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## Articles

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# The Lobo Limp on from Limbo: A History, Summary, and Outlook for Mexican Wolf Recovery in the American Southwest

Edward A. Fitzgerald\*

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\* Professor, Department of Political Science, Wright State University; Ph.D. 1983, Boston University; M.A. 1976, Northeastern University; J.D. 1974, Boston College Law School; B.A. 1971, Holy Cross College. The author would like to acknowledge the valuable comments on the article made by David Parsons, former U.S. Fish and Wildlife Service Mexican Wolf Recovery Coordinator and current Carnivore Conservation Biologist at The Rewilding Institute.

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## INTRODUCTION

The New Mexico Department of Game and Fish (“NMDGF” or “Department”), acting pursuant to new administrative regulations, denied a U.S. Fish and Wildlife Service (“FWS”)<sup>1</sup> application to import and release Mexican wolves—lobos—into New Mexico in November 2015. The FWS, acting pursuant to its own regulations, decided to proceed with Mexican wolf reintroduction. Acting without a state permit, FWS released two Mexican gray wolf pups at a location on federal land in New Mexico in early 2016.<sup>2</sup> The NMDGF brought suit to challenge FWS’s actions. In *NMDGF v. U.S. Department of the Interior*, the U.S. District Court for the District of New Mexico issued a preliminary injunction that halted FWS

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<sup>1</sup> The FWS is the federal agency within the Department of Interior responsible for implementing the Endangered Species Act with regard to terrestrial species. 50 C.F.R. § 402.01(b) (2017).

<sup>2</sup> *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1239 (10th Cir. 2017).

recovery actions until state permits were issued.<sup>3</sup> The United States Court of Appeals for the Tenth Circuit then reversed the district court and allowed the FWS to continue with Mexican wolf recovery efforts.<sup>4</sup> This is the most recent litigation dealing with Mexican wolf recovery (a controversial topic that has given rise to much litigation).

This Article will provide a historical overview of the conflict by examining the early litigation opposing recovery, including cases involving livestock depredation and wolf trapping in wolf recovery areas. It will then trace the development of 2015 regulations that changed the status of the Mexican wolf and modified its management. Next, the Article examines the current conflict over the development of the Mexican wolf recovery plan, including an analysis of the Tenth Circuit's decision in *NMDGF v. U.S. Department of the Interior*. It then reviews recent congressional efforts to halt Mexican wolf recovery. Finally, it will analyze the 2017 Mexican wolf recovery plan and describe and analyze the resulting litigation.

## I. THE REINTRODUCTION OF THE MEXICAN WOLF

The Mexican gray wolf was listed as an endangered subspecies under the Endangered Species Act (“ESA”) in 1976.<sup>5</sup> The entire gray wolf species in North America, except Minnesota, was listed as endangered in 1978.<sup>6</sup> The national listing subsumed the Mexican gray wolf subspecies listing. In an effort to encourage recovery, Mexico and the United States established a captive-breeding program in the 1970s. The captive breeding program originated with seven founders from three distinct family groupings: the McBride, Ghost Ranch, and Aragon lineages.<sup>7</sup> In 1982, the FWS completed the first Mexican gray wolf recovery plan, which established a recovery goal of one hundred Mexican wolves in the middle of a five thousand-square-mile area.<sup>8</sup>

Congress provided a more efficient means to advance species recovery and decrease political opposition in 1982. Section 10(j) of the

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<sup>3</sup> See *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, No. CV 16-00462-WJ-KBM, 2016 WL 4536465, at \*12–13 (D.N.M. June 16, 2016).

<sup>4</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1239.

<sup>5</sup> 41 Fed. Reg. 17,737 (Apr. 28, 1976).

<sup>6</sup> 43 Fed. Reg. 9607 (Mar. 9, 1978).

<sup>7</sup> 80 Fed. Reg. 2488, 2515 (Jan. 16, 2015).

<sup>8</sup> Section 4(f) of the ESA requires the Secretary of the Interior to develop and implement recovery plans “for the conservation and survival of endangered and threatened species.” 16 U.S.C. § 1533(f) (2012); see also *N.M. Dep't of Game & Fish*, 854 F.3d at 1241.

ESA was enacted, which grants the Secretary of the Interior (the “Secretary”) flexibility to establish and decrease the legal protection afforded to reintroduced species.

Section 10(j) identifies an experimental population as “any population . . . authorized by the Secretary for release . . . but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species.”<sup>9</sup> Section 10(j) also authorizes the Secretary to release “any population . . . of an endangered species or threatened species outside of the current range of such species if the Secretary determines that such release will further the conservation of such species.”<sup>10</sup> Before authorizing such a release, “the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such a population is essential to the continued existence of an endangered species or a threatened species.”<sup>11</sup> All members of the experimental population “shall be treated as a threatened species.”<sup>12</sup> A nonessential population is only managed as a threatened species “within the National Wildlife Refuge System or the National Park System.”<sup>13</sup> Otherwise it is treated “as a species proposed to be listed.”<sup>14</sup> No critical habitat is designated for a nonessential population.<sup>15</sup>

The final rule for the reintroduction of the Mexican wolf into the Blue Range Wolf Recovery Area (“BRWRA”) in central Arizona and New Mexico as a nonessential experimental population was issued in 1998.<sup>16</sup> FWS began to release captive-bred wolves into the BRWRA in March 1998.<sup>17</sup> Wolves born and raised in captivity could only be released in certain areas within Arizona and were not allowed to establish territories on public lands outside the BRWRA.<sup>18</sup> Additionally, the FWS was required to retrieve dispersing wolves.<sup>19</sup>

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<sup>9</sup> *Id.* § 1539(j)(1).

<sup>10</sup> *Id.* § 1539(j)(2)(A).

<sup>11</sup> *Id.* U.S.C § 1539(j)(2)(B).

<sup>12</sup> *Id.* 1539(j)(2)(C).

<sup>13</sup> *Id.* 1539(j)(2)(C)(i).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* 1539(j)(2)(C)(ii).

<sup>16</sup> 63 Fed. Reg. 1752, 1753 (Jan. 12, 1998). The BRWRA, which covered 6,854 square miles, consists of ninety-five percent national forest, including the Apache and Gila National Forests. *Id.*

<sup>17</sup> *Id.* at 1754.

<sup>18</sup> *Id.* at 1769.

<sup>19</sup> *Id.*

## II. EARLY LEGAL CHALLENGES

### A. New Mexico Cattle Growers Association v. U.S. Fish & Wildlife Service

Mexican wolf recovery in the American Southwest immediately faced legal challenges. The first round of litigation commenced with *New Mexico Cattle Growers Association v. FWS*.<sup>20</sup> In that case, the livestock industry, one of the major forces behind the extermination of the wolf, brought suit to challenge Mexican wolf reintroduction by alleging violations of the National Environmental Policy Act (“NEPA”) and the ESA.<sup>21</sup> The U.S. District Court for the District of New Mexico properly rejected the industry’s arguments regarding predation rates, hybridization of the reintroduced wolves, the existence of a natural population of wolves, the impact on other endangered and threatened species, consultation with the state and local governments, and the necessity for a Supplemental Environmental Impact Statement (“SEIS”).<sup>22</sup> The district court held that the FWS’s decision to introduce Mexican wolves—despite the plaintiff’s objections based on differing interpretations of data on predation rates, hybridization of the reintroduced wolves, impacts on other endangered and threatened species—was not arbitrary and capricious and was supported by substantial evidence.<sup>23</sup>

### B. Coalition for Arizona/New Mexico Counties for Stable Economic Growth v. U.S. Fish & Wildlife Service

The livestock industry rekindled the second round of litigation in April 2003.<sup>24</sup> The Coalition for Arizona/New Mexico Counties for Stable Economic Growth<sup>25</sup> brought suit, seeking an injunction to halt any further

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<sup>20</sup> N.M. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv., CIV No. 98-367, 1999 U.S. Dist. LEXIS 19096 (D.N.M. Oct. 28, 1999). See also Edward A. Fitzgerald, *Lobo Returns from Limbo: New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Service*, 46 NAT. RES. J. 9 (2006).

<sup>21</sup> *N.M. Cattle Growers Ass’n*, 1999 U.S. Dist. LEXIS at \*3.

<sup>22</sup> See *id.* at \*32–82.

<sup>23</sup> *Id.* at 55–75.

<sup>24</sup> See Tania Soussan, *Trapped by Doubts*, ALBUQUERQUE J., Aug. 31, 2003, at B1.

<sup>25</sup> Five of the nine organizations were plaintiffs in the earlier suit: New Mexico Cattle Growers Association, Grant County Farm and Livestock Bureau, New Mexico Farm and Livestock Bureau, New Mexico Public Lands Council, New Mexico Wool Growers. The other 4 plaintiffs are the Coalition, Gila Permittees Association, Mimbres Farm and Livestock Bureau, and Arizona Cattle Growers Association.

releases and recapture the Mexican wolves already present in the BRWRA.<sup>26</sup> The Coalition alleged that the discovery of hybrids in the Pipestem pack required intra-agency consultation and violated the conservation mandate in section 10(j) of the ESA.<sup>27</sup> Hybridization (wolf-coyote-dog interbreeding) can permit the introgression of other canine genetic material into the wolf population.<sup>28</sup> The Coalition argued that continual breeding by and with hybrids would lead to the extinction of pure genetic Mexican wolves.<sup>29</sup> The Coalition also contended that a SEIS was necessary to discuss the translocation of problem wolves into the secondary recovery area, the resulting depredation rates in the secondary area, and the hybridization of Mexican wolves.<sup>30</sup> The U.S. District Court for the District of New Mexico again denied the request for a preliminary injunction in July 2004.<sup>31</sup> The court held that the issues of depredation, hybridization, and translocation had been discussed adequately in the final EIS and environmental assessment.<sup>32</sup> Further, the court found that sufficient intra-agency consultation had occurred.<sup>33</sup> In the court's view, the single instance of hybridization did not undermine the ESA conservation mandate.<sup>34</sup> The court held that the reintroduction and translocation of Mexican gray wolves should continue because it will "further the conservation of the species and thereby advance the congressional priorities set forth" in the ESA.<sup>35</sup>

The case was decided on the merits in January 2005. The federal district court found no support in the Coalition's NEPA claims, because all of the issues had been detailed in the administrative process.<sup>36</sup> The court also rejected the Coalition's ESA assertions, and it found that there

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<sup>26</sup> Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. U.S. Fish & Wildlife Serv., No. 03-508 (D.N.M. July 6, 2004) (order denying preliminary injunction).

<sup>27</sup> *Id.* at 12–18. For a discussion of the hybridization issue, see Am. Wildlands v. Norton, 193 F.Supp.2d 244 (D.C. 2002). See also Kate Geoffroy & Tom Doyle, *Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?*, 16 Nat. Res. & Envt. 82, 86 (2001).

<sup>28</sup> See N.M. Dep't of Game & Fish v. U.S. Dep't of Interior, No. CV 16-00462-WJ-KBM, at \*12–13 (D.N.M. June 16, 2016).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, slip op., at 30–42.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 42–47.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 49–51.

<sup>36</sup> *Coalition of Arizona/New Mexico Counties for Stable Economic Growth vs. U.S. Fish & Wildlife Serv.*, No. 03-508, slip op. at 57–58 (D.N.M. Jan. 31, 2005).

had been adequate intra-agency consultations and compliance with the conservation mandates of section 7 and section 10(j) of the ESA.<sup>37</sup> At the end of 2005, there were forty-two Mexican wolves in the BRWRA.<sup>38</sup>

### III. STANDARD OPERATING PROCEDURE 13

New Mexico's Democratic Governor William Richardson took office in 2003. Governor Richardson, unlike his predecessor Republican Gary Johnson, supported Mexican wolf reintroduction.<sup>39</sup> In April 2004, the New Mexico Game Commission ("NMGC"), with each commissioner having been appointed by Governor Richardson, voted to join the Memorandum of Understanding ("MOU"), which defined and formalized the role of each participant in the recovery program.<sup>40</sup> The MOU created the Adaptive Management Oversight Committee ("AMOC") to provide guidance to the interagency field team on policy and to coordinate agency activities.<sup>41</sup> In 2005, AMOC approved Standard Operating Procedure ("SOP") 13, requiring the permanent removal of wolves that engaged in three livestock depredations during a one year period.

Catron County, New Mexico is the center of opposition to Mexican wolf recovery. Catron County has made many arguments in opposition to Mexican wolf recovery. It has alleged the following: wolves threaten children and cause them psychological trauma;<sup>42</sup> wolf depredation causes chronic stress on livestock, which affects their health;<sup>43</sup> wolf depredation causes family farms to go bankrupt;<sup>44</sup> government compensation does not

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<sup>37</sup> *Id.* at 58–62

<sup>38</sup> ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED REVISION TO THE REGULATIONS FOR THE NONESSENTIAL EXPERIMENTAL POPULATION OF THE MEXICAN WOLF (*CANIS LUPUS BAILEY*), at ch. 1, p. 18, U.S. FISH & WILDLIFE SERV., (Nov. 2014) [hereinafter FEIS], [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](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).

<sup>39</sup> *State Supports Wolf Reintroduction Program*, AP STATE & LOCAL WIRE, Apr. 8, 2004.

<sup>40</sup> *Id.* FWS can enter cooperative agreements with states regarding the management of endangered and threatened species pursuant to 16 U.S.C. § 1535(c).

<sup>41</sup> AMOC comprised of USDA Wildlife Services, Arizona Department of Game and Fish, New Mexico Department of Game and Fish, White Mountain Apache Tribe, and U.S. Fish and Wildlife Service. *U.S. Wildlife Officials Failing to Conserve Mexican wolf*, TARGETED NEW SERV., May 30, 2008 (on file with author).

<sup>42</sup> Glyn Griffin, *Their View: Living with Mexican Wolves and the Liberal Press*, LAS CRUCES SUN-NEWS (NEW MEXICO), June 19, 2011.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

reflect true monetary loss or the cost to the county from the loss of jobs and tax revenues;<sup>45</sup> and wolf advocates who do not live in wolf country are unaware of these pressures.<sup>46</sup> In February 2007, the Catron County Commission (“CCC”) passed an ordinance that allowed the removal of wolves that have habituated to humans and have a high probability of harming people.<sup>47</sup> Environmental groups brought suit opposing the ordinance.<sup>48</sup> The U.S. District Court for the District of New Mexico dismissed the suit after CCC amended the ordinance to remove the provision that allowed it to unilaterally trap or remove wolves from the wild.<sup>49</sup> The court subsequently declared the suit moot.<sup>50</sup> However, while the suit was still ongoing, the CCC requested the removal of a female wolf (F294) that was guilty of three livestock deprecations.<sup>51</sup> After F294 was removed and killed, Governor Richardson requested the suspension of SOP 13 in July 2007.<sup>52</sup> SOP 13 had resulted in removal of forty-five wolves from the BRWRA over three years, which was two times more than in the prior seven years.<sup>53</sup>

Following Catron County’s lead, Otero County enacted an ordinance in October 2007 that prohibited the release of wolves within the county.<sup>54</sup> Luna County followed in December 2007, approving an ordinance that prohibited the release of predatory animals, including the Mexican wolf, in the county.<sup>55</sup> These ordinances spurred further litigation regarding Mexican wolf recovery efforts. WildEarth Guardians and the Rewilding Institute (“RI”) brought suit in the U.S. District Court for the District of Arizona in April 2008, alleging that the FWS and U.S. Forest Service (“USFS”) violated section 10(j) of ESA because SOP 13 did not further

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Sue Major Holmes, *Endangered Wolf Program Remains a Complex, Volatile Issue*, AP STATE & LOCAL WIRE, June 23, 2007.

<sup>48</sup> *Conservation Groups Oppose Catron County Action Against Wolves*, AP STATE & LOCAL WIRE, May 3, 2007.

<sup>49</sup> Susan Montoya Bryan, *N.M. Judge Rules on Mexican Gray Wolf Ordinance*, AP STATE & LOCAL WIRE, Oct. 2, 2008.

<sup>50</sup> *Id.*

<sup>51</sup> Sue Major Holmes, *N.M. County Says Request to Remove Wolf Meant to Prevent Problems*, AP STATE & LOCAL WIRE, May 11, 2007.

<sup>52</sup> Chris Kahn, *N.M. Governor Wants Suspension of ‘3 Strikes’ Rule vs. Endangered Wolves*, AP STATE & LOCAL WIRE, July 7, 2007.

<sup>53</sup> Chris Kahn, *Wildlife Groups Call for End to Mexican Wolf Removal Policy*, ASSOCIATED PRESS, May 1, 2008.

<sup>54</sup> *Otero County Manager Supports Law Prohibiting Wolf Releases*, AP STATE & LOCAL WIRE, Dec. 5, 2007.

<sup>55</sup> *N.M. County Approves Ordinance Against Release of Wolves*, AP STATE & LOCAL WIRE, Dec. 14, 2007.

the conservation of the Mexican wolf.<sup>56</sup> The Western Environmental Law Center (“WELC”), representing eleven environmental groups, filed a similar suit in the Arizona federal district court, alleging FWS violated NEPA, ESA, and the Administrative Procedure Act (“APA”) by creating AMOC and authorizing SOP 13 in May 2008.<sup>57</sup> Both cases were consolidated in July 2008.<sup>58</sup>

By that time, the FWS had already abandoned SOP 13.<sup>59</sup> The FWS stopped trapping and shooting wolves for control purposes in 2008. This was after having taken eleven wolves, trapping and not releasing forty-six wolves, and causing the death of eighteen wolves from live capture since reintroduction.<sup>60</sup> No wolves were removed in 2008 due to depredation, but five wolves were illegally shot and two others experienced “suspicious demise.”<sup>61</sup>

In 2009, President Obama signed the Omnibus Public Land Management Act that created the “Wolf Livestock Loss Demonstration Project,” which provided \$1 million dollars over five years to states and Indian tribes to compensate for wolf depredation of livestock and fund nonlethal methods to reduce wolf-livestock conflicts.<sup>62</sup> As a result, Defenders of Wildlife suspended its program that provided compensation to ranchers for livestock losses from wolf depredation.<sup>63</sup> Under its program, Defenders of Wildlife paid \$106,493 for confirmed kills of 156 cattle and 10 sheep since 1998.<sup>64</sup> Defenders of Wildlife then shifted its resources to the “Wolf Coexistence Partnership,” which encouraged ranchers to use nonlethal methods to discourage depredation.<sup>65</sup> The FWS hoped that this compensation would facilitate the lifting of the controversial three strikes policy.<sup>66</sup> The FWS and National Fish and Wildlife Foundation established the Mexican Wolf Interdiction Trust Fund

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<sup>56</sup> Kahn, *supra* note 52.

<sup>57</sup> *Id.*

<sup>58</sup> See *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095 (D. Ariz. 2009).

<sup>59</sup> *Conservationist Intervene Against Frivolous Anti-Mexican Gray Wolf Lawsuit*, STATES NEWS SERV., November 12, 2010.

<sup>60</sup> *Id.*

<sup>61</sup> Susan Montoya Bryan, *Judge Sides with Environmentalists in Wolf Case*, AP STATE & LOCAL WIRE, Apr. 3, 2009.

<sup>62</sup> Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009).

<sup>63</sup> April Reese, *WOLVES: New Federal Compensation Program Could Soften Resistance to Southwest Reintroduction Program*, E&E W. REP., April 23, 2009.

<sup>64</sup> *Id.*

<sup>65</sup> Raymond B. Wrabley, Jr., *Showdown at Catron: Cows, Wolves, and the Ecology of Public Lands Policies*, 51 Nat. Res. J. 119, 154-155 (2011).

<sup>66</sup> Reese, *supra* note 63.

to pay for depredation and nonlethal controls to curb predation in October 2009.<sup>67</sup>

A settlement agreement was reached in December 2009, whereby the FWS agreed to revamp the wolf recovery program.<sup>68</sup> Pursuant to the settlement agreement, the FWS ended SOP 13 and terminated the AMOC.<sup>69</sup> Unsurprisingly, ranchers were not happy with the settlement. The New Mexico Farm Livestock Bureau stated, “[the] FWS is just bending over backward to kowtow to these environmental groups . . . [the] FWS has zero credibility among ranchers . . . [n]one of them want this.”<sup>70</sup>

Catron and Otero Counties, and several ranching groups, brought suit against the NMDGF and the FWS challenging changes in the wolf recovery program, specifically the FWS’s takeover of the program and abandonment of SOP 13.<sup>71</sup> The plaintiffs alleged that the FWS “arbitrarily determines which management methods to implement and which to ignore” and asserted that a new EIS was required.<sup>72</sup> The plaintiffs’ attorney stated: “The bottom line is that the individual landowners and small rural communities that are located in places in close proximity to where the wolf release program is being operated are not getting an adequate voice into the process.”<sup>73</sup> In December 2010, the U.S. District Court for the District of New Mexico dismissed the complaint against the NMDGF, stating that the plaintiffs did not “allege sufficient facts to state a plausible claim against the State defendants.” The plaintiffs then withdrew their complaint against the FWS in February 2011.<sup>74</sup> Meanwhile, recovery efforts were continuing, and at the end of 2011 there were sixty-seven Mexican wolves in the BRWRA.<sup>75</sup>

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<sup>67</sup> Susan Montoya Bryan, *Fund will help ranchers deal with Mexican wolves*, AP State & Local Wire, October 7, 2009; *see also* 80 Fed. Reg. 2488, 2504 (Jan. 16, 2015) (providing a full explanation of the Mexican Wolf/Livestock Interdiction Trust Fund).

<sup>68</sup> Consent Decree, *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, (D. Ariz. 2009) (No. 08-cv-280 TUC-DCB), *sub nom.* *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095 (D. Ariz. 2009); *see also* Wrabley, *supra* note 65.

<sup>69</sup> *Id.*; Sue Major Holmes, *Federal Agency Settles Wolf Lawsuit*, AP STATE & LOCAL WIRE, Nov. 15, 2009.

<sup>70</sup> Patrick Reis, *Wolves: FWS agrees to revamp Southwest management program*, E&E REP., Nov. 19, 2009.

<sup>71</sup> *WOLVES: N.M. Counties, Ranchers, Sue to Halt Reintroductions*, E&E NEWS (Aug. 26, 2010), <https://www.eenews.net/landletter/stories/94698/print>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Livestock Growers, Counties Withdraw Lawsuit to Eradicate Gray Wolves From New Mexico*, CTR. FOR BIOLOGICAL DIVERSITY (Feb. 1, 2011), [http://www.biologicaldiversity.org/news/press\\_releases/2011/mexican-gray-wolf-02-01-2011.html](http://www.biologicaldiversity.org/news/press_releases/2011/mexican-gray-wolf-02-01-2011.html).

<sup>75</sup> FEIS, *supra* note 38, at ch. 1, p. 18.

#### IV. MEXICO'S ROLE IN RECOVERY

Much of the Mexican wolf's historic range is in Mexico.<sup>76</sup> The United States and Mexico established the Mexican Wolf Species Survival Plan, a binational captive breeding program, between 1977 and 1980.<sup>77</sup> In October 2011, Mexico began reintroducing wolves into the wild.<sup>78</sup> The following month, the FWS granted itself a permit to trap and indefinitely incarcerate any wolves entering Arizona or New Mexico from Mexico.<sup>79</sup> The Center for Biodiversity brought suit to challenge the FWS permit in 2013.<sup>80</sup> Several weeks later, the FWS, responding to the litigation, rescinded the permit.<sup>81</sup> Later, a settlement agreement was reached, wherein the FWS acknowledged that it lacked the authority to issue a permit to capture fully protected wolves entering from Mexico.<sup>82</sup>

By August 2014, Mexico had released fourteen adult wolves; eleven died, and one was removed.<sup>83</sup> The remaining two Mexican wolves were documented with five pups in 2014, the first successful reproduction in Mexico.<sup>84</sup> By the end of 2017, Mexico had released forty-one wolves.<sup>85</sup> As of April 2017, twenty-eight Mexican wolves inhabit Chihuahua, Mexico in the northern Sierra Madre Occidental.<sup>86</sup> One pair of Mexican wolves has reproduced in three of its four years in the wild and their pups are establishing packs.<sup>87</sup> Scientists, however, caution that “high human-associated mortality risk and low prey density within potential core areas

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<sup>76</sup> Endangered and Threatened Wildlife and Plants; Endangered Status for the Mexican Wolf, 80 Fed. Reg. 2490–91 (Jan. 16, 2015) (to be codified at 50 C.F.R. pt. 17); *NEW MEXICO: Approval of Federal Wolf Plan Could Signal Thawing Relations*, E&E NEWS (Jan. 4, 2018), <https://www.eenews.net/greenwire/stories/1060070103/print>.

<sup>77</sup> *Id.* at 2491–92.

<sup>78</sup> *Id.* at 2491.

<sup>79</sup> *Washington: Lawsuit Filed to Protect Border-crossing Wolves Entering Arizona, New Mexico from Government Traps*, PLUS MEDIA SOLUTIONS, Apr. 3, 2013.

<sup>80</sup> *Id.*

<sup>81</sup> *After Legal Challenge, U.S. Fish and Wildlife Service Rescinds Permit to Trap Border-crossing Wolves in the Southwest*, CTR. FOR BIOLOGICAL DIVERSITY (Apr. 11, 2013), [http://www.biologicaldiversity.org/news/press\\_releases/2013/mexican-gray-wolf-04-11-2013.html](http://www.biologicaldiversity.org/news/press_releases/2013/mexican-gray-wolf-04-11-2013.html).

<sup>82</sup> *Washington: Two Settlement Agreements Reached to Protect Mexican Gray Wolves*, PLUS MEDIA SOLUTIONS, Aug. 27, 2013.

<sup>83</sup> 80 Fed. Reg. at 2491.

<sup>84</sup> *Mexico Reports First Litter of Wolf Cubs in the Wild*, ASSOCIATED PRESS, July 17, 2014.

<sup>85</sup> U.S. FISH & WILDLIFE SERV. SW. REGION, DRAFT MEXICAN WOLF RECOVERY PLAN, FIRST REVISION 16 (2017).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

in Mexico suggest that these areas are unlikely to support populations over 100 individuals.”<sup>88</sup> This evidence shows that Mexico plays an important role in the ultimate goal of Mexican wolf recovery.

## V. THE NEXT ROUND OF LITIGATION

Six months before leaving office, Governor Richardson, acting pursuant to the New Mexico Wildlife Conservation Act, issued an executive order that temporarily banned trapping in the BRWRA.<sup>89</sup> At that point, there had been six confirmed and three probable Mexican wolves trapped in New Mexico’s portion of BRWRA in the past eight years.<sup>90</sup> Five wolves had been injured by traps, two severely enough to require leg amputations.<sup>91</sup> As a result, Governor Richardson asked the NMDGF to assess the impact of trapping on the Mexican wolf.<sup>92</sup> Following the executive order, the NMGC extended the trapping ban for six months.<sup>93</sup> Trapping had already been banned on public lands in Arizona and Colorado.<sup>94</sup> In response to Governor Richardson’s request, the NMDGF commissioned a study with the U.S. Geological Survey (“USGS”) regarding the impact of trapping on the Mexican wolf.<sup>95</sup>

Republican Governor Susana Martinez, who took office in 2011, did not share her predecessor’s concern for Mexican wolf recovery. Governor Martinez decided to end New Mexico’s participation in Mexican wolf recovery efforts.<sup>96</sup> Under Governor Martinez’s lead, the NMGC voted to

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<sup>88</sup> CARLOS CARROLL ET AL., DEVELOPING METAPOPULATION CONNECTIVITY CRITERIA FROM GENETIC AND HABITAT DATA TO RECOVER THE ENDANGERED MEXICAN WOLF, 28 CONSERVATION BIOLOGY 76, 78 (2013); *see also* SARAH A. HENDRICKS, ET. AL., RE-DEFINING HISTORICAL GEOGRAPHIC RANGE IN SPECIES WITH SPARSE RECORDS: IMPLICATIONS FOR THE MEXICAN WOLF REINTRODUCTION PROGRAM, 194 BIOLOGICAL CONSERVATION 48, 53 (2016).

<sup>89</sup> Governor Bill Richardson Orders Temporary Trapping Ban to Protect the Mexican Gray Wolf, N.M. Exec. Order 2010-029 (2010).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *NM Commission Extends Trapping Ban in Wolf Area*, AP STATE & LOCAL WIRE, October 28, 2010.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Reyes Mata, *Commission Suspends Mexican Wolf Reintroduction Program*, LOBOS OF THE S.W. (June 9, 2011), <https://mexicanwolves.org/index.php/news/430/51/In-the-Press-Commission-suspends-Mexican-Wolf-Reintroduction-program>; Chris Roberts, *Mexican Gray Wolves Face New Challenges in Struggle for Survival*, EL PASO TIMES (July 5, 2011), [http://www.biologicaldiversity.org/news/media-archive/a2011/Wolves\\_ElPasoTimes\\_7.5.11.pdf](http://www.biologicaldiversity.org/news/media-archive/a2011/Wolves_ElPasoTimes_7.5.11.pdf).

end all participation in the 2010 MOU, which provided for cooperative federal-state management.<sup>97</sup> Four new members appointed by Governor Martinez voted unanimously with two former members to cease any state participation.<sup>98</sup> Over the past thirteen years, New Mexico had invested \$507,644 in recovery efforts.<sup>99</sup> Federal funds to the state over this time amounted to \$1.4 million, constituting a \$1.9 million total investment in Mexican wolf recovery.<sup>100</sup>

New Mexico's departure from the 2010 MOU generated similar action among other partners. Grant and Sierra Counties in New Mexico withdrew, as did the New Mexico Department of Agriculture.<sup>101</sup> This left the Arizona Game and Fish Department, the White Mountain Apache Tribe and Greenlee, Navajo and Graham Counties in Arizona as the only remaining partners with federal land and wildlife agencies.<sup>102</sup> After the Martinez administration departed from the MOU, it began to reconsider the trapping ban. The Small Business Task Force, appointed by Governor Martinez to review state rules in an effort to make New Mexico more business friendly, recommended that local economies could be "enhanced" by removing the trapping ban in wolf territory.<sup>103</sup> As a result, NMGC unanimously voted to end the ban in July 2011.<sup>104</sup> WildEarth Guardians filed petitions with the USFS and the FWS for emergency

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<sup>97</sup> Rene Romo, *State Pulling Out of Wolf Program*, ALBUQUERQUE J. (June 10, 2011), <https://www.abqjournal.com/35669/state-pulling-out-of-wolf-program.html>.

<sup>98</sup> *Id.*

<sup>99</sup> Chris Roberts, *Mexican Gray Wolves Face New Challenges*, DESERET NEWS (July 11, 2011), <https://www.deseretnews.com/article/700150826/Mexican-gray-wolves-face-new-challenges.html>.

<sup>100</sup> *Id.*

<sup>101</sup> Susan Montoya Bryan, *Support Waning for Mexican Gray Wolf Program*, TUCSON.COM (Apr. 8, 2012), [http://tucson.com/news/state-and-regional/support-waning-for-mexican-gray-wolf-program/article\\_ed7474fa-81c9-11e1-80fd-001a4bcf887a.html](http://tucson.com/news/state-and-regional/support-waning-for-mexican-gray-wolf-program/article_ed7474fa-81c9-11e1-80fd-001a4bcf887a.html).

<sup>102</sup> *Id.*

<sup>103</sup> Susan Montoya Bryan, *NM Game Officials to Consider Ending Trapping Ban*, DESERET NEWS (July 21, 2011), <https://www.deseretnews.com/article/700164873/NM-game-officials-to-consider-ending-trapping-ban.html>.

<sup>104</sup> Susan Montoya Bryan, *NM Game Commission Votes to End Trapping Ban*, SANTA FE NEW MEXICAN (July 21, 2011), [http://www.santafenewmexican.com/news/local\\_news/game-commission-votes-to-end-trapping-ban/article\\_f1a860d6-5ecb-56cc-a90c-309e6f2591a7.html](http://www.santafenewmexican.com/news/local_news/game-commission-votes-to-end-trapping-ban/article_f1a860d6-5ecb-56cc-a90c-309e6f2591a7.html).

exclusions in the Mexican wolf recovery area.<sup>105</sup> The USFS rejected the request, and the FWS ignored it.<sup>106</sup>

The USGS study commissioned by the NMDGF regarding the impact of trapping on the Mexican wolf was released in August 2011.<sup>107</sup> The study noted that there had been seventy-eight Mexican wolf deaths since reintroduction, eighty percent of which were caused by humans.<sup>108</sup> Trapping, however, was only responsible for four percent of the deaths.<sup>109</sup> The study also found that thirty-seven wolves were shot illegally, twelve were hit by vehicles, eleven were lethally removed, one was legally shot by the public, and one died of a trapping injury incurred during government research.<sup>110</sup> There had been thirteen trapping incidents in New Mexico: seven wolves were injured, two suffered leg amputations, and two died.<sup>111</sup> New Mexico officials applauded the study as evidence that the trapping issue was a minor one.<sup>112</sup>

#### A. WildEarth Guardians v. Lane

As a result of the change in New Mexico's trapping policy, environmental groups brought suit against the NMDGF and its Director. The environmental plaintiffs alleged that New Mexico's "continued authorization of trapping within the occupied range of the critically endangered Mexican gray wolf . . . without exercising due care to avoid trapping these wolves" violated the ESA.<sup>113</sup> In *WildEarth Guardians v. Lane*, the U.S. District Court for the District of New Mexico dismissed the

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<sup>105</sup> Milan Simonich, *Real New Mexico Lobos Are in Middle of Expensive Courtroom Clash*, LAS CRUCES SUN-NEWS (Aug. 30, 2012), [http://www.wildearthguardians.org/site/DocServer/Real\\_New\\_Mexico\\_lobos\\_are\\_in\\_middle\\_of\\_expensive\\_courtro.pdf?docID=6182&AddInterest=1103](http://www.wildearthguardians.org/site/DocServer/Real_New_Mexico_lobos_are_in_middle_of_expensive_courtro.pdf?docID=6182&AddInterest=1103).

<sup>106</sup> *Id.*

<sup>107</sup> U.S. GEOLOGICAL SURVEY, EVALUATING TRAPPING TECHNIQUES TO REDUCE POTENTIAL FOR INJURY TO MEXICAN WOLVES: OPEN FILE REPORT 2011-1190 (2011) [hereinafter OPEN FILE REPORT 2011-1190]; Susan Montoya Bryan, *Feds Release Study of Trapping Effects on Wolves*, ALBUQUERQUE J. (Aug. 8, 2011), <https://www.abqjournal.com/48154/feds-release-study-of-trapping-effects-on-wolves.html>.

<sup>108</sup> OPEN FILE REPORT 2011-1190, *supra* note 107, at 3.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Milan Simonich, *Gray Wolf Lawsuit Cost Hits \$216,000*, EL PASO TIMES, Aug. 30, 2012.

<sup>112</sup> Susan Montoya Bryan, *Feds Release Study of Trapping Effects on Wolves*, ALBUQUERQUE J. (August 8, 2011), <https://www.abqjournal.com/48154/feds-release-study-of-trapping-effects-on-wolves.html>.

<sup>113</sup> *WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 6019306, at \*1 (D.N.M. Dec. 3, 2012).

suit and upheld NMDGF's actions in lifting the trapping ban.<sup>114</sup> The court held that section 9 of the ESA, which prohibits private taking of endangered and threatened species, did not apply to nonessential experimental populations.<sup>115</sup> In the court's view, section 9 applied only to private taking of endangered and threatened species.<sup>116</sup>

For a number of reasons, the district court in the *WildEarth Guardians* case was mistaken. Reintroduced experimental populations under section 10(j), like the Mexican wolf, are indeed considered threatened species under the ESA<sup>117</sup> and under the FWS regulations.<sup>118</sup> Sections 5(d)<sup>119</sup> and 9(a)(G)<sup>120</sup> of the ESA allow the Secretary of Interior to regulate the taking of threatened species. Since the nonessential experimental population of Mexican wolves is a threatened species, it is protected under section 9(g) of the ESA, which states that "it is unlawful for any person subject to the jurisdiction of the U.S. to attempt to commit, solicit another to commit, or cause to be committed any offense defined in this section."<sup>121</sup> Section 10(j) establishes special rules for takings of experimental populations.<sup>122</sup>

The district court's holding that the NMDGF did not violate section 10(j) by allowing trapping in the BRWRA is questionable.<sup>123</sup> The section 10(j) rule permits only an

unavoidable and unintentional take . . . which occurs despite reasonable care, is incidental to an otherwise lawful activity, and is not done on purpose . . . . Taking a wolf with a trap, snare, or other type of capture device within occupied wolf range . . . *will not* be considered unavoidable, accidental, or unintentional take, *unless* due care was exercised to avoid taking a wolf.<sup>124</sup>

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<sup>114</sup> *Id.* at \*14.

<sup>115</sup> *Id.* at \*7–8.

<sup>116</sup> *Id.* at \*8–10.

<sup>117</sup> 16 U.S.C. § 1539 (j)(C) (2012).

<sup>118</sup> 50 C.F.R. § 17.83 (2016).

<sup>119</sup> Section 5(d) of the ESA [16 U.S.C. § 1533] allows the Secretary to "prohibit with respect to any threatened species any act prohibited under section 1538(a)(1)[section 9] of this title . . . with respect to endangered species."

<sup>120</sup> Section 9(a)(G) [16 U.S.C. § 1538] prohibits any individual to "violate any regulation pertaining . . . to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided in this chapter."

<sup>121</sup> 16 U.S.C. § 1538(g) (2012).

<sup>122</sup> *Id.* § 1539(j).

<sup>123</sup> *WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 6019306, at \*12 (D. N.M. Dec. 3, 2012).

<sup>124</sup> 50 C.F.R. § 17.84(k)(15) (2016) (emphasis added).

Between March 2002 and February 2009, fourteen wolves were captured fifteen times in foothold traps set by unauthorized personnel.<sup>125</sup> Most of these wolves were trapped within the BRWRA.<sup>126</sup> Since the beginning of Mexican wolf recovery program 1998, the NMDGF had sold 21,734 resident trapping licenses and 313 nonresident trapping licenses that allowed individuals to place various types of traps in New Mexico to capture furbearers.<sup>127</sup> Although these traps were required to meet regulations, they could still trap (and thereby take) Mexican wolves.<sup>128</sup> In fact, New Mexico never defined nor required trappers to exercise due care to avoid taking Mexican wolves.<sup>129</sup>

Next, the district court's holding that the NMDGF could not be vicariously liable for harm to wolves by independent third parties is not fully supported.<sup>130</sup> The state is responsible for issuing trapping licenses, and no trap can be set in New Mexico without first purchasing such a license.<sup>131</sup> The issuance of the license by the state is the "but for" causation resulting in the unlawful taking of Mexican wolves. Federal courts have held states liable for licensing actions by third parties that harm endangered and threatened species.<sup>132</sup> In *Strahan v. Coxe*, the First Circuit invalidated a Massachusetts law that posed a risk to the endangered North Atlantic right whale. The court declared that "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated provisions of the ESA."<sup>133</sup> The court held that Massachusetts had licensed commercial activities "in specifically the manner that [was] likely to result in a violation of federal law."<sup>134</sup> The court went on to declare that the causation in such an instance "while indirect, is not so removed that it extends outside the realm of causation as it is understood in the common law."<sup>135</sup>

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<sup>125</sup> *WildEarth Guardians*, 2012 WL 6019306, at \*11.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at \*15.

<sup>131</sup> N.M. STAT. ANN. § 17-5-1 to § 17-5-9 (2017).

<sup>132</sup> *See, e.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir. 1997); *Animal Protection Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008); *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 99–100 (D. Me. 2008).

<sup>133</sup> 127 F.3d at 163.

<sup>134</sup> *Strahan*, 127 F.3d at 164; *see Edward A. Fitzgerald, Red Wolf Coalition v. North Carolina Wildlife Resources Commission: Better Red than Dead*, 23 ANIMAL L. 273, 281–292 (2017).

<sup>135</sup> *Strahan*, 127 F.3d at 164.

As the litigation continued, so did the slow recovery of the Mexican wolf. In 2012, there were eighty Mexican wolves in the BRWRA.<sup>136</sup>

## VI. CHANGE IN STATUS

### A. *The Mexican Wolf as an Endangered Species*

The up and down nature of the protracted litigation encouraged environmental groups to petition the FWS to change the status of the Mexican wolf from a threatened to endangered subspecies or distinct population segment and establish its critical habitat in 2009.<sup>137</sup> However, the FWS denied the petition in October 2012 because the species was already listed under the ESA.<sup>138</sup> Unsatisfied with this response, environmental groups again filed suit.<sup>139</sup> The FWS was already in the process of reviewing the status of the gray wolf nationwide.<sup>140</sup> The FWS in 2013, relying on an in-house study,<sup>141</sup> determined that there are three distinct species of gray wolves: *Canis lupus*, *Canis rufus*, and *Canis lycaon*.<sup>142</sup> *Canis lupus* can be subdivided into three subspecies: *Canis nubilus*, *Canis occidentalis*, and *Canis baileyi* (the Mexican wolf).<sup>143</sup> The FWS planned to delist *Canis nubilus* and *Canis occidentalis* but grant *Canis baileyi* status as an endangered subspecies.<sup>144</sup> The FWS was also considering the creation of a Southwest Distinct Population Segment

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<sup>136</sup> FEIS, *supra* note 38, at ch. 1, p. 18.

<sup>137</sup> Press Release, Ctr. for Biological Diversity, Center for Biological Diversity Petitions for Protection of Mexican Gray Wolf (Aug. 11, 2009); Susan Montoya Bryan, *Groups Push for Special Wolf Protections*, DESERET NEWS (Aug. 11, 2009), <https://www.deseretnews.com/article/705322710/Groups-push-for-special-wolf-protections.html>.

<sup>138</sup> Endangered and Threatened Wildlife and Plants, 77 Fed. Reg. 61,375 (Oct. 9, 2012) (to be codified at 50 C.F.R. pt. 17).

<sup>139</sup> Julie Cart, *Lawsuit Seeks Subspecies Status for Protected Mexican Wolves*, L.A. TIMES (Dec. 10, 2012), <http://articles.latimes.com/2012/dec/10/science/la-sci-sn-wolves-20121210>.

<sup>140</sup> Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 35,664 (June 13, 2013) (to be codified at 50 C.F.R. pt. 17).

<sup>141</sup> See Steven M. Chambers, et al., *An Account of the Taxonomy of North American Wolves From Morphological Genetic Analysis*, 77 N. AM. FAUNA 1 (2012).

<sup>142</sup> *Id.* at 2.

<sup>143</sup> *Id.* at 6–10.

<sup>144</sup> Endangered and Threatened Wildlife and Plants, 78 Fed. Reg. 35,664 (June 13, 2013) (to be codified at 50 C.F.R. pt. 17); see also Edward A. Fitzgerald, *Wolf Delisting: Old Wine in New Bottles*, 44 ENVTL. L. REP. 10,413 (2014).

(“DPS”) across central and southern Arizona and New Mexico, where the Mexican wolf would be treated as an endangered species.<sup>145</sup>

The FWS published its final rule designating the Mexican wolf as an endangered subspecies in January 2015.<sup>146</sup> The FWS determined that Mexican wolves qualified as an endangered subspecies because of “illegal killing, inbreeding, loss of heterozygosity, loss of adaptive potential, small population size, and the cumulative effects of these aforementioned threats.”<sup>147</sup> Furthermore, absent ESA protection, “regulatory protection would not be adequate to ensure the survival of the Mexican wolf.”<sup>148</sup> There were ninety-seven wolves in the BRWRA by the end of 2015.<sup>149</sup> This was down from the 110 wolves in 2014, primarily because of low pup survival rates.<sup>150</sup>

### *B. Change in Management Regulations*

In 2004, Center for Biological Diversity submitted a proposal for a change in the 10(j) rule regarding Mexican wolf management. Center for Biological Diversity then sued in 2012 challenging the FWS’s alleged failure to finalize amendments to the 10(j) rule. Finally, in June 2013, the FWS published a proposed rule revising the existing nonessential experimental population designation for the Mexican wolf.<sup>151</sup> In July 2013, a settlement agreement was reached. The FWS committed to act on the proposed 10(j) rule modifications by January 12, 2015.<sup>152</sup>

Responding to the settlement agreement and change in the Mexican wolf’s status, the FWS revised the 1998 rule regarding Mexican wolf management in January 2015.<sup>153</sup> The new 2015 rule provided for a four-fold increase in the area that Mexican wolves can occupy and a ten-fold increase in the area where Mexican wolves can initially be released from

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<sup>145</sup> Fitzgerald, *supra* note 144, at 10,416.

<sup>146</sup> Endangered and Threatened Wildlife and Plants, 80 Fed. Reg. 2488 (Jan. 16, 2015) (to be codified at 50 C.F.R. pt. 17).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> U.S. FISH & WILDLIFE SERVICE, MEXICAN WOLF RECOVERY PROGRAM: PROGRESS REPORT #18 10 (2015).

<sup>150</sup> *Id.*

<sup>151</sup> 78 Fed. Reg. 35,719 (June 13, 2013).

<sup>152</sup> Ctr. for Biological Diversity v. Jewell, No. 1:12-CV-1920 (D.D.C. Jul. 29, 2013) (stipulation and proposed order).

<sup>153</sup> Endangered and Threatened Wildlife and Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512 (Jan. 7, 2015).

captivity.<sup>154</sup> The BRWRA was terminated and replaced by the Mexican Wolf Experimental Recovery Area (“MWERA”), which extends south of Interstate 40 in Arizona and New Mexico to the Mexican border, and expands areas in eastern Arizona and western New Mexico.<sup>155</sup> Geographically, the MWERA is divided into three zones. Mexican wolves can initially be released or translocated into Zone 1, which includes 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.<sup>156</sup> Mexican wolves are allowed to disperse into, occupy, and be translocated into Zone 2.<sup>157</sup> Only pups less than five months old are allowed to be released into Zone 2.<sup>158</sup> Finally, Zone 3 is an area less suitable for wolves, where they will be managed to avoid conflict with the public who may potentially be affected.<sup>159</sup> There will be a phased approach to translocations, initial releases, and occupancy west of Highway 87 in Zone 2 in Arizona.<sup>160</sup>

Environmental groups criticized the 2015 rule on several grounds. First, Mexican wolves can be killed on certain private and state land, even in the absence of livestock predation, if the wolves pose an adverse or unacceptable impact on big game.<sup>161</sup> State officials have discretion to decide when wolves pose an unacceptable impact on prey species, which then triggers their removal.<sup>162</sup> Second, the environmental groups argued that Mexican wolves needed more room to roam and that much of the expanded area in the MWERA was unsuitable.<sup>163</sup> Third, FWS arguably ignored the best available science regarding Mexican wolf recovery, which calls for three genetically linked subpopulations in the Southwest,

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<sup>154</sup> *Id.* at 2519–20.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2520.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* FWS noted that “there are areas within the MWEPA where there is limited suitable habitat and increased potential for human-related conflict.” *Id.* at 2532.

<sup>160</sup> *Id.* at 2520.

<sup>161</sup> *Id.* at 2542.

<sup>162</sup> Drew Kerr, *Endangered Mexican Gray Wolf Rule Would Hinder Species Recovery*, WILDEARTH GUARDIANS (Nov. 25, 2014) <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=10993#.WprPxBPwYyk>; *Conservationists Take Aim at Flawed New Rule on Mexican Gray Wolf Management*, EARTHJUSTICE (Jan. 12, 2015) <https://earthjustice.org/news/press/2015/conservationists-take-aim-at-flawed-new-rule-on-mexican-gray-wolf-management>.

<sup>163</sup> *See* Kerr, *supra*, note 162.

consisting of 750 wolves.<sup>164</sup> Fourth, the multiphase implementation approach contemplated by the 2015 rule restricts reintroduction for another twelve years.<sup>165</sup> Fifth, the FWS capitulated to political pressure from the livestock owners and hunters.<sup>166</sup> Ultimately, environmental groups brought suit challenging the revised regulation.<sup>167</sup>

The NMDGF was also dismayed by the 2015 rule because there was no cap on the number of wolves allowed in the Southwest, which, in their opinion, should be limited to 325.<sup>168</sup> According to the NMDGF, the rule did not focus on suitable habitat and failed to articulate the unacceptable impacts on wildlife.<sup>169</sup> Further, in New Mexico's view, the wolf recovery efforts would threaten energy development in the Permian basin.<sup>170</sup>

## VII. THE EVOLUTION OF THE RECOVERY PLAN

### A. *Problems with the 1982 Recovery Plan and Attempts to Update It*

There was a great deal of criticism regarding the 1982 Recovery Plan. In 2010, FWS warned that the recovery program was “at risk of failure.”<sup>171</sup> The combination of threats (including illegal shooting, inbreeding, and inadequate management), stringent regulatory mechanisms (such as the requirement to capture and return wolves that exit the BRWRA), and the wolf's biological attributes (such as lower reproduction rates, less genetic diversity, and limited migration) are “putting the population at risk of

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> On March 30, 2018, the U.S. District Court for the District of Arizona held that the revised rule violated the Endangered Species Act because it limited the population of Mexican wolves, banned them from suitable recovery habitat, and broadened the basis for their legal taking in the wild. *Ctr. for Biological Diversity v. Jewell*, No. CV-15-00019-TUC-JGZ (D. Ariz. Mar. 30, 2018); Press Release, *Ctr. for Biological Diversity*, Court Rejects Flawed Mexican Gray Wolf Rule (Apr. 2, 2018) (on file with author).

<sup>168</sup> See *The Status of the Federal Government's Management of Wolves: Investigation and Oversight Hearing in Front of the H. Nat. Res. Subcomm. of the Comm. on Nat. Res.*, 114th Cong. 5 (2016) (statement of Alexandra Sandoval, Director, NMDGF), <http://docs.house.gov/meetings/II/II15/20160921/105396/HHRG-114-II15-Wstate-SandovalA-20160921.pdf>.

<sup>169</sup> *Id.* at 10–11.

<sup>170</sup> See Mark Baron, *United States: Federal Wolf Program Could Threaten Energy Development in the Permian Basin*, MONDAQ BUS. BRIEFING, Sept. 14, 2014.

<sup>171</sup> April Reese, *Southwest Reintroduction Program Flawed-FWS*, E&E NEWS (May 13, 2010), <https://www.eenews.net/stories/90927/print>.

failure.”<sup>172</sup> The FWS concluded that the “failure to develop an up-to-date recovery plan results in inadequate guidance for the reintroduction and recovery effort.”<sup>173</sup> These concerns helped facilitate development of an updated recovery plan.

The FWS assembled a new team to produce the updated recovery plan in 2011.<sup>174</sup> In developing the recovery plan, the FWS considered returning wolves to Utah and Colorado in the Southern Rocky Mountains.<sup>175</sup> Notably, there had been an earlier, unsuccessful effort in 2008 to have wolves reintroduced into Colorado.<sup>176</sup> WildEarth Guardians petitioned the FWS to allow Mexican wolf reintroduction into Colorado, where habitat is suitable.<sup>177</sup> WildEarth Guardians argued that wolves were needed to thin the elk herds that were overgrazing and destroying vegetation.<sup>178</sup> However, FWS decided to decline the petition on the ground that the recovery area was restricted by the 1982 recovery plan.<sup>179</sup>

The proposed return of the Mexican wolf to the southern Rocky Mountains generated opposition in that region. Utah Republican Governor Gary Herbert objected to the proposed expansion into the area on the ground that it was not part of Mexican wolf’s historic range.<sup>180</sup> Likewise, Utah Republican Senator Hatch declared that “the federal government has no business foisting Mexican wolves and other non-native species on Utah . . . I am committed to do all I can to ensure that they don’t.”<sup>181</sup>

A draft recovery plan was completed by the FWS recovery team in 2012 that called for three connected populations, each with at least 250

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *U.S. Fish and Wildlife Convenes Mexican Wolf Recovery Plan Team*, U.S. FED. NEWS, Feb. 24, 2011.

<sup>175</sup> For a full discussion of the 2012 proposal, see Letter from David Parsons, Carnivore Conservation Biologist, The Rewilding Inst., to U.S. Fish & Wildlife Serv. (Aug. 24, 2017), <https://mexicanwolves.org/uploads/DraftMWRPCComments-DaveParsons.pdf>.

<sup>176</sup> Associated Press, *Wolf Reintroduction Proposed for Colo.*, DENVER POST (Sep. 27, 2008), <https://www.denverpost.com/2008/09/27/wolf-reintroduction-proposed-for-colo/>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Wolves: Reintroduction Proposed for Southern Rockies*, LAND LETTER, Oct. 2, 2008.

<sup>180</sup> Brandon Loomis, *Utah Worries About Protections for Mexican Wolves*, SALT LAKE TRIB. (Nov. 10, 2011), <http://archive.sltrib.com/article.php?id=52880896&itype=CMSID>.

<sup>181</sup> April Reese, *Endangered Species: Another Controversy in Mexican Wolf Program as Watchdog Files Integrity Complaint*, E&E NEWS (June 20, 2012) <https://www.eenews.net/stories/1059966188>.

wolves, in the BRWRA, southern Utah, and southern Colorado.<sup>182</sup> These terms were similar to those that appeared in a 2004 proposal that was later abandoned.<sup>183</sup> With little surprise, the draft recovery plan generated controversy.<sup>184</sup> The Luna County New Mexico Board of Commissioners declared that it would “prepare for litigation against U.S. FWS for a decision that [was] based on incomplete and incorrect environmental assessments.”<sup>185</sup> The FWS did not proceed with the 2012 draft recovery plan because it was in the process of revising the regulations for the release and management of Mexican wolves, discussed above.<sup>186</sup> Critics, however, asserted that the FWS abandoned the effort in the face of political pressure.<sup>187</sup>

In response, Public Employees for Environmental Responsibility (“PEER”) filed a complaint with the U.S. Department of Interior’s Office of Integrity, stating that “[t]he scientific integrity of the work of the Science and Planning Subgroup of Mexican Wolf Recovery Team has been significantly and intentionally compromised by political interference of [the FWS], as well as by specified state ‘Partners.’”<sup>188</sup> PEER alleged further that the FWS’s abandonment of the 2012 draft recovery plan violated President Obama’s Scientific Integrity Policy issued in January 2011.<sup>189</sup> That policy stated, “When scientific or technical information is considered in decision making, the information will be as robust, of the highest quality, and the result of the most rigorous scientific processes as can be achieved within the available decision time-frame.”<sup>190</sup> In PEER’s view, politics interfered with the recovery planning process for many reasons.<sup>191</sup> First, it thought the FWS encouraged scientists to forgo wolf

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<sup>182</sup> See Letter from David Parsons, *supra* note 175, (providing a full discussion of the 2012 proposal).

<sup>183</sup> Tania Soussan, *Review Urges More Room for Wolves*, ALBUQUERQUE J., Jan. 10, 2005, at A1.

<sup>184</sup> Susan Montoya Bryan, *Return of Gray Wolves to Southwest Slow Going*, AP STATE & LOCAL WIRE, February 14, 2013.

<sup>185</sup> Matt Robinson, *Luna County Group Rejects Mexican Gray Wolf Plan*, LAS CRUCES SUN-NEWS, Feb. 18, 2013.

<sup>186</sup> *Id.*; Cally Carswell, *Endangered U.S. Wolf Denied New Habitat, as Critics Charge that Politics Trumped Science*, SCI. MAG. (Sept. 27, 2017), <http://www.science-mag.org/news/2017/09/endangered-us-wolf-denied-new-habitat-critics-charge-politics-trumped-science>.

<sup>187</sup> *Id.*; Matt Robinson, *Mexican Gray Wolf Management Plan for Gila National Forest, Western New Mexico, Dropped by Feds*, LAS CRUCES SUN-NEWS, Feb. 20, 2013; see also Letter from David Parsons, *supra* note 175.

<sup>188</sup> Reese, *supra*, note 181.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

recovery in acquiescence to demands by Utah and Colorado.<sup>192</sup> Next, it believed the FWS prevented the recovery team from proceeding with the draft Mexican wolf recovery plan.<sup>193</sup> Attributing similar motives to the FWS, Representative Raul M. Grijalva (D., N.M.), ranking Democratic minority member on the House Natural Resources Committee, demanded an investigation, arguing that “attempts to change scien[tific] findings because of political preferences should not be part of the process.”<sup>194</sup>

### *B. Continued Struggles*

With the updated draft recovery plan in limbo, environmental groups filed suit in U.S. District Court for the District of Arizona, alleging that the FWS violated section 4(f) of the ESA by failing to finalize an updated recovery plan.<sup>195</sup> Arizona, Colorado, Utah, and NMGFD intervened in the suit.<sup>196</sup> Earlier, in 2011, Arizona had opposed the release of any new wolves until a new recovery plan was completed.<sup>197</sup>

As environmental groups argued that wolf recovery efforts were progressing too slowly, the U.S. Department of Interior (“Interior”) and the FWS were facing opposition from local stakeholders regarding the introduction of wolves in the Southern Rocky Mountains. Utah Governor Herbert and three other governors from Colorado, New Mexico, and Arizona, sent a letter to Secretary Jewell in November 2015. The letter voiced opposition to expanding the Mexican wolf’s range because the

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See *Defs. of Wildlife v. Jewell*, No. CV-14-02472-TUC-JGZ, 2016 U.S. Dist. LEXIS 145122 (D. Ariz. Oct. 17, 2016); *Lawsuit Fights 38 Years of Delay in Recovering Southwest Mexican Gray Wolves*, EARTHJUSTICE (Nov. 12, 2014), <https://earthjustice.org/news/press/2014/lawsuit-fights-38-years-of-delay-in-recovering-southwest-s-mexican-gray-wolves>.

<sup>196</sup> *Defs. of Wildlife*, No. CV-14-02472-TUC-JGZ, 2016 U.S. Dist. LEXIS 145122 (D. Ariz. Oct. 17, 2016); see also *Arizona Game and Fish Issues Notice of Intent to Sue Federal Officials Over Mexican Wolf Recovery Plan Development*, ARIZ. GAME & FISH DEPT. (Jan. 6, 2015), <http://azgfd.net/artman/publish/NewsMedia/Arizona-Game-and-Fish-issues-notice-of-intent-to-sue-federal-officials-over-Mexican-wolf-recovery-plan-development.shtml>.

<sup>197</sup> In December 2011 the AGFC voted to oppose the release of any new wolves from captivity until a new recovery plan was completed. The Commission amended the policy in January 2012 to allow “replacement releases” for wolves that were killed. U.S. FISH & WILDLIFE SERV., MEXICAN WOLF RECOVERY PROGRAM: 2011 PROGRESS REPORT 5 (2012), [https://www.fws.gov/southwest/es/mexicanwolf/pdf/2011\\_progress\\_report\\_final\\_w\\_adendum.pdf](https://www.fws.gov/southwest/es/mexicanwolf/pdf/2011_progress_report_final_w_adendum.pdf).

southern Rockies were not in the historic range of the Mexican wolf.<sup>198</sup> Governor Herbert also asserted that wolf reintroduction would cost the state too much money in the form of lost hunting and recreation revenue.<sup>199</sup> Utah brings in \$20.5 million annually from hunting licenses, permits, and application fees.<sup>200</sup> Approximately forty-three percent of the state's wildlife budget comes from hunting, which includes federal aid based on hunting licenses.<sup>201</sup> The Utah Wildlife Board echoed these concerns in a letter to Secretary Jewell in December 2015, which stated that the wolves would damage big game herds that support \$34.5 million in hunting license revenue.<sup>202</sup> At the same time the FWS was being criticized for appeasing the states, the Utah Wildlife Board accused the recovery team of being "driven [more] by personal agenda than by science."<sup>203</sup> Congresspersons from the region reiterated the same arguments to the Secretary.<sup>204</sup> The Colorado Parks and Wildlife Commission, with the support of Colorado Governor Hickenlooper, passed a resolution opposing wolf reintroduction by a 7-4 vote in January 2016.<sup>205</sup> Wolves wandering into Colorado, however, would be allowed to remain.<sup>206</sup>

In April 2016, Senators Jeff Flake (R., Az.) and John McCain (R., Az.) introduced the Mexican Wolf Recovery Plan Act, which would have

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<sup>198</sup> Brady McCombs, *Utah Balks at Being Part of Recovery Zone for Mexican Wolf*, ALBUQUERQUE J. (Dec. 6, 2015), <https://www.abqjournal.com/687227/utah-balks-at-being-part-of-recovery-zone-for-mexican-wolf.html>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*; Brian Maffly, *Does Imperiled Mexican Gray Wolf Belong In Utah? No Way, Four States Say*, SALT LAKE TRIB. (Dec. 2, 2015), <https://www.sltrib.com/news/environment/2015/12/02/does-imperiled-mexican-gray-wolf-belong-in-utah-no-way-4-states-say>.

<sup>203</sup> Maffly, *supra* note 202.

<sup>204</sup> Congresspersons included Utah Representatives Jason Chaffetz (R.), Rob Bishop, Chris Stewart, and Mia Love; Wyoming Representative Cynthia Lummis (R.); Arizona Representatives Trent Franks (R.) and Paul Gosar (R.); and New Mexico Representative Steve Pearce (R.). *Chaffetz Leads Western States Coalition in Fighting The Introduction of the Mexican Wolf in Utah*, CONG. DOCUMENTS & PUBLICATIONS, Dec. 11, 2015.

<sup>205</sup> COLORADO PARKS & WILDLIFE COMM'N, WOLF RESOLUTION (2016); Bruce Finely, *Colorado Turns Cold Shoulder to Wolves*, DENVER POST (January 14, 2016), <https://www.denverpost.com/2016/01/13/colorado-turns-cold-shoulder-to-endangered-wolves>; Kevin Fixler, *Wolf Reintroduction in Colorado Faces New Obstacles*, SUMMIT DAILY (Jan. 15, 2016), <https://www.summitdaily.com/news/wolf-reintroduction-in-colorado-faces-new-obstacle>.

<sup>206</sup> COLORADO PARKS & WILDLIFE COMM'N, *supra* note 205.

required the FWS to adopt a new Mexican wolf recovery plan.<sup>207</sup> Pursuant to the legislation as it was introduced, the FWS had an obligation to ensure state and local input in the drafting of the new recovery plan.<sup>208</sup> If the FWS failed to cooperate with Arizona and New Mexico, the states would be able to assume management of the recovery process.<sup>209</sup> The Act also contained a provision that would have automatically delisted the Mexican wolf as an endangered species once conservation goals were met.<sup>210</sup> Environmental groups again made their voices heard by criticizing the proposed legislation. The law would have prevented wolves from dispersing north of Interstate 40 in Arizona and New Mexico, automatically removed ESA protections once the population goal was reached, and precluded any judicial review of these actions.<sup>211</sup>

A settlement agreement in the litigation regarding Interior's failure to complete a final Mexican wolf recovery plan was reached in October 2016.<sup>212</sup> As part of the agreement, the FWS agreed to complete a final recovery plan by November 30, 2017 that would deal with population objectives and recovery areas.<sup>213</sup> The FWS also agreed to conduct an independent peer review of the recovery plan with the participation of New Mexico, Colorado, Utah, and Arizona.<sup>214</sup> The FWS, additionally, would submit status reports every six months and assume all costs of the wolf recovery program.<sup>215</sup> The NMDGF and Colorado refused to join the agreement because they objected to the final plan deadline, but both agreed to voluntarily dismiss their claims opposing wolf recovery.<sup>216</sup> Environmental groups praised this agreement.<sup>217</sup>

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<sup>207</sup> Press Release, Sens. Jeff Flake, Flake, McCain Call for Revised Mexican Gray Wolf Recovery Plan (April 29, 2016) (on file with author).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *EarthJustice Statement on Legislation Aimed to Derailing Recovery of Mexican wolf*, EARTHJUSTICE (May 2, 2016), <https://earthjustice.org/news/press/2016/earthjustice-statement-on-legislation-aimed-at-derailing-recovery-of-mexican-gray-wolves>.

<sup>212</sup> *Defs. of Wildlife v. Jewell*, No. CV-14-02472-TUC-JGZ, 2016 U.S. Dist. LEXIS 145122 at \*6–7 (D. Ariz. Oct. 17, 2016); *Court Guarantees Mexican Gray wolves Recovery Plan*, TARGETED NEWS SERV., Oct. 18, 2016.

<sup>213</sup> *Defs. of Wildlife*, No. CV-14-02472-TUC-JGZ, 2016 U.S. Dist. LEXIS 145122 at \*3, \*6, \*22.

<sup>214</sup> *Id.* at \*6.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at \*20.

<sup>217</sup> Susan Montoya Bryan, *Court Mandates New Recovery Plan for Mexican Gray Wolves*, ASSOCIATED PRESS (Oct. 18, 2016), <https://apnews.com/4de0af8565dc47f4be679f2318b72852>.

## VIII. THE STATE PERMITTING QUESTION: *NMDGF v. INTERIOR*

The *NMDGF v. Interior* case is the latest round of contentious litigation concerning Mexican wolf recovery. New Mexico had previously allowed the FWS to import and release Mexican wolves without requiring state permits.<sup>218</sup> New Mexico, however, changed its permitting rules in 2014.<sup>219</sup> Under the new rules, the FWS was required to obtain a permit issued by the Director of the NMDGF before releasing any wolves.<sup>220</sup> All decisions regarding the importation or release of wildlife, including Mexican wolves, had to be approved by the NMGC.<sup>221</sup> The FWS in April and May 2015 requested two separate permits to release no more than twelve Mexican wolves into New Mexico.<sup>222</sup> The Director denied both applications because the FWS had not submitted the final Mexican wolf recovery plan or an interim Mexican wolf management plan with the requests.<sup>223</sup> The FWS appealed to the NMGC, which upheld the Director's decision.<sup>224</sup> After exhausting their administrative remedies, the FWS, acting pursuant to its own regulations,<sup>225</sup> informed the NMDGF that it would no longer comply with the permitting requirements and planned to reintroduce wolves without state permission.<sup>226</sup> The FWS then released

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<sup>218</sup> N.M. Dep't of Game & Fish v. U.S. Dep't of Interior, No. CV 16-00462-WJ-KBM, at \*1-2 (D.N.M. June 16, 2016).

<sup>219</sup> *See id.*

<sup>220</sup> *Id.* N.M. CODE R. § 19.35.7.8 (2017) ("It shall be unlawful to import any live non-domesticated animal into New Mexico without first obtaining appropriate permits(s) issued by the director."); N.M. CODE R. § 19.35.7.19 (2017) ("No person shall release from captivity an imported animal into New Mexico except by obtaining a release permit from the director."). This regulation was revised in 2014 to include a provision requiring the Commission to review "any permit application for the importation of any carnivore that will be held, possessed or released on private property for the purpose of recovery, reintroduction, condition, establishment or reestablishment in New Mexico." N.M. CODE R. § 19.31.10.11 (2016) makes it "unlawful for any person . . . to release, intentionally or otherwise, or cause to be released in this state any mammal . . . except domestic mammals . . . with first obtaining a permit from the department of game and fish."

<sup>221</sup> *N.M. Dep't of Game & Fish*, 2016 WL 4536465, at \*1.

<sup>222</sup> *Id.* at \*2.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> The FWS is required to "[c]onsult with the States and comply with State permit requirements when reintroducing wildlife", except in instances where the Secretary of Interior determines that such compliance would prevent him from carrying out his statutory responsibilities." 43 C.F.R. § 24.4(i)(5) (2010).

<sup>226</sup> *N.M. Dep't of Game & Fish*, 2016 WL 4536465, at \*2; 43 C.F.R. § 24.4(i)(5) (2010).

two Mexican wolves into New Mexico in April 2016.<sup>227</sup> The NMDGF brought suit in the U.S. District Court for the District of New Mexico, seeking a preliminary injunction to halt further wolf reintroductions without prior state approval.<sup>228</sup>

In analyzing whether to issue a preliminary injunction, a federal district court must assess the likelihood of the plaintiff's success on the merits, whether the plaintiffs would suffer irreparable harm during the pendency of the litigation, whether the balance of equities favors the plaintiff, and whether an injunction is in the public interest.<sup>229</sup> As a general rule, "a preliminary injunction is an extraordinary remedy, any right to relief must be clear and unequivocal."<sup>230</sup>

The district court in *NMDGF v. Interior* found in favor of the NMDGF on all four factors, granting the requested injunction and halting any further reintroductions.<sup>231</sup> The district court did not, however, order the FWS to remove the previously reintroduced wolves or pups.<sup>232</sup> In response, Interior appealed to the Tenth Circuit, which reversed the district court.<sup>233</sup> The Tenth Circuit held that the NMDGF did not demonstrate that it would suffer any irreparable harm, but the court did not proceed to address the other three factors.<sup>234</sup> This analysis demonstrates that the district court was mistaken regarding the other three factors as well, and contends that Interior and the FWS complied with their statutory and administrative obligations in good faith.

### A. Irreparable Harm

The district court agreed with the NMDGF's argument that it would suffer irreparable harm from being unable to comprehensively manage wildlife within its borders.<sup>235</sup> The court found that the NMDGF's lack of knowledge regarding the numbers, location, and timing of the release of Mexican wolves, an apex predator, would disrupt its effort to manage

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<sup>227</sup> *N.M. Dep't of Game & Fish*, 2016 WL 4536465, at \*2.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* (citing *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).

<sup>230</sup> *Id.* (citing *Beltronics USA, Inc. v. Midwest Inventory Distrib. LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

<sup>231</sup> *Id.* at \*11–12.

<sup>232</sup> *Id.* at \*12.

<sup>233</sup> *See N.M. Dep't. of Game and Fish v. U.S. Dep't. of the Interior*, 854 F.3d 1236 (10th Cir. 2017).

<sup>234</sup> *Id.* at 1245.

<sup>235</sup> *N.M. Dep't of Game & Fish*, 2016 WL 4536465, at \*9–10.

wildlife.<sup>236</sup> Since this disruption could not be compensated by monetary damages, in the district court’s view, irreparable harm was shown.<sup>237</sup>

On appeal, the Tenth Circuit first noted that “probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, [and therefore] the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.”<sup>238</sup> The Tenth Circuit reversed the district court on this preliminary issue, holding that the department “failed to establish a significant risk of irreparable injury in the absence of an injunction.”<sup>239</sup>

For a number of reasons, the Tenth Circuit decision was correct on this issue. First, the NMDGF knew the time, manner, and location of the release of Mexican wolves.<sup>240</sup> The FWS Initial Release and Translocation Plan for 2016 specified the number of wolves planned for release, the possible release locations, and the approximate date for releases or cross fostering of pups.<sup>241</sup> The possible release sites identified were in McKenna Park, Lilley Park, West Fork of Gila or Miller Springs, and at the North Seco site in the Aldo Leopold Wilderness.<sup>242</sup> Additionally, the releases were meant to correspond with elk calving—which generally starts in early June—to facilitate natural hunting behavior.<sup>243</sup> Grazing permittees and local officials were notified about wolf releases and translocations in the area prior to any actual releases.<sup>244</sup> Moreover, the wolves could be tracked, because prior to release they were marked and fitted with radio collars.<sup>245</sup>

Next, the NMDGF’s assertions of irreparable harm were based on speculative conclusions. The NMDGF argued that a single Mexican wolf kills more than twenty elk or deer per year.<sup>246</sup> If there are 300 to 325 Mexican wolves, the Department argued, that would have a major impact

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *N.M. Dep’t of Game & Fish*, 854 F.3d at 1249 (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)).

<sup>239</sup> *Id.* at 1250.

<sup>240</sup> Brief of Foundation to Protect N.M. Wildlife as Amicus Curiae Supporting U.S. Dep’t. of Interior at 17–19, *N.M. Dep’t. of Game & Fish*, 854 F.3d 1236 (Nos. 16-2189, 16-2022).

<sup>241</sup> *Id.* at 18.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 19 (quoting 80 Fed. Reg. 2512, 2525 (Jan. 16, 2015)).

<sup>246</sup> *N.M. Dep’t. of Game & Fish*, 854 F.3d at 1253 (10th Cir. 2017).

on the state's ungulate population.<sup>247</sup> However, the NMDGF largely exaggerated the potential harm to its wildlife, as there was no imminent risk of irreparable harm to the state's ungulate population. The FWS planned only to release one or two packs—two adults and several pups—every four years for the next eight years, one or two packs during the following three successive generations until year twenty in the program.<sup>248</sup> Furthermore, the success rate for releases from 1998 through 2013 was only twenty-one percent.<sup>249</sup> For every one hundred Mexican wolves released, only twenty-one “survive, breed, and produce pups, therefore becoming effective migrants.”<sup>250</sup> The FWS projected that the Mexican wolf population would not reach 300 wolves for at least thirteen more years.<sup>251</sup>

Even when the Mexican wolf population consists of 300 to 325 wolves, a strong argument can be made that there will be no irreparable harm to state ungulate populations. The FWS pointed out that wolf/elk ratios, which are an indicator of predation pressure, are expected to occur at levels that will not cause significant biological damage or adversely affect the ungulate population.<sup>252</sup> The FWS further determined that the density of wolves per acre, even with a population of 300 to 325, was not expected to exceed current levels because the MWEPA area is expanded.<sup>253</sup> The wolf-to-elk ratio in 2014 was 2.56 wolves for every 1,000 elk.<sup>254</sup> This would only increase to 3.9 wolves for every 1000 elk with a wolf population of 300 to 325.<sup>255</sup> The FWS reasonably concluded that this will have “less than significant direct and indirect adverse impact on wild ungulate prey species.”<sup>256</sup> Furthermore, Mexican wolves tend to prey on unproductive calves and older cows, leaving the remaining elk for hunters.<sup>257</sup> Hunter visitations and success rates since 1998 in areas

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1252 (citing 80 Fed. Reg. 2512, 2524 (Jan. 16, 2015)).

<sup>249</sup> *Id.* at 1253.

<sup>250</sup> *Id.* (citing 80 Fed. Reg. 2512, 2524 (Jan. 16, 2015)).

<sup>251</sup> U.S. FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED REVISION TO THE REGULATIONS FOR THE NONESSENTIAL EXPERIMENTAL POPULATION OF THE MEXICAN WOLF, app. D at 7, tbl.D-2 (2014).

<sup>252</sup> *N.M. Dep't. of Game & Fish*, 854 F.3d at 1253.

<sup>253</sup> 80 Fed. Reg. 2512, 2555 (Jan. 16, 2015) (to be codified at 50 C.F.R. pt. 17).

<sup>254</sup> *N.M. Dep't. of Game & Fish*, 854 F.3d at 1253.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> 80 Fed. Reg. at 2555.

occupied by Mexican wolves have been stable.<sup>258</sup> The FWS forecasted that these trends will continue during the recovery effort.<sup>259</sup>

The FWS relied in part on the analysis of the Arizona Game and Fish Department (“AGFD”). Specifically, the FWS cited an AGFD analysis of data compiled from 1998 through 2012 regarding the Mexican wolf’s impact on the ungulate population in the BRWRA.<sup>260</sup> The FWS did note that Mexican wolves target elk as their primary prey, particularly calves during the spring and summer season.<sup>261</sup> However, the number of elk calves that survived through early fall remained constant,<sup>262</sup> and there was a similar finding regarding mule deer.<sup>263</sup> AGFD also reported that the number of elk hunting permits issued has varied since wolf reintroduction, but the variation is unrelated to the elk available for hunters.<sup>264</sup> Further, the 2015 Final Rule regarding the management of the Mexican wolves allows for their taking if they cause unacceptable impacts on wild ungulate herds.<sup>265</sup>

Third, the Tenth Circuit’s decision was more consistent with the case law. It has been recognized that injury to a small number of animals does not constitute irreparable harm.<sup>266</sup> In *Fund for Animals v. Frizzell*, the D.C. Circuit upheld a FWS regulation that permitted hunting of certain migratory birds during the 1975–1976 season.<sup>267</sup> The court held that the plaintiffs had made only nonspecific claims regarding “the destruction and loss of wildlife.”<sup>268</sup> In the court’s view, the loss of only one bird was not a sufficient injury to warrant an injunction.<sup>269</sup> The plaintiffs were required to show that the harvest of excessive numbers of the waterfowl would cause irretrievable damage to the species.<sup>270</sup> The court stated that “[t]o equate the death of a small percentage of a reasonably abundant game species without any attempt to show that the well-being of that species

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> 530 F.2d 982 (D.C. Cir. 1975).

<sup>267</sup> *Fund for Animals*, 530 F.2d at 983–84.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 986.

<sup>270</sup> *Id.*

may be jeopardized is to ignore the plain meaning of [irreparable harm].”<sup>271</sup>

The Tenth Circuit applied and distinguished the *Frizzell* principle in *Greater Yellowstone Coalition v. Flowers*.<sup>272</sup> There, the district court upheld the Army Corps of Engineers’ issuance of a section 404 permit to the development of a golf course, which would have jeopardized the threatened bald eagle.<sup>273</sup> The district court acknowledged that some harm to bald eagle nests and juvenile birds was likely, but, consistent with *Frizzell*, concluded that harm to individual bald eagles was insufficient to justify an injunction.<sup>274</sup> The Tenth Circuit reversed, recognizing *Frizzell* but distinguishing it on the ground that “the animals likely to be harmed [bald eagles] . . . belong[ed] to a threatened species, not a ‘reasonably abundant game species.’”<sup>275</sup>

### *1. State Sovereignty*

On appeal, NMDGF argued that any release of Mexican wolves would significantly interfere with core government functions and would hinder the enforcement of laws within the state.<sup>276</sup> The state argued that the release of the wolves unreasonably encroached on state sovereignty, and therefore constituted irreparable harm.<sup>277</sup> The district court did not address the issue,<sup>278</sup> but the Tenth Circuit rejected the claim, stating: “The [NMDGF] has not presented any factual or legal basis for finding that FWS’s anticipated releases would interfere with the State’s ability to establish or enforce its laws, or that the releases would pressure the State to change its laws.”<sup>279</sup>

The Tenth Circuit properly rejected the NMDGF’s claim regarding state sovereignty. The NMDGF’s argument implicitly rested in part on the state ownership of wildlife theory.<sup>280</sup> In *Geer v. Connecticut*, the Supreme Court upheld a state statute that prohibited the export of game birds.<sup>281</sup> The Court declared that the state could “control and regulate the common

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<sup>271</sup> *Id.*

<sup>272</sup> 321 F.3d 1250 (10th cir. 2003).

<sup>273</sup> *Id.* at 1252, 1255.

<sup>274</sup> *Id.* at 1256.

<sup>275</sup> *Id.* at 1255.

<sup>276</sup> *N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior*, 854 F.3d 1236, 1250 (10th Cir. 2017).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1254.

<sup>280</sup> *See id.* at 1255.

<sup>281</sup> 161 U.S. 519, 527 (1896).

property in game” because the state holds such a right in “trust for the benefit of the people.”<sup>282</sup> The state ownership theory, however, was later overturned in *Hughes v. Oklahoma*.<sup>283</sup> There, the Court invalidated an Oklahoma statute that prohibited the export of natural minnows.<sup>284</sup> The Court declared that the *Geer* analysis had eroded “to the point of virtual extinction in cases involving the regulation of wild animals.”<sup>285</sup> The Court noted that “the ownership language . . . must be understood as no more than a [nineteenth] century fiction expressing ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”<sup>286</sup> Wildlife regulation must be evaluated according to the same principles applied to state regulation of other natural resources.<sup>287</sup> State power only extends as far as its exercise is not incompatible with, or restrained by, the constitutional supremacy of the federal government.<sup>288</sup> Nevertheless, the Court acknowledged that there are legitimate state concerns regarding the conservation and protection of wild animals within their borders.<sup>289</sup>

Federal authority under the Property Clause<sup>290</sup> has been recognized in many contexts by the Court as being “without limitation.”<sup>291</sup> This broad federal authority has been extended to include a federal right to protect wildlife. In *Kleppe v. New Mexico*, the Court upheld the constitutionality of the Wild Free Range Horses and Burros Act,<sup>292</sup> enacted to protect wild horses and burros on federal land.<sup>293</sup> The Court held that the Property Clause grants Congress federal authority to protect wildlife, even on state lands.<sup>294</sup> Although the Property Clause does not authorize “an exercise of a general control over public policy in a State,” it does permit “an exercise

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<sup>282</sup> *Id.* at 526–27.

<sup>283</sup> 441 U.S. 322, 324 (1979).

<sup>284</sup> *Id.* at 329.

<sup>285</sup> *Id.* at 331.

<sup>286</sup> *Id.* at 335.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 329.

<sup>289</sup> *Id.* at 330.

<sup>290</sup> U.S. CONST., art. IV, § 3, cl. 2 (“Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

<sup>291</sup> *United States v. City of San Francisco*, 310 U.S. 16, 22 (1940); *see also Kleppe v. New Mexico*, 426 U.S. 529, 532, 536 (1976); *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 400–01 (1917); *Light v. U.S.*, 220 U.S. 523, 526 (1911); *United States v. Gratiot*, 39 U.S. 526, 532 (1840).

<sup>292</sup> 16 U.S.C. §§ 1331–1340.

<sup>293</sup> *Kleppe*, 426 U.S. at 533.

<sup>294</sup> *Id.* at 537.

of the complete power which Congress has over particular public property entrusted to it.”<sup>295</sup> As the Court stated in *Kleppe*, “the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.”<sup>296</sup>

The Tenth Circuit has likewise recognized broad federal authority over wildlife on federal land. For example, in *Wyoming v. United States*, the court upheld the FWS’s refusal to permit Wyoming to vaccinate elk on the National Elk Refuge against brucellosis.<sup>297</sup> The court noted that the state possessed “broad trustee and police powers over the . . . wildlife within their borders, including . . . wildlife found on Federal lands within a state.”<sup>298</sup> However, the court stated that these powers are not derived from the Constitution.<sup>299</sup> The Property Clause “delegates to Congress ‘the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the U.S.’ ”<sup>300</sup> The court also recognized that the Property Clause does not preclude “all state regulation of federal land.”<sup>301</sup> The state retains civil and criminal jurisdiction over federal lands within its borders for many purposes.<sup>302</sup> Congress is simply able “to exercise jurisdiction over federal land within a State if Congress so chooses.”<sup>303</sup> The court noted that, because congressional power over federal lands is plenary, state authority cannot overrule federal law.<sup>304</sup> The court stated, “federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution’s Supremacy Clause.”<sup>305</sup> In sum, the Tenth Circuit held that the Tenth Amendment did “not reserve to the State of Wyoming the right to manage wildlife . . . on the [National Elk Refuge], regardless of circumstances.”<sup>306</sup> Because the NMDGF relied on speculative conclusions, and because precedent did not support the NMDGF’s state sovereignty argument, the Tenth Circuit properly reversed the district court’s finding that the NMDGF would

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<sup>295</sup> *Id.* at 536.

<sup>296</sup> *Id.*

<sup>297</sup> 279 F.3d 1214, 1241 (10th Cir. 2002).

<sup>298</sup> *Id.* at 1226 (citing 43 C.F.R. § 24.3 (2017)).

<sup>299</sup> *Id.*

<sup>300</sup> U.S. CONST., Art. IV § 3, cl. 2.

<sup>301</sup> *Wyoming*, 279 F.3d at 1224.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 1227.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

suffer irreparable harm as a result of continued Mexican wolf recovery efforts.

### *B. Likelihood of Success on the Merits*

After disposing of the irreparable harm issue, the Tenth Circuit did not address the conclusions of the district court regarding the other three criteria for issuance of a preliminary injunction. A further analysis of the issues in this case indicates that the district court was mistaken when it held that the NMDGF was likely to succeed on the merits of the case.<sup>307</sup> Section 6(a) of the ESA requires the Secretary to “cooperate to the maximum extent possible with the States.”<sup>308</sup> The district court determined that the “permissive language” in section 10(j), which states that “the Secretary may authorize the release of” an experimental population, “does not create “a specific statutory directive requiring the Secretary to take action.”<sup>309</sup> According to the district court, section 10(j) is simply a “grant of authority,” not a specific mandate of the ESA, and the importation and release of Mexican wolves is a discretionary act.<sup>310</sup> Under that view, the NMDGF’s refusal to issue a permit allowing importation or release of Mexican wolves did not interfere with Interior’s statutory duty.<sup>311</sup> This analysis contends that the district court’s finding of likelihood of success on the merits is inconsistent with the *Chevron* and *Auer* doctrines.

#### *1. Chevron: The Statutory Mandate*

In its analysis, the district court appears to have substituted its interpretation of the legal duty imposed by the ESA for that adopted by the FWS. The district court’s analysis implicates the *Chevron* doctrine, which assures federal court deference to reasonable interpretations of ambiguous statutory language by administrative agencies.<sup>312</sup>

In *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, the Supreme Court developed a two-step process regarding judicial review of an agency’s statutory interpretations. First, the court must determine “whether Congress has directly spoken to the precise question at issue.”<sup>313</sup>

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<sup>307</sup> See *N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior*, No. CV 16-00462-WJ-KBM, 2016 WL 4536465, at \*7–9 (D.N.M. June 16, 2016).

<sup>308</sup> 16 U.S.C. § 1535 (2012); see also 43 C.F.R. § 24.4(i)(5) (2010).

<sup>309</sup> *N.M. Dep’t of Game & Fish*, 2016 WL 4536465, at \*9.

<sup>310</sup> *Id.* at \*8.

<sup>311</sup> *Id.*

<sup>312</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>313</sup> *Id.* at 842.

This requires the court to examine the text, intent, and purposes of the statute.<sup>314</sup> The court begins by examining the text of the statute, as enacted by Congress.<sup>315</sup> The district court's decision in this case was inconsistent with the text of the section 6(a) of the ESA, which requires only that the Secretary "cooperate to the maximum extent practicable with the States."<sup>316</sup> It does not grant the states a veto over federal action.

Textual analysis allows courts to examine how similar words are used in other statutes.<sup>317</sup> It should be assumed that Congress knows how to command specific action from agency actors. For example, the Tenth Circuit in *Wyoming v. United States* interpreted a provision in the National Wildlife Refuge System Improvement Act that required the FWS to cooperate with the states "to the extent practicable."<sup>318</sup> There, the court held that "Congress undoubtedly intended a preeminent federal role for the FWS in the care and management of the [National Wildlife Refuge System]."<sup>319</sup> Further, the Tenth Circuit in *Cure Land v. U.S. Department of Agriculture* examined a NEPA provision that required public involvement "to the extent practicable."<sup>320</sup> The court in that case held that the Department of Agriculture was granted "considerable discretion to decide the extent to which such public involvement is practicable."<sup>321</sup>

If Congress has not addressed an issue, a court must "not simply impose its own construction on the statute."<sup>322</sup> The court must move to the second step of the Chevron analysis and determine "whether the agency's answer is based on a permissible construction of the statute."<sup>323</sup> In applying this step, a court does not have to conclude that the agency's

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<sup>314</sup> Cass R. Sunstein, Alan B. Morrison, Kenneth W. Starr & Richard K. Willard, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 367 (1987). A strong reading requires the court to defer to the agency's legal interpretation unless Congress has specifically addressed the issue. *Id.* A weak reading stresses the continued use of the traditional tools of statutory interpretation. Only when these tools fail to yield an answer to the legal issue is the court required to defer to the agency's legal interpretation. *Id.* Justice Stevens, the author of the *Chevron* decision, later stated that a "pure question of statutory interpretation [is] for the courts to decide" by "employing traditional tools of statutory interpretation." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987).

<sup>315</sup> William N. Eskridge & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-41 (1990).

<sup>316</sup> 16 U.S.C. § 1535(a) (2012).

<sup>317</sup> Eskridge & Frickey, *supra* note 315, at 340-41.

<sup>318</sup> 279 F.3d 1214, 1232-35 (10th Cir. 2002).

<sup>319</sup> *Id.* at 1234.

<sup>320</sup> 833 F.3d 1223, 1236 (10th Cir. 2016).

<sup>321</sup> *Id.*

<sup>322</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>323</sup> *Id.*

interpretation is “the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had arisen in a judicial proceeding.”<sup>324</sup> Instead the court must defer to “a reasonable interpretation made by the administrator of the agency.”<sup>325</sup> Courts generally apply the hard look doctrine at this step of the Chevron analysis to determine if the agency decision is reasonable.<sup>326</sup> The hard look doctrine requires courts to examine agency action “to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.”<sup>327</sup>

In this case, the text of section 6 of the ESA, which requires the Secretary to “cooperate to the maximum extent practicable with the States,”<sup>328</sup> is somewhat ambiguous. A narrow reading of that section would effectively provide the states with a veto over federal action. Where statutory text is unclear, a court must examine the legislative process to discover how the enacting legislature would have resolved the question.<sup>329</sup> The reintroduction of experimental populations pursuant to section 10(j) has never been dependent on prior state approval.<sup>330</sup> Congress has recognized the importance of state involvement in reintroduction efforts, but has never indicated that the states would be the final arbiters of whether a release should occur. The 1982 House Report stated only that 10(j) regulations “should be viewed as an agreement among the Federal agencies, the state fish and wildlife agencies and any landowners involved . . . and [c]hanges in the regulations should only be made after close consultation with all of the affected parties.”<sup>331</sup>

In determining whether an agency interpretation is a reasonable one, a court should be guided by statutory purposes, which are the ultimate motive of the legislation.<sup>332</sup> The express purposes of the ESA are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for

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<sup>324</sup> *Id.* at 843 n.11.

<sup>325</sup> *Id.* at 842–45.

<sup>326</sup> Jonathan T. Molot, *Judicial Perspectives in the Administrative State*, 53 STAN. L. REV. 1, 92–99 (2000).

<sup>327</sup> *Greater Bost. Television Corp. v. FCC*, 444 F.2d 841, 850–51 (D.C. Cir. 1970).

<sup>328</sup> 16 U.S.C. § 1535 (2012).

<sup>329</sup> William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990).

<sup>330</sup> *N.M. Dep’t of Game & Fish v. U.S. Dep’t Interior*, 854 F.3d 1236, 1243–44 (10th Cir. 2017).

<sup>331</sup> H.R. REP. NO. 97-567 at 34 (1982).

<sup>332</sup> REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 71–79, 85–102 (1975); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1124, 1374–80 (1994).

the conservation of such endangered species and threatened species.”<sup>333</sup> 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.”<sup>334</sup> Once a species is designated as endangered or threatened, the Secretary must develop and implement a recovery plan to realize the goals of species conservation and survival.<sup>335</sup> Recovery plans must include the following: site management actions, as well as objective, measurable criteria for removing species from the list, and an estimate of the time required and costs to carry out the plan’s goals.<sup>336</sup> Recovery plans are “supposed to be a basic road map to recovery, i.e. the process that stops or reverses the decline of a species and neutralizes threats to its existence . . . . It is supposed to provide a means for achieving the species’ long-term survival in nature.”<sup>337</sup>

Congress amended the ESA in 1982 and added section 10(j) to provide the FWS with more flexibility to accomplish these purposes.<sup>338</sup> The House Conference Committee stated that section 10(j) “obliges the Secretary to issue such regulations as he deems necessary and advisable to provide for the conservation of the experimental population . . . .”<sup>339</sup> The Secretary of the Interior is granted “broad flexibility in promulgating regulations to protect such species.”<sup>340</sup> The Tenth Circuit noted that “Congress added section 10(j) to the [ESA] in 1982 to address the [FWS]’s and other affected agencies’ frustration over political opposition to reintroduction efforts perceived to conflict with human activity.”<sup>341</sup> Congress, somewhat optimistically, anticipated that section 10(j) “would mitigate industry’s fears [that] experimental population(s) would halt development projects, and . . . actually encourage private parties to host such populations on their lands.”<sup>342</sup>

The ESA requires the FWS to employ its statutory authority, including authority pursuant to section 10(j), to recover Mexican wolves. In the *NMDGF* case, the district court’s characterization of section 10(j) as a discretionary duty rests on a mistaken view of the status of non-

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<sup>333</sup> 16 U.S.C. § 1531(b) (2012).

<sup>334</sup> *Id.* § 1532(3).

<sup>335</sup> *Id.* § 1533(f).

<sup>336</sup> *Id.*

<sup>337</sup> *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 103 (D.D.C. 1995).

<sup>338</sup> *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000).

<sup>339</sup> H.R. REP. NO. 97-835, at 34 (1982).

<sup>340</sup> *Id.*

<sup>341</sup> *Wyo. Farm Bureau Fed’n*, 199 F.3d at 1231-32.

<sup>342</sup> *Id.*

experimental populations.<sup>343</sup> Reintroduced species under section 10(j) are considered to be a threatened species.<sup>344</sup> Federal regulations state that “an experimental population shall be treated as if it were listed as a threatened species for establishing protective regulations . . . .”<sup>345</sup> The Secretary can establish “special rules adopted for the experimental population [that] will contain applicable prohibitions, as appropriate, and exceptions for that population.”<sup>346</sup>

The district court apparently confused conservation (which is tied to recovery) with survival (which is tied to extinction). Section 10(j) authorizes the Secretary to release nonessential experimental populations, which will contribute to species conservation in the wild.<sup>347</sup> This simply means there is no danger to species survival if the nonessential population is lost in the wild. The ESA is concerned with both conservation (recovery) and survival (extinction).<sup>348</sup>

The reintroduction of the Mexican wolf is designed to achieve conservation of wolves in the wild, so that the ESA protections can be removed. The Ninth Circuit aptly recognized the difference between recovery and survival in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*.<sup>349</sup> There, the court held that “the ESA was enacted not merely to forestall the extinction of species [i.e., to promote species survival], but to allow a species to recover to the point where it may be delisted.”<sup>350</sup> Congress clearly “intended that conservation and survival be two different (though complementary) goals of the ESA.”<sup>351</sup> The Fifth Circuit reached the same conclusion in *Sierra Club v. U.S. Fish & Wildlife Service*.<sup>352</sup> The court in that case held that “conservation is a much broader concept than mere survival . . . the ESA definition of ‘conservation’ speaks to recovery of a threatened or endangered species.”<sup>353</sup>

In this case, the FWS’s decision to go forward with recovery was not arbitrary and capricious, nor was it unreasonable under the above standards. The FWS was not legally required to draft an interim

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<sup>343</sup> See *N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior*, No. CV 16-00462-WJ-KBM, 2016 WL 4536465, at \*8–9 (D.N.M. June 16, 2016).

<sup>344</sup> 16 U.S.C. § 1539(j)(C) (2012).

<sup>345</sup> 50 C.F.R. § 17.82 (2016).

<sup>346</sup> *Id.*

<sup>347</sup> 16 U.S.C. § 1539(j)(2)(A) (2012).

<sup>348</sup> *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069 (9th Cir. 2004).

<sup>349</sup> *See id.*

<sup>350</sup> *Id.* at 1070.

<sup>351</sup> *Id.*

<sup>352</sup> 245 F.3d 434 (5th Cir. 2001).

<sup>353</sup> *Id.* at 441–42.

management plan or wait for the revised recovery plan in November 2017 before continuing Mexican wolf recovery. As important as recovery plans are in promoting species recovery, the plans are advisory, and not binding on the FWS. For many years, the FWS has taken the position that “recovery plans are not regulatory documents . . . but serve as the road map for species recovery, laying out where [FWS] need[s] to go, how best to get there, and how long . . . it will take.”<sup>354</sup>

A number of courts have held that recovery plans are not legally enforceable.<sup>355</sup> The D.C. Circuit, in *Friends of Blackwater v. Salazar*, reversed a district court decision holding that the FWS violated the ESA by removing the West Virginia northern flying squirrel from the endangered species list when several criteria in the recovery plan had not been satisfied. On review, the D.C. Circuit stated that “[a] plan is a statement of intention, not a contract . . . . If the plan is overtaken by events, then there is no need to change the plan; it may simply be irrelevant.”<sup>356</sup> Further, courts have found that the ESA does not constrain the FWS from taking action prior to completing a recovery plan. In *Home Builders Association of Northern California v. U.S. Fish & Wildlife Service*, the Ninth Circuit held that Interior did not have to establish recovery criteria before setting aside critical habitat.<sup>357</sup> The court stated that “there is no reason why FWS cannot determine what elements are necessary for conservation without determining exactly when conservation will be complete.”<sup>358</sup> The U.S. District Court for the District of Arizona, in *Arizona Cattlegrowers v. Kempthorne*, was “unconvinced” by the argument that the FWS could not “move forward with a conservation effort without first identifying that precise point at which conservation will be achieved.”<sup>359</sup> In the *NMDGF* case, not only did the district court’s analysis of the specific statutory question overlook the *Chevron* framework, it also failed to give proper deference under the *Auer* doctrine.

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<sup>354</sup> U.S. FISH & WILDLIFE SERV., RECOVERY REPORT TO CONGRESS 2 (2002).

<sup>355</sup> See, e.g., *Fund for Animals Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996); *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834, 835 (D.D.C. 1992); *Nat’l Wildlife Found. v. Nat’l Park Serv.*, 669 F. Supp. 384, 386 (D.Wyo. 1987); *Nat’l Audubon Soc’y v. Hester*, 801 F.2d 405, 406 (D.C. Cir. 1986). See generally Edward A. Fitzgerald, *Dysfunctional Downlisting Defeated: Defenders of Wildlife v. Secretary, U.S. Department of Interior*, 34 B.C. ENVTL. AFF. L. REV. 37, 85–87 (2007).

<sup>356</sup> *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012).

<sup>357</sup> 616 F.3d 983, 989–90 (9th Cir. 2010).

<sup>358</sup> *Id.* at 989.

<sup>359</sup> 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008).

## 2. Auer: *The Regulatory Mandate*

Federal regulations require agencies within Interior to “consult with the States and comply with State permit requirements in connection with the . . . [reintroduction of fish and wildlife], *except* in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities.”<sup>360</sup> In *NMDFG*, the district court held that the exception in the regulation applied only to specific and defined statutory responsibilities, not to discretionary functions under section 10(j).<sup>361</sup> In so holding, the district court arguably misapplied or overlooked the Supreme Court’s precedent in *Auer v. Robbins*, which declares that an agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation.”<sup>362</sup> The *Auer* doctrine is related to the *Chevron* doctrine, in that both require judicial deference to agency interpretations.

The Secretary’s statutory responsibilities extend to matters under his or her control. The Tenth Circuit previously held that such responsibilities include “the state or fact or being . . . answerable or accountable, as for something within one’s power to control.”<sup>363</sup> As discussed above, the Secretary has a statutory duty to ensure the recovery of Mexican wolves. Section 10(j) provides the means to accomplish this statutory responsibility. Interior and the FWS determined that the release of additional captive Mexican wolves was necessary to reduce inbreeding, restore genetic health, and help with long-term recovery.<sup>364</sup> The FWS then informed NMDGF of its plans to proceed with the recovery effort.<sup>365</sup> The FWS applied for state permits pursuant to New Mexico law, but its applications were rejected.<sup>366</sup> Left with no other choice, the FWS properly determined that compliance with the state law interfered with its statutory responsibilities. Interior and the FWS’s interpretation of the regulatory consultation requirement was not plainly erroneous, nor was it inconsistent with the regulation, which itself provides a state-interference exception.

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<sup>360</sup> 43 C.F.R. § 24.4(i)(5) (2017) (emphasis added).

<sup>361</sup> N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior, No. CV 16-00462-WJ-KBM, 2016 WL 4536465, at \*8–9 (D.N.M. June 16, 2016).

<sup>362</sup> *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>363</sup> *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1485 n.7 (10th Cir. 1990).

<sup>364</sup> Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2542 (Jan. 16, 2015) (codified at 50 C.F.R. pt. 17).

<sup>365</sup> See N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior, 854 F.3d. 1236, 1241-45 (10th Cir. 2017).

<sup>366</sup> *Id.* at 1243.

Accordingly, the FWS's decision to proceed with Mexican wolf recovery in the absence of state permits was a reasonable determination made consistent with the purposes of the ESA. Because continued reintroductions are needed in order to realize recovery of the Mexican wolf, and to improve genetic diversity, the FWS's recovery actions should not be subject to overriding control by the states. Allowing an effective state veto would hinder the FWS from carrying out its statutory duty to protect Mexican wolves and other endangered species. The district court's holding in *NMDGF*, which would arguably allow such a state veto, was based on a flawed and regrettable reading of the ESA and relevant regulations.

### C. Balance of Equities

Courts have found that “the language, history, and structure of the ESA demonstrates Congress’s determination that the balance of hardships and the public interest tips heavily in favor of protected species” when considering motions for preliminary injunction relief.<sup>367</sup> The district court in *NMDGF* held that the balance of equities weighed in favor of the plaintiffs.<sup>368</sup> The court justified this reasoning on the belief that short-term delays would not harm Mexican wolf recovery efforts.<sup>369</sup> The court held that Interior and the FWS were required to comply with the state permitting law.<sup>370</sup> The court’s analysis contended that the balance of equities favored New Mexico’s interest in managing its wildlife.

The *NMDGF* argued that because the Mexican wolf population<sup>371</sup> was close to the initial recovery goal, no additional wolves were immediately needed.<sup>372</sup> In making this argument, the *NMDGF* failed to acknowledge that in 2015 the recovery goal changed from only 100 to more than 300 wolves.<sup>373</sup> The FWS acknowledged that the “prime objective” of the 1982 recovery plan was to ensure the survival of one hundred Mexican wolves.<sup>374</sup> Nonetheless, the FWS explained that these

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<sup>367</sup> *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978)).

<sup>368</sup> *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, No. CV 16-00462-WJ-KBM, at \*10 (D.N.M. June 16, 2016).

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> At that time, ninety-seven Mexican wolves.

<sup>372</sup> Response Brief of Plaintiff-Appellee at 34, *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236 (10th Cir. 2017) (No. 16-2189).

<sup>373</sup> Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2517 (Jan. 16, 2015) (codified at 50 C.F.R. pt. 17).

<sup>374</sup> *Id.* at 2529.

population goals were no longer adequate to protect the Mexican wolf.<sup>375</sup> The FWS recognized 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 pop[ulation]” with a recovery goal of only one hundred.<sup>376</sup> Furthermore, the FWS noted that the change in status of the Mexican wolf from the generic gray wolf population listing to an endangered subspecies necessitated a change in the population goal.<sup>377</sup> The evidence makes it clear that additional wolves are needed to conserve the subspecies.

The NMDGF also argued that there was no danger of inbreeding or genetic deterioration in the existing population of Mexican wolves.<sup>378</sup> The FWS countered by arguing that a higher level of genetic variation within the experimental population was crucial to diminishing the risk of inbreeding and to ensuring the persistence of the population, particularly until it reaches a size of at least 250.<sup>379</sup>

Because there has already been evidence of inbreeding in the experimental population,<sup>380</sup> if additional management actions designed to improve the wolf’s genetic composition are not taken, “inbreeding will accumulate and heterozygosity and alleles will be lost faster than in the captive population.”<sup>381</sup> The FWS itself pointed out that the genetic diversity of the Mexican wolf population was problematic.<sup>382</sup> In nineteen of the twenty-one potential breeding pairs for 2016, one breeding pair will be a descendent of a single wolf pack, the Bluestem pack.<sup>383</sup> In eleven of the twenty-one potential breeding pairs, both individuals will be descendants of the Bluestem pack.<sup>384</sup> Field observations have suggested

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<sup>375</sup> *Id.* at 2517–18.

<sup>376</sup> *Id.* at 2517.

<sup>377</sup> *Id.* at 2517–18.

<sup>378</sup> See Response Brief for Plaintiff-Appellee at 34-35, N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior, 854 F.3d 1236 (10th Cir. 2017) (No. 16-2189).

<sup>379</sup> U.S. FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED REVISION TO THE REGULATIONS FOR THE NONESSENTIAL EXPERIMENTAL POPULATION OF THE MEXICAN WOLF, ch. 1 at 22 (2012). See also Endangered Status for the Mexican Wolf, 80 Fed. Reg. 2488, 2504-06 (Jan. 16, 2015) (codified at 50 C.F.R. pt. 17).

<sup>380</sup> U.S. FISH & WILDLIFE SERV., *supra* note 379, at 21.

<sup>381</sup> *Id.*

<sup>382</sup> Declaration of Sherry Barrett, Mexican Wolf Recovery Coordinator at 9. N.M. Dep’t of Game & Fish v. U.S. Dep’t of Interior, No. CV 16-00462-WJ-KBM (D.N.M. June 16, 2016) (No. 16-2189).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

an even greater kinship.<sup>385</sup> Furthermore, thirty-seven of forty-two wolves with known genetics are related to the Bluestem pack, which indicates that future related pair matching will be high.<sup>386</sup> This homogeneity may have long-term implications because the breeding of close relatives aggravates the problems associated with genetic drift.<sup>387</sup>

The NMDGF argued that it lacked knowledge regarding the release of Mexican wolves.<sup>388</sup> New Mexico signed MOU's with the FWS in 2004 and 2010, which contained the procedures designed to coordinate New Mexico's and Arizona's actions with the FWS. As discussed above, Governor Susana Martinez, who took office in 2011, decided to end New Mexico's participation in the Mexican wolf recovery program by withdrawing from the MOUs.<sup>389</sup>

New Mexico voluntarily withdrew from the MOUs, which provided for federal-state cooperation in the management of Mexican wolves.<sup>390</sup> For many years during the recovery effort, the FWS was not required to obtain permits before reintroducing Mexican wolves.<sup>391</sup> However, in 2014, New Mexico implemented the NMDGF permit requirement.<sup>392</sup> The Director of the NMDGF, the official in charge of processing permit applications, is appointed by the NMGC.<sup>393</sup> The NMGC is appointed by the Governor with the advice and consent of the state senate.<sup>394</sup>

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* Genetic drift is “a change in the gene pool of a small population that takes place strictly by chance. Genetic drift can result in genetic traits being lost for a population or becoming widespread in a population without respect to the survival or reproductive value of the alleles involved. A random statistical effect, genetic drift can occur only in small, isolated populations in which the gene pool is small enough that chance events can change its makeup substantial. In larger populations, any specific allele is carried by so many individuals that it is almost certain to be transmitted by some of them unless it is biologically unfavorable.” *Genetic Drift*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/science/genetic-drift> (last updated Feb. 5, 2018).

<sup>388</sup> N.M. Dep't of Game & Fish v. U.S. Dep't of Interior, No. CV 16-00462-WJ-KBM, at 20 (D.N.M. June 16, 2016).

<sup>389</sup> Press Release, Lobos of the Southwest, Governor Martinez Ends New Mexico's Cooperation with Feds on Endangered Wolves (June 10, 2011), <https://mexicanwolves.org/index.php/news/431/51/Press-Release-Governor-Martinez-Ends-New-Mexico-s-Cooperation-With-Feds-on-Endangered-Wolves>.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> N.M. STAT. ANN. § 17-1-5 (2017).

<sup>394</sup> *Id.* § 17-1-2; Brief for Foundation to Protect N.M. Wildlife as Amicus Curiae in Supporting Respondents at 6, N.M. Dep't of Game & Fish v. U.S. Dep't of Interior, 854 F.3d 1236 (10th Cir. 2017) (No. 16-2202).

Accordingly, the NMGC is a political body that can take partisan positions.<sup>395</sup> Pursuant to the 2014 regulations imposing the permit requirement, any decision by the Director regarding the importation and release of non-domestic wildlife, including the Mexican wolf, must be approved by the NMGC.<sup>396</sup>

After the 2014 regulations went into effect, the FWS applied for the required permits.<sup>397</sup> The NMGC denied the permits “on grounds that the Service did not prepare or submit a federal species management plan,” so the Director “was unable to determine whether the proposed releases would conflict with state management efforts.”<sup>398</sup> All of the requisite information, however, had been published by the FWS in a January 2015 publication.<sup>399</sup> There was no reason for the FWS to reapply for permits that would have been denied.<sup>400</sup> Further, the NMDGF had indicated that it was unwilling to grant any permits until there was a new recovery plan.<sup>401</sup> The FWS was in the process of revising the recovery plan, which would address NMDGF concerns.<sup>402</sup> For these reasons, a strong argument can be made that the balance of equities favored the FWS, and the broader interest in species recovery.

#### *D. The Public Interest*

The district court in *NMDGF v. Interior* determined that New Mexico’s interest in managing its wildlife was the paramount public interest at issue.<sup>403</sup> The NMDGF argued that Mexican wolves had to be managed properly or they would cause environmental havoc.<sup>404</sup> The NMDGF also contended that wolves were a public nuisance.<sup>405</sup> The NMDGF reasoned, because of this threat to public interest, that the FWS was required to comply with state law and obtain a permit before importing or releasing Mexican wolves in New Mexico.<sup>406</sup>

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<sup>395</sup> *Id.* at 6–7.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 7–8.

<sup>398</sup> *Id.* at 8.

<sup>399</sup> *Id.* (citing 50 C.F.R. pt. 17 (2017)).

<sup>400</sup> Brief for the Federal Appellants at 28, *N.M. Dep’t of Game & Fish*, 854 F.3d 1236 (No. 16-2202).

<sup>401</sup> *Id.* at 13.

<sup>402</sup> *Id.* at 11.

<sup>403</sup> *N.M. Dep’t of Fish & Game v. U.S. Dep’t of Interior*, No. CV 16-00462 WJ/KBM, 2016 WL 4536465, at \*11 (D.N.M. June 10, 2016).

<sup>404</sup> *Id.* at \*9.

<sup>405</sup> *Id.* \*11.

<sup>406</sup> *Id.*

For numerous reasons, the district court's decision was contrary to the national policy of protecting ecosystems. The ESA is federal law expressing national policy, while New Mexico's state permit requirement furthers only local interests. In the context of the ESA, the 1982 House Conference Committee stated:

In enacting the ESA, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.<sup>407</sup>

Mexican wolves play an important role in preserving biodiversity and maintaining ecosystem balance. Biodiversity is the "total of genes, species and ecosystems on the earth."<sup>408</sup> Biodiversity is a "living exploitable renewable resource," which has "economic importance and potential consumptive and transformative uses."<sup>409</sup> The preservation of biodiversity is important for the development of food and medicine and the maintenance of the ecosystem.<sup>410</sup> For these reasons, biodiversity, in the form of individual species and all species in the aggregate, plays an important role in national commerce.<sup>411</sup>

Plants and animals exist in interconnected ecosystems.<sup>412</sup> The loss of one species affects the entire system.<sup>413</sup> Disruptions create environmental instabilities that diminish nature's ability to establish food chains, cycle

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<sup>407</sup> H.R. REP. 97-835, at 30 (1982).

<sup>408</sup> Mark A. Urbanski, *Chemical Prospecting, Biodiversity Conservation, and the Importance of International Protection of Intellectual Property Rights in Biological Materials*, 2 BUFF. J. INT'L L. 131, 134-35 (1995).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 135 n.9; see also George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law: Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RES. J. 247, 253-56 (1987); Eric Christensen, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 STAN. L. REV. 279, 285-88 (1987); Keith Saxe, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HAST. L. J. 399, 407 (1988).

<sup>411</sup> Urbanski, *supra* note 408, at 135-37; see also Omar White, *The Endangered Species Act's Precarious Perch: Constitutional Analysis Under the Commerce Clause and Treaty Power*, 27 ECOL. L. Q. 215, 244-46 (2000).

<sup>412</sup> George C. Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970s*, 1978 DUKE L. REV. 753, 814 (1978); Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinctions*, 22 WILLIAM & MARY ENVTL. L. & POL'Y REV. 227, 237-44 (1998).

<sup>413</sup> Parenteau, *supra* note 412, at 237-44.

nutrients, maintain the quality of the atmosphere, control the climate, regulate the fresh water supply, maintain the soil, dispose of wastes, pollinate crops, and control pests and disease.<sup>414</sup>

Commentators have estimated the value of ecosystems services to be in the range of \$16 to \$54 trillion dollars annually.<sup>415</sup> With an average estimated annual value of \$33 trillion dollars per year, ecosystems provide services that cost almost twice the total gross national product of all the nations of the world combined.<sup>416</sup> Specifically, Robert Costanza, an ecological economist, has noted that “because ecosystems services are not fully ‘captured’ in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions.”<sup>417</sup> He also noted that “[t]his neglect may ultimately compromise the sustainability of humans in the biosphere.”<sup>418</sup> As a result, “[t]he economies of the Earth would grind to a halt without the services of ecological life-support systems, so in one sense their total value to the economy is infinite.”<sup>419</sup> Robert Costanza’s updated 2011 study, utilizing the same study parameters, concluded that ecosystem services provide benefits worth between \$125 to \$145 trillion dollars per year.<sup>420</sup>

The ESA is primarily concerned with the preservation of biodiversity.<sup>421</sup> The 1973 House Committee Report on the ESA states, “the value of endangered species is quite literally incalculable . . . from the most narrow possible point of view, it is in the best interest of mankind to minimize the loss of genetic variations.”<sup>422</sup> The ESA’s reasoning for protecting endangered species is simple: “they are potential resources . . . . They are the keys to puzzles, which we cannot solve, and may provide answers to questions which we have not yet learned to ask.”<sup>423</sup>

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<sup>414</sup> PAUL EHRLICH & ANNE EHRLICH, *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* 86–95 (1981).

<sup>415</sup> Robert Costanza et al., *The Value of the World’s Ecosystem Services and Natural Capital*, 387 *NATURE* 253, 259 (1997).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 253.

<sup>420</sup> Robert Costanza et al., *Changes in the Global Value of Ecosystem Services*, 26 *GLOB. ENVTL. CHANGE* 152, 152–58 (2014).

<sup>421</sup> 16 U.S.C. § 1531(b) (2012).

<sup>422</sup> H.R. REP. NO. 93-412, at 4–5 (1973).

<sup>423</sup> *Id.*

Senator John V. Tunney (D., Cal.), the floor leader and member of the conference committee regarding the ESA,<sup>424</sup> pointed out that the preservation of each and every species is important for science.<sup>425</sup> The diversity of genetic types is necessary for thorough scientific knowledge.<sup>426</sup> The unknown potential of investigating genetic structure must remain unhindered to produce knowledge for the benefit of humankind.<sup>427</sup> Federal courts have likewise recognized the importance of biodiversity.<sup>428</sup> The Supreme Court, in *Tennessee Valley Authority v. Hill*,<sup>429</sup> acknowledged Congress's concern regarding "the unknown uses that endangered species might have and . . . the unforeseeable place such creatures may have in the chain of life on this planet."<sup>430</sup>

The benefit of Mexican wolf recovery could spread across the ecosystem of the Southwest. A wide variety of scavengers and other carnivores acquire sustenance from carrion being readily available year-round rather than one-time in the early spring because of winter deaths.<sup>431</sup> When wolves make a kill, sustenance is provided for the entire food chain.<sup>432</sup> After wolves are finished, other carnivores and scavengers take their share, insects clean the carcass, and birds feed on the insects.<sup>433</sup> In addition, wolf predation improves soil nutrients, soil microbes, and plant quality by increased deposition and distribution of prey carcasses over the landscape.<sup>434</sup> Mexican wolves also help maintain an important balance among predators. The Mexican wolf is a summit predator that keeps smaller predators ("mesopredators"), like the coyote, in check.<sup>435</sup>

In the absence of summit predators, "mesopredator outbreaks often lead to declining prey populations, sometimes destabilizing communities and driving local extinctions."<sup>436</sup> A 2010 study analyzing the effects of

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<sup>424</sup> Eskridge, *supra* note 329, at 636–40 (noting that "statements by sponsors and/or floor managers," who know the language, intent, and purposes of the statute, are important because other congresspersons defer to their judgement).

<sup>425</sup> 119 CONG. REC. 22,668-70 (1973) (statement of Sen. Tunney).

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> See Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997); Bldg. Indus. of Cal. v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997); U.S. v. Bramble, 103 F.3d 1475 (9th Cir. 1996).

<sup>429</sup> 437 U.S. 153 (1978).

<sup>430</sup> *Id.* at 178–79.

<sup>431</sup> See FEIS, *supra* note 38, at ch. 4, pp. 11–12; Fitzgerald, *supra* note 20, at 40.

<sup>432</sup> FEIS, *supra* note 38, at ch. 4, p. 11.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> Laura R. Prugh et al., *The Rise of the Mesopredator*, 59 BIOSCIENCE 779 (2009).

<sup>436</sup> *Id.*

mesopredators, stated, “[T]here’s evidence that the explosion of mesopredator populations is very severe and has both ecological and economic repercussions.”<sup>437</sup> When wolves disappear, they are replaced by coyotes, “which are killing thousands of sheep all over the West.”<sup>438</sup> Coyote populations occur at higher densities and are more adaptable, so they pose a greater threat to livestock.<sup>439</sup> The 2010 study concluded that “the cost of controlling mesopredators is so high it would be cheaper and more effective to return the top predators back into the ecosystem.”<sup>440</sup> Ironically, “[m]ore wolves in the West could actually mean more sheep.”<sup>441</sup> Furthermore, diminution of the coyote leaves much of the coyotes’ prey, mainly small rodents, for predatory birds, such as hawks, eagles, and owls.<sup>442</sup> Red foxes and bobcats benefit from reduced coyote competition for food, particularly during the winter months.<sup>443</sup>

There were similar findings in a 2017 University of Washington study, which concluded that the range of top predators, like the Mexican wolf, is so diminished and fragmented that they cannot control small predators.<sup>444</sup> A coauthor of the study, stated, “It will require managing for top predator persistence across large landscapes, rather than just in protected areas, in order to restore natural predator-predator interactions.”<sup>445</sup> Furthermore, he noted that “coyotes have essentially hitched a ride with people . . . . Not only do we subsidize coyotes, but we also helped them by wiping out their predators: wolves.”<sup>446</sup>

The ESA is also concerned with ecosystem maintenance, which relies on a diverse gene pool.<sup>447</sup> In the words of Senator Tunney, each species provides a service to the environment and is part of a complex ecosystem which depends on all its components for stability.<sup>448</sup> Because the value of

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<sup>437</sup> FEIS, *supra* note 38, at ch. 4, pp. 17–18; *Wildlife: Goodbye Wolf, Hello Coyote and More*, DEFENDERS OF WILDLIFE (Jan. 15, 2010), <https://defenders.org/magazine/winter-2010/wildlife-goodbye-wolf-hello-coyote-and-more>.

<sup>438</sup> DEFENDERS OF WILDLIFE, *supra* note 437.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> FEIS *supra* note 38, at ch. 4, p. 19; Fitzgerald, *supra* note 20, at 60.

<sup>443</sup> *Id.*

<sup>444</sup> *Top Predators Constrain Mesopredator Distribution*, 8 NATURE COMM. 15469 (2017).

<sup>445</sup> Michelle Ma, *Wolves Need Space to Roam to Control Expanding Coyote Populations*, UW NEWS (May 23, 2017), <https://www.washington.edu/news/2017/05/23/wolves-need-space-to-roam-to-control-expanding-coyote-populations/>.

<sup>446</sup> *Id.*

<sup>447</sup> Parenteau, *supra* note 412, at 238–41.

<sup>448</sup> 119 CONG. REC. 25668 (1973) (statement of Sen. Tunney).

each species is unknown, its loss cannot be assessed.<sup>449</sup> Federal courts have played an important role in recognizing the value and importance of ecosystem maintenance.<sup>450</sup> In *National Association of Home Builders v. Babbitt*, Judge Henderson rightfully determined that endangered species must be preserved in order to maintain an interconnected ecosystem.<sup>451</sup> If one species is harmed, it can disrupt the ecosystem and cause interstate impacts.<sup>452</sup>

Mexican wolves play an important role in regulating prey population, which include elk, white-tail, and mule deer, and to a lesser extent pronghorn, javelin, and Rocky Mountain bighorn sheep.<sup>453</sup> Elk are the preferred prey of Mexican wolves, and constitute a majority of their diet.<sup>454</sup> Prey populations increase to the carrying capacity of their environment in the absence of predation.<sup>455</sup> At carrying capacity, prey population density is high and population growth rates are limited by resource scarcity, which results in poor nutrition.<sup>456</sup> Reducing the prey population below carrying capacity allows for a positive annual increase in the population.<sup>457</sup> Mexican wolves also benefit their prey in other ways. Wolves are selective hunters and usually choose more vulnerable and less fit prey.<sup>458</sup> Younger, older, diseased and injured animals are taken in greater proportion than healthy, prime-aged animals.<sup>459</sup> Wolf predation can suppress the emergence of disease in ungulates and limit its prevalence, in part by reducing density and group sizes of elk and deer.<sup>460</sup> This reduces or eliminates the spread of brucellosis and chronic wasting disease. In addition, causing ungulates to graze in smaller groups potentially slows the spread of ungulate diseases that persist among high-density populations of ungulates.<sup>461</sup>

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<sup>449</sup> *Id.*

<sup>450</sup> See *Nat'l Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041, 1057–60 (D.C. Cir. 1997); *U.S. v. Bramble*, 103 F.3d 1475, 1480–82 (9th Cir. 1996); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

<sup>451</sup> *Nat'l Assoc. of Home Builders*, 130 F.3d at 1057–60.

<sup>452</sup> *Id.*

<sup>453</sup> Endangered and Threatened Wildlife and Plants; Endangered Status for the Mexican Wolf, 80 Fed. Reg. 2488, 2492 (Jan. 16, 2015) (codified at 50 C.F.R. pt. 17).

<sup>454</sup> FEIS, *supra* note 38, at ch. 4, pp. 16–17.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> 80 Fed. Reg. at 2555.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 2508.

<sup>461</sup> FEIS, *supra* note 38, at ch. 4, pp. 12–16.

The presence of the Mexican wolves also changes prey behavior. Ungulate prey avoid areas where wolves are present, which reduces adverse impacts on plants in those areas.<sup>462</sup> The undisturbed grazing by large ungulates is an important issue that impacts biodiversity and plant communities, particularly in riparian ecosystems. Increased grazing negatively impacts the growth and regeneration of trees and scrubs. A decrease in prey restores the vegetation in these areas.<sup>463</sup> Reintroduction of the top predator relieves pressure on riparian corridors, leading to less erosion into natural streams and waterways. Decreased sediment runoff produces benefits for water quality, aquatic health, and riparian ecosystems in general.<sup>464</sup> For all of these reasons, there are substantial public interest factors supporting Mexican wolf recovery.

Because Interior and the FWS are obligated by the ESA to ensure the recovery of species such as the Mexican wolf, and because those agencies executed their administrative responsibility to consult with New Mexico regarding recovery efforts in good faith, Mexican wolf recovery efforts should continue without being subject to state permit requirements. The FWS reasonably resolved the statutory questions that were presented by NMDGF's denial of state permits, and did so in a way that was consistent with federal law and policy as announced in the ESA and the many judicial decisions interpreting it.

## IX. CONGRESSIONAL REACTION

Judicial decisions often begin an institutional dialogue. Judicial decisions not only affirm or reject executive-legislative deals manifested in statute; they also affect the competitive struggle between the legislative and executive branches over policy, impact executive implementation of policy, and structure federal-state relations. Judicial decisions can fairly be viewed as political resources that mark the beginning of the political process.<sup>465</sup> Congress is well aware of judicial interpretations, devotes significant time to analyzing their policy implications, and, in the end, can

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<sup>462</sup> *Id.* at ch. 4, pp. 10–12.

<sup>463</sup> *Id.*

<sup>464</sup> William J. Ripple & Robert L. Bescheta, *Trophic Cascades in Yellowstone: The First 15 Years After Wolf Reintroduction*, 145 *BIOLOGICAL CONSERVATION* 205–213 (2012).

<sup>465</sup> See William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 334–38 (1991); Beth M. Henshen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda Setting Process*, 5 *J. L. & POL.* 685 (1989); James L. Walker & Michael E. Solomine, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 *TEMP. L. REV.* 425 (1992).

override judicial statutory interpretations.<sup>466</sup> Political factors are often crucial regarding congressional overrides of judicial decisions.<sup>467</sup> Unfortunately, there has been a negative congressional reaction to Mexican wolf recovery.

Representative Steve Pearce (R., N.M.) requested a study of the recovery program after he received a complaint in 2013 from the Catron County Commission.<sup>468</sup> The complaint focused on the FWS's Mexican Wolf Recovery Coordinator, who was accused of mismanaging depredation complaints, inadequately communicating with residents, destroying wolf DNA samples, and failing to investigate wolf bites.<sup>469</sup> Interior's Office of Inspector General conducted an independent investigation into these issues in July 2016. The final report concluded that the FWS falsified a case involving a wolf bite, falsified the location of wolf kills, lied to the press about a wolf bite, failed to communicate with public officials and the public, failed to adequately manage the field team, manipulated scientific data, and sought to falsify findings about wolf depredations.<sup>470</sup> The FWS disputed these claims of mismanagement, and acknowledged that while there had been some problems with the recovery program, they had been solved.<sup>471</sup>

Congress took matters into its own hands and responded. Representatives Paul Gosar (R., Az.) and Steve Pearce (R., N.M.) introduced HR 2910, the bipartisan Mexican Wolf Transparency and Accountability Act, which aimed to end the Mexican wolf's threatened species designation, its critical habitat, and return program administration back to the states.<sup>472</sup> Representative Pearce attached a rider to the House appropriation bill, which would cut all funding for Mexican wolf recovery.<sup>473</sup> The House passed the Gosar-Pearce amendment and Pearce

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<sup>466</sup> Eskridge, *supra* note 465, at 332.

<sup>467</sup> *Id.* at 353–55.

<sup>468</sup> Danny Udero, *Officials Finish Wolf Program Probe*, SILVER CITY SUN-NEWS, July 20, 2016.

<sup>469</sup> *Id.*

<sup>470</sup> Pearce Statement on Inspector General Report on Alleged Misconduct in Managing Wolf Program, PLUS MEDIA SOLUTIONS, July 19, 2016.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> Rebecca Moss, *Representative Pearce Adds Amendment that Would End Wolf Recovery Program to \$32B Spending Bill*, SANTA FE NEW MEXICAN (July 15, 2016), [http://www.santafenewmexican.com/news/local\\_news/rep-pearce-adds-amendment-that-would-end-wolf-recovery-program/article\\_27ba4ea4-3841-544b-89dc-0163b1c98167.html](http://www.santafenewmexican.com/news/local_news/rep-pearce-adds-amendment-that-would-end-wolf-recovery-program/article_27ba4ea4-3841-544b-89dc-0163b1c98167.html).

rider, which were attached to the \$32 billion spending bill in July 2016. The bill passed by a 231–196 vote, with only three Democratic votes.<sup>474</sup>

The enactment of policy changes through appropriations riders, which unfortunately occurs all too often, is a flawed process.<sup>475</sup> First, substantive changes in policy do not receive adequate consideration. They are generally introduced late in the process, with little debate, often in the dark of night.<sup>476</sup> Congresspersons have little opportunity to examine the riders.<sup>477</sup> Second, changing policy through riders alters the balance of power in Congress.<sup>478</sup> The authorizing committees with subject matter expertise do not review appropriation riders.<sup>479</sup> The Appropriations Committee can amend existing legislation, which undermines the authority of the authorizing committee and disrupts the substantive legislation.<sup>480</sup> These amendments can cause conflict between the authorizing and Appropriations committees in both the House and the Senate and between the House and Senate.<sup>481</sup> Third, appropriation riders that cannot get through the front door of the conventional legislative process often get through the back door of the appropriation process.<sup>482</sup> These changes generally promote narrow interests over broader public interests.<sup>483</sup> Interest groups pursue this path because there is little public scrutiny or public accountability regarding such proposals.<sup>484</sup> Fourth, appropriation riders interfere with the President's ability to veto bad legislation because he must accept or veto the bill as a whole.<sup>485</sup> It also frustrates the President's ability to implement the law properly because of constraints established in the appropriation bill.<sup>486</sup>

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<sup>474</sup> *Id.*

<sup>475</sup> Edward A. Fitzgerald, *Alliance for Wild Rockies v. Salazar*, 25 VILL. ENVTL. L.J. 351, 394–98 (2014).

<sup>476</sup> Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 465 (1987).

<sup>477</sup> *Id.*

<sup>478</sup> *Id.* at 464–65.

<sup>479</sup> *Id.*

<sup>480</sup> Victor M. Sher & Carol S. Hunting, *Eroding the Landscape, Eroding the Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 478 (1991).

<sup>481</sup> Devins, *supra* note 476, at 464.

<sup>482</sup> Jaques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L. Q. 457, 474–475 (1992).

<sup>483</sup> See Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 WASH. U. J. URB. & CONTEMP. L. 35, 51–57 (1993).

<sup>484</sup> *Id.*

<sup>485</sup> Devins, *supra* note 476, at 471–74; LeBoeuf, *supra* note 482, at 472–78.

<sup>486</sup> LeBoeuf, *supra* note 482, at 472–78.

Many other damaging anti-wildlife provisions were included in numerous bills: the House and Senate Fiscal Year 2017 Interior, Environment, and related Agencies Appropriations bill (particularly the Gosar-Pearce amendment and Pearce rider); the House passed energy package; and the Fiscal Year 2017 House National Defense Authorization Act.<sup>487</sup> These provisions undermine the ESA, upend the management of national wildlife refuges and other federally protected lands, and harm individual species at risk of extinction, including the Mexican wolf.<sup>488</sup> In October 2016, ninety-two House Democrats, led by Representative Raul M. Grijalva, urged President Obama to veto any attempts to strip ESA protections from spending bills.<sup>489</sup> In December 2016, H.R. 2028, the Further Continuing and Security Assistance Appropriations Act, was enacted.<sup>490</sup> It provided continuing appropriations through April 26, 2017, but included none of the anti-environmental riders.<sup>491</sup>

In February 2017, Senator Jeff Flake (R., Az.) introduced a bill to prohibit the recovery of wolves above Interstate 40, thereby keeping wolves out of the southern Rockies.<sup>492</sup> The bill also aimed to replace science-based ESA criteria for taking determinations, by imposing criteria developed by ranchers and states, which precluded judicial review.<sup>493</sup> Senator Tom Udall (D., N.M.), the ranking Democrat on the Senate Appropriations Subcommittee on Interior and Environment, successfully eliminated the riders, which would have removed protection for wolves from the temporary appropriation bill that funded the federal government through September 2017.<sup>494</sup>

Nevertheless, the House and Senate continue to consider numerous bills that would weaken the ESA.<sup>495</sup> In July 2017, House Republicans

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<sup>487</sup> Press Release, U.S. Official News, House Democrats Urge President Obama to Oppose Anti-Wildlife Provisions (Oct. 16, 2016).

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> See Further Continuing and Security Assistance Appropriations Act, H.R. 2028, 114<sup>th</sup> Cong. (2016).

<sup>491</sup> Press Release, H. Comm. on Appropriations, Short-term Continuing Resolution to Maintain Government Operations Released (Dec. 6, 2016), <https://appropriations.house.gov/news/documentsingle.aspx?DocumentID=394665>.

<sup>492</sup> Press Release, Ctr. for Biological Diversity, Senator Flake Introduces Bill to Supplant Science in Endangered Mexican Wolf Recovery, Suppress Population (Feb. 16, 2017), [https://www.biologicaldiversity.org/news/press\\_releases/2017/mexican-gray-wolf-02-16-2017.php](https://www.biologicaldiversity.org/news/press_releases/2017/mexican-gray-wolf-02-16-2017.php).

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> Press Release, U.S. Official News, Senate Environment and Public Works Committee Passes Harmful Anti-Wildlife Bill (July 26, 2017) (Lexis); Press Release, Ctr.

introduced an appropriation bill for the Interior that would end all protections for wolves in the western Great Lakes, and freeze all wolf recovery efforts across the country.<sup>496</sup> Pursuant to the proposed legislation, Interior would be prohibited from spending any money on gray wolf recovery.<sup>497</sup> Mexican wolves would retain their ESA protections, but no federal expenditures for Mexican wolf recovery would be made.<sup>498</sup> The appropriation bill also contained a provision that required the FWS to examine the Mexican wolf genetics to assess its status as a subspecies.<sup>499</sup> These examples highlight that Congress possesses plenary authority over the future of the Mexican wolf recovery effort. If Congress chooses to deal with this issue, it is important that it does so through an open and transparent legislative process. Congress must be careful to remember not only the broad policy goals of the ESA, but also the tangible and important benefits that stable ecosystems provide.

## X. THE FINAL MEXICAN WOLF RECOVERY PLAN

### A. *Key Terms*

The FWS released a long-awaited draft recovery plan for the Mexican wolf in June 2017.<sup>500</sup> The First Revised Mexican Wolf Recovery Plan, which mirrors the draft plan, was released in November 2017 pursuant to the settlement agreement with AGFD and Defenders of Wildlife in earlier litigation.<sup>501</sup> The plan establishes a population objective of 320 Mexican

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for Biological Diversity, House Republicans Advance Five Bills to Weaken Endangered Species Act (Sept. 11, 2017).

<sup>496</sup> Press Release, U.S. Official News, House Republicans Expand War on Wolves in Latest Budget Bill Legislation Would Halt Wolf Recovery Nationwide Including Southwest's Mexican Wolves, California Fledgling Population (July 12, 2017) (Lexis).

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> Press Release, Associated Press, Federal Spending Proposal Calls for Review of Wolf Genetics (July 19, 2017) (Lexis); Press Release, U.S. Official News, House Republicans Seek Unneeded Mexican Wolf Genetic Review (July 18, 2017) (Lexis).

<sup>500</sup> See Endangered and Threatened Wildlife and Plants; Mexican Wolf Draft Recovery Plan, First Revision, 82 Fed. Reg. 29,918 (July 1, 2017); Alex Devoid, *Federal Government Releases Long-Awaited Recovery Plan for Endangered Mexican Wolf*, AZ CENT. (June 29, 2017), <https://www.azcentral.com/story/news/local/arizona-science/2017/06/29/mexican-gray-wolves-federal-recovery-plan/439856001/>.

<sup>501</sup> U.S. FISH & WILDLIFE SERV., *supra* note 85; Press Release, Ctr. for Biological Diversity, Trump Administration Finalizes Deeply Flawed Mexican Wolf Recovery Plan (Nov. 29, 2017); Susan Montoya Bryan, *US Adopts Recovery Plan for Mexican Wolves*,

wolves in the United States and 200 in Mexico.<sup>502</sup> Because the MWEPA is below Interstate 40 in Arizona and New Mexico, no Mexican wolves will be allowed in southern Colorado or southern Utah.<sup>503</sup> Mexican wolves will be considered for delisting when the populations meet specific abundance and genetic criteria requirements.<sup>504</sup> Among the requirements are that the MWEPA population average “is greater than or equal to 320 wolves over eight consecutive years.”<sup>505</sup> There must be sufficient genetic diversity that has been accomplished by the “scheduled releases of a sufficient number of wolves to result in 22 released Mexican wolves surviving to breeding age in the MWEPA.”<sup>506</sup> In Mexico, the population average must be “greater than or equal to 200 wolves” over an eight-year period.<sup>507</sup> There must be sufficient genetic diversity “through scheduled releases of a sufficient number of wolves that results in 37 released Mexican wolves surviving to breeding age in the Mexican population.”<sup>508</sup> Furthermore, there must be effective state and tribal regulations in place to ensure “that viable populations of wolves can be maintained” in the United States and Mexico.<sup>509</sup>

### B. Analysis

Environmental groups criticized the revised plan for setting “unjustifiably low thresholds.”<sup>510</sup> New Mexico Democratic state officials claimed that the program was “critically flawed and [did] not represent the best scientific and commercial data available.”<sup>511</sup> Representative Raul M.

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*Lawsuit Planned*, ABC NEWS (Nov. 29, 2017), <http://abcnews.go.com/amp/Technology/wireStory/apnewsbreak-us-adopts-recovery-plan-mexican-wolves-51461249>.

<sup>502</sup> Bryan, *supra* note 501.

<sup>503</sup> *Id.*; Brian Maffly, *Conservationists Blast Long-Awaited Recovery Plan for Mexican Wolves, Which Excludes Utah, Colorado from Lobos Range*, SALT LAKE TRIB. (June 29, 2017), <http://archive.sltrib.com/article.php?id=5458639&itype=CMSID>.

<sup>504</sup> See U.S. FISH & WILDLIFE SERV., *supra* note 85, at 10–11.

<sup>505</sup> *Id.* at ES-2 to ES-3.

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.* at ES-2 to ES-3, 1.

<sup>509</sup> *Id.* FWS expects Mexican wolf recovery within 25–35 years. The estimated costs of recovery through 2043 are projected at \$178,439,000. The cost in the first five years is estimated to be \$38,455,000, which will be borne by governmental and non-governmental agencies in the U.S. and Mexico. *Id.* at ES-3.

<sup>510</sup> Devoid, *supra* note 500.

<sup>511</sup> Rebecca Moss, *New Mexico Dems Call Federal Government’s Wolf Recovery Plan ‘Flawed, Politically Driven,’* SANTA FE NEW MEXICAN (Sept. 7, 2017), [http://www.santafenewmexican.com/news/local\\_news/new-mexico-dems-call-federal-government-s-wolfrecovery-plan/article\\_b0f9d90b-9cef-56f0-9c2e-9d4c62013ffd.html](http://www.santafenewmexican.com/news/local_news/new-mexico-dems-call-federal-government-s-wolfrecovery-plan/article_b0f9d90b-9cef-56f0-9c2e-9d4c62013ffd.html).

Grijalva (D., N.M.) stated: “I’m disappointed the Trump administration has once again allowed politics to override science . . . . Research shows clearly that areas in southern Utah and Colorado are within the historic range of the Mexican wolf and contain suitable habitat to support its recovery.<sup>512</sup> The representative stated further that “action[s] to restrict recovery planning to Arizona, and New Mexico, and Mexico, combined with Trumps plan to ignore the ESA to build his ill-conceived border wall, virtually ensures the extinction of the Mexican wolf.”<sup>513</sup>

The revised recovery plan, which restricts wolves to the MWEPA only, is not based on the “best available science” as required by law.<sup>514</sup> A strong argument can be made that the population number remains too small.<sup>515</sup> The FWS cited several studies to establish the population objective for MWEPA in 2015.<sup>516</sup> A study cited by the FWS recommended that there should be three connected populations of at least 250 wolves in each population to achieve recovery across the whole range.<sup>517</sup> Wayne and Hedrick noted that “the north rim of the Grand Canyon . . . and Northern New Mexico Southern Colorado sites . . . seem most appropriate for these two additional populations.”<sup>518</sup>

Mexican wolves must be allowed to migrate north into the southern Rockies.<sup>519</sup> The FWS’s 2001 and 2004 draft reports asserted that the

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<sup>512</sup> Press Release, Natural Resources Committee Democrats, Grijalva on Trump’s Mexican Wolf Announcement: “This Decision and Building the Border Wall Ensure Mexican Wolves’ Extinction” (June 29, 2017), <https://democrats-naturalresources.house.gov/media/press-releases/grijalva-on-trumps-mexican-wolf-announcement-this-decision-and-building-the-border-wall-ensure-mexican-wolves-extinction>.

<sup>513</sup> *Id.*

<sup>514</sup> 16 U.S.C. § 1533(b)(1)(A) (2012).

<sup>515</sup> See generally Cally Carswell, *Endangered U.S. Wolf Denied New Habitat, As Critics Charge That Politics Trumped Science*, SCI. MAG. (Sept. 27, 2017), <http://www.sciencemag.org/news/2017/09/endangered-us-wolf-denied-new-habitat-critics-charge-politics-trumped-science>; Devoid, *supra* note 500.

<sup>516</sup> See Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2517 (Jan. 7, 2015) (codified at 50 C.F.R. pt. 17).

<sup>517</sup> *Id.* (citing Robert Wayne & Phillip Hedrick, *Genetics and Wolf Conservation in the American West: Lessons and Challenges*, 107 HEREDITY 16, 17–18 (2010)).

<sup>518</sup> Wayne & Phillip Hedrick, *Genetics and Wolf Conservation in the American West: Lessons and Challenges*, 107 HEREDITY 16, 17–18 (2010).

<sup>519</sup> Studies show that the historic range of the Mexican wolf is larger than estimated by the FWS. Sarah A. Hendricks et al., *Re-defining Historical Geographic Range in Species With Sparse Records: Implications for the Mexican Wolf Reintroduction Program*, 194 BIOLOGICAL CONSERVATION 48, 49 (2016). But see James R. Heffelfinger et al., *Clarifying Historical Range to Aid Recovery of the Mexican Wolf*, 81 J. WILDLIFE MGMT. 766 (2017). See also Sarah A. Hendricks, et al., *Defense of an Expanded Historical Range for the Mexican Wolf: A Response to Heffelfinger et al.*, 81 J. WILDLIFE MGMT. 1331 (2017).

boundaries for wolf recovery were too restrictive and were impeding wolf recovery.<sup>520</sup> There is a body of reputable scientific evidence that Mexican wolves should be released and allowed to settle throughout the Southwest.<sup>521</sup> The field team recommended expanding the recovery area to “include all of Arizona and New Mexico and parts of southern Utah, southern Colorado, western Oklahoma, western Texas and Mexico.”<sup>522</sup> The FWS draft recovery plan in 2012 recommended expanding the recovery area at least to include areas in southern Utah and southern Colorado.<sup>523</sup> The 2013 study cited by the FWS<sup>524</sup> noted that there are three core areas in the Southwest that can support Mexican wolves: “eastern Arizona and western New Mexico (i.e., Blue Range, the location of the current wolf population), northern Arizona and southern Utah (Grand Canyon), and northern New Mexico and southern Colorado.”<sup>525</sup> The FWS also assumed that there would be, and needed to be, three interconnected populations of Mexican wolves.<sup>526</sup>

The southern Rocky Mountains have been described as “the mother lode for wolves.”<sup>527</sup> The region, which extends from south-central Wyoming to northern New Mexico, contains some of the best wolf habitat in the United States.<sup>528</sup> This forty-one million acre region also includes twenty million acres of public lands and has abundant elk and deer

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<sup>520</sup> Edward A. Fitzgerald, *Lobo Returns from Limbo: New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 46 NAT. RES. J. 9, 51-55 (2006).

<sup>521</sup> Devoid, *supra* note 500.

<sup>522</sup> Tania Soussan, *Review Urges More Room for Wolves*, ALBUQUERQUE J., Jan. 10, 2004, at A1.

<sup>523</sup> Matt Robinson, *Luna County Group Rejects Mexican Gray Wolf Plan*, LAS CRUCES SUN-NEWS, Feb. 18, 2013; Matt Robinson, *Mexican Gray Wolf Management Plan for Gila National Forest, Western New Mexico, Dropped by Feds*, LAS CRUCES SUN-NEWS, Feb. 20, 2013.

<sup>524</sup> Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2517 (Jan. 7, 2015) (codified at 50 C.F.R. pt. 17).

<sup>525</sup> Carlos Carroll et al., *Developing Metapopulation Connectivity Criteria from Genetic and Habitat Data to Recover the Endangered Mexican Wolf*, 28 CONSERVATION BIOLOGY 76, 78 (2013).

<sup>526</sup> FWS in 2015 declared: “We will continue to refine this information through a revised recovery plan. It will be important to ensure that a specific number of effective migrants are incorporated into the population, in this case from captivity, until such time as other wild populations are established within the context of a metapopulation as defined in a Service approved recovery plan. Prior to the establishment of other wild Mexican wolf populations outside of the MWEPA and documentation of effective migrants between wild populations, we will need to use the captive population as a source of migrants from the experimental population.” 80 Fed. Reg. at 2517 (citation omitted).

<sup>527</sup> Michael Robinson, et. al., *South from Yellowstone, What Remains to Be Done*, 16 INT’L WOLF 8, 9 (2006).

<sup>528</sup> *See id.* at 10.

populations.<sup>529</sup> The region contains six times the amount of public land than was originally available within the BRWRA in Arizona and New Mexico.<sup>530</sup> The region contains 1.7 to 25 times more public land than other sites considered for wolf restoration.<sup>531</sup> Moreover, the region contains many roadless and wilderness areas, equaling four times the amount of wilderness available to Mexican wolves in the BRWRA.<sup>532</sup> Indeed, FWS's own studies have shown the southern Rockies can support up to 1,100 wolves.<sup>533</sup>

The absence of wolves in the southern Rockies region represents a significant gap in the taxon. Since the region is equidistant from the northern Rockies and the MWEPA, the establishment of a southern Rockies wolf population would create “a spatially segregated population of wolves that extend[s] from the Arctic to Mexico.”<sup>534</sup> David Mech, a notable wolf expert, declared that “[southern Rockies] restoration could connect the entire North American wolf population from Minnesota, Wisconsin, Michigan through Canada and Alaska, down the Rocky Mountains into Mexico . . . . It would be difficult to overestimate the biological and conservation value of this achievement.”<sup>535</sup>

Mexican wolves should also be allowed to migrate south into Mexico where they can join with that wolf population. The MWEAP and northern Sierra Madre Occidental reintroduction sites are approximately 280 miles apart, so they offer dispersal possibilities.<sup>536</sup> Patchy habitat in border regions of Mexico and the United States can support low-level Mexican wolf dispersal between high quality habitat patches in the MWEPA and northern Sierra Madre Occidental.<sup>537</sup> Dispersal possibilities, however, are projected to be too low to provide adequate gene flow to avoid genetic threats.<sup>538</sup>

In January 2018, environmental groups brought suit challenging the revised recovery plan. The environmental plaintiffs alleged that the

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<sup>529</sup> Michael K. Phillips, et al., *Restoration of the Gray Wolf to the Southern Rocky Mountains: Anatomy of a Campaign to Resolve a Conservation Issue*, in PEOPLE AND PREDATORS: FROM CONFLICT TO COEXISTENCE 240, 243–246 (Nina Fascione et al. eds., 2004).

<sup>530</sup> *Id.* at 244–45.

<sup>531</sup> *Id.*

<sup>532</sup> *See id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.* at 240, 243–46.

<sup>535</sup> *Id.* at 244–45.

<sup>536</sup> *See* U.S. FISH & WILDLIFE SERV., *supra* note 85, at 8.

<sup>537</sup> *Id.* at 14.

<sup>538</sup> *Id.*

recovery program violates the ESA.<sup>539</sup> They pointed to numerous flaws in the recovery plan, including the following: the population target is arguably too low;<sup>540</sup> wolves are confined to their current habitat;<sup>541</sup> suitable potential habitat on public land, specifically in Grand Canyon and southern Rockies, is not considered;<sup>542</sup> there is no effort to address the genetic crisis due to inbreeding;<sup>543</sup> and the potential impacts of climate change on wolf habitat and President Trump's proposed border wall are not addressed.<sup>544</sup> WildEarth Guardians, one of the plaintiffs, stated that the "FWS has kowtowed to anti-wolf interests instead of heeding the best available science . . . [the new recovery plan] is a dramatic swerve away from recovery and toward extinction."<sup>545</sup>

## CONCLUSION

The seemingly never-ending saga of the Mexican wolf highlights the importance of public interest litigation and of the federal courts, which have been instrumental in the Mexican wolf's recovery and in enforcing the mandates of the ESA. Through ups and downs, the recovery of the Mexican wolf has continued since the federal courts first rejected an early livestock industry challenge to wolf reintroduction. The subsequent litigation has at times proven successful, causing the FWS to revoke SOP 13 and develop new recovery plans, for example. However, litigation is not always the most effective means to achieve certain ends. Environmental groups have not always won in the courtroom, and the failure to prevent trapping in the BRWRA is an important example.

In the latest round of litigation, involving the important question of state permitting, the Tenth Circuit correctly reversed the district court.

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<sup>539</sup> Akira Tomlinson, *Environmentalists Sue Trump Administration Over Mexican Wolf*, Jurist: Paper Chase (Jan. 31, 2018), <http://www.jurist.org/paperchase/2018/01/environmentalists-sue-trump-administration-over-mexican-wolf.php> (stating that WildEarth Guardians and Defenders of Wildlife filed lawsuits in the U.S. District Court for the District of Arizona).

<sup>540</sup> See *id.*; Susan Montoya Bryan, *Lawsuit Alleges Mexican Gray Wolf Recovery Plan is Flawed*, SPOKESMAN REV., Jan. 31, 2018; Press Release, WildEarth Guardians, Wolf Advocates Sue: 'Recovery Plan' Sets Mexican Wolves on Road to Extinction (Jan. 30, 2018), [http://www.wildearthguardians.org/site/News2?page=NewsArticle &id=13369 &news\\_iv\\_ctrl=0](http://www.wildearthguardians.org/site/News2?page=NewsArticle &id=13369 &news_iv_ctrl=0).

<sup>541</sup> *Wolf Recovery Plan Challenged in Court by Advocacy Groups*, Ruidoso News (N.M.), Feb. 2, 2018.

<sup>542</sup> See WildEarth Guardians, *supra* note 540.

<sup>543</sup> See Bryan, *supra* note 540.

<sup>544</sup> See WildEarth Guardians, *supra* note 540.

<sup>545</sup> *Id.*

Although states have primary control over wildlife within their borders, that state authority is constrained by federal law. The ESA requires Interior and the FWS to ensure the recovery of the Mexican wolf. This is not a discretionary function, but one mandated by the text of the ESA. The nonessential experimental population designation is simply the means chosen to accomplish this statutory duty. The NMDGF's denial of permits to allow the importation and release of Mexican wolves prevented the FWS from complying with its statutory duty under the ESA to recover the Mexican wolf. The problems asserted by the NMDGF were the product of New Mexico's own state policy choices, arising from their withdrawal from the cooperative system established by the 2010 MOU. New Mexico's 2014 regulation, imposing the permit requirement, was arguably a deliberate effort to frustrate Mexican wolf recovery. It is clear that the nationwide public interest in ecosystem sustainability and biodiversity demands Mexican wolf recovery.

Mexican wolf recovery is also under attack in Congress. There have been numerous efforts by Republicans to end or curtail Mexican recovery,<sup>546</sup> particularly by attaching riders to appropriation bills. While Congressional authority to redefine the contours of the ESA is clear, we must ensure that if this is done, it is done through proper legislative processes. Congress should not be quick to sacrifice the nationwide interest in ecosystem sustainability to appease local interests. The ESA is a landmark environmental and natural resources law. It is a statute that has the potential to create many more success stories, including the Mexican wolf.

Although Mexican wolf recovery is proceeding, the process has been slow. There were 114 Mexican wolves in the MWEPA in early 2017, up from 97 in 2016.<sup>547</sup> Nevertheless, dangers lie ahead, both on the ground, in the courtroom, and in the halls of Congress.<sup>548</sup> The NMDGF issued a permit to allow for cross fostering of two captive born pups into a wolf

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<sup>546</sup> See Susan Montoya Bryan, *US Senator Proposes Ending Protections for Mexican Gray Wolf*, SUN J. (Jan. 8, 2018), <https://the-journal.com/articles/80564>. Senator Flake continues his opposition to Mexican wolf recovery. He introduced legislation calling for the FWS to delist the Mexican wolf and return wolf management back to the state. *Id.*

<sup>547</sup> *Flat Mexican Wolf Count Points to Need for Increased Collaboration*, TARGETED NEWS SERV., Feb. 21, 2018.

<sup>548</sup> In a positive development, Congress dropped all the anti-environmental riders in the 2018 spending bill. Marianne Lavelle, *\$1.3 Trillion Omnibus Spending Bill Passes After GOP Drops Anti-Environmental Riders*, INSIDE CLIMATE NEWS (Mar. 23, 2018), <https://insideclimatenews.org/news/22032018/congress-omnibus-spending-bill-environment-clean-energy-riders-campaign-finance-dark-money>.

den in May 2017.<sup>549</sup> However, the NMDGF demanded that for each pup introduced, one wild born pup must be removed and placed in captivity.<sup>550</sup> The NMDGF did not want any increase in the wolf population, so it forced the FWS to make a “Sophie’s choice.”<sup>551</sup>

On the other hand, state opposition might be waning. Environmental groups asked the FWS to release more Mexican wolves to diversify the gene pool in July 2017.<sup>552</sup> The FWS proposed releasing twelve newborn pups into New Mexico and Arizona in 2018 for cross-fostering to address the genetic bottleneck.<sup>553</sup> Somewhat surprisingly, the NMGC approved the FWS proposal.<sup>554</sup> Environmental groups declared that “these are encouraging developments because it shows the state is finally supporting the recovery of the Mexican wolf.”<sup>555</sup> Recently, the NMDGF, Arizona, and the FWS announced an agreement, which is designed to lead to the delisting of the Mexican wolf. The FWS plans to work with state wildlife managers regarding “the timing, location, and circumstances for releasing wolves into the wild in Arizona and New Mexico.”<sup>556</sup>

The most recent Mexican Wolf recovery plan limits the population and restricts it to the MWEPA. Mexican wolves should be allowed to migrate into the Grand Canyon region and into the southern Rockies where there is a great deal of suitable habitat. Furthermore, the wolf populations in the United States and Mexico should be allowed to come and

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<sup>549</sup> Susan Montoya Bryan, *New Mexico Issues Permit to Allow for Fostering of Wolf Pups*, USNEWS (May 4, 2017), <https://www.usnews.com/news/best-states/new-mexico/articles/2017-05-04/new-mexico-issues-permit-to-allow-for-fostering-of-wolf-pups>; Press Release, Defenders of Wildlife, State of New Mexico Issues ‘Sophie’s Choice’ on Mexican Gray Wolf Pups (May 4, 2017), <https://defenders.org/press-release/state-new-mexico-issues-%E2%80%98sophie%E2%80%99s-choice%E2%80%99-mexican-gray-wolf-pups>.

<sup>550</sup> Bryan, *supra* note 549.

<sup>551</sup> Defenders of Wildlife, *supra* note 549.

<sup>552</sup> Press Release, Ctr. for Biological Diversity, Letter Urges Release of Endangered Mexican Gray Wolves into Wild (July 14, 2017), [https://www.biologicaldiversity.org/news/press\\_releases/2017/mexican-gray-wolf-07-14-2017.php](https://www.biologicaldiversity.org/news/press_releases/2017/mexican-gray-wolf-07-14-2017.php).

<sup>553</sup> Rebecca Moss, *Fish and Wildlife Service Plan Calls for Release of 12 Newborn Wolf Pups*, SANTA FE NEW MEXICAN (Dec. 4, 2017), [http://www.santafenewmexican.com/news/local\\_news/fish-and-wildlife-service-plan-calls-for-release-of-newborn/article\\_c993f1ab-d6f0-59ee-9818-10025f98c382.html](http://www.santafenewmexican.com/news/local_news/fish-and-wildlife-service-plan-calls-for-release-of-newborn/article_c993f1ab-d6f0-59ee-9818-10025f98c382.html).

<sup>554</sup> *Approval of Federal Wolf Plan Could Signal Thawing Relations*, E&E NEWS: GREENWIRE (Jan. 4, 2018), <https://www.eenews.net/greenwire/2018/01/04/stories/1060070103>.

<sup>555</sup> *Id.*

<sup>556</sup> Susan Montoya Bryan, U.S., States to Collaborate on Mexican Wolf Recovery, U.S. NEWS (Mar. 16, 2018), <https://www.usnews.com/news/best-states/new-mexico/articles/2018-03-15/us-states-agree-to-collaborate-on-mexican-wolf-recovery>.

crossbreed. There are already many barriers that separate the U.S. and Mexican wolf populations.<sup>557</sup> President Trump's proposed border wall would only exacerbate the separation. The Trump administration should acknowledge that

wildlife does not recognize the artificial geographical boundaries that we impose on the landscape, and its future depends on unencumbered movement from one country to the next. Erecting a barrier between Mexico and U.S. may be the simplest and most expedient solution to the illegal immigration problem, but [it is not] the best way to ensure our nation's security or preserve its wildlife heritage over the long-term.<sup>558</sup>

In closing, Mexican wolf recovery, which is mandated by the ESA and produces many benefits to the ecosystem, should continue without these impediments. The recovery of the Mexican wolf has limped on for far too long. Politics has played, and continues to play, too great a role in Mexican wolf recovery. The time for proper recovery is now.

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<sup>557</sup> See Jason Mark, *Migrants*, 102 SIERRA 30, 34–35 (2017). Most of the border between Arizona, New Mexico, and Mexico is cordoned off. The Arizona-Mexico border is 372 miles long. Bollard fences block 123 miles and Normandy barriers or other obstacles cover 189 miles. Construction is barred on 60 miles because of topography. *Id.*

<sup>558</sup> Laura Bies, *Bordering on Disaster: New Homeland Security Legislation Jeopardizes Wildlife*, WILDLIFE PROF. 24, 27 (2007).