevail on its state-law claims absent a federal commitment to follow state law. *See* Resp. Br. 58–66. As explained in Interior's opening brief, sovereign immunity and intergovernmental immunity bar New Mexico's state-law claims. *See* Fed. Op. Br. 36–37. Moreover, New Mexico's contention that its state-law claims are not in conflict with Interior's responsibilities under the ESA—and therefore not preempted—is unavailing. As explained above, Interior has a responsibility under the ESA to release Mexican wolves as needed to advance the species' recovery, and has determined that recovery requires immediate releases of captive-bred wolves into the wild population.[11] New Mexico has refused to permit those releases. Even if New Mexico does not ban releases in *all* circumstances, that does not lessen the conflict between federal and state law in this instance.

CONCLUSION

For all the foregoing reasons, Interior requests that this Court reverse the district court and lift the unsupported preliminary injunction.

[11] That the 10(j) rule calls for the release of two pairs with pups by 2019 does not undermine Interior's determination that it cannot wait until the very end of that period to mitigate the current risks to the population. *See* Aplt. App. at 128–30.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with Fed. R. App. P. 32(a)(7), because it contains 5,632 words, and that this brief complies with the word-limit requirement set by this Court in its August 24, 2016 order, because this reply brief and the separate reply brief filed by Intervenor-Defendants-Appellants together do not exceed 35 pages.

s/Rachel Heron
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I hereby certify that:

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I hereby certify that on November 10, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

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